

SEPARATION OF FUNCTIONS AT THE FERC: DOES THE
REORGANIZATION OF THE OFFICE OF GENERAL COUNSEL MEAN
WHAT IT SAYS?

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The recent reorganization of the Office of the General Counsel (OGC)¹ at the Federal Energy Regulatory Commission ("FERC") has raised questions about how the new organizational structure meshes with the separation of functions requirements of the Administrative Procedure Act² and the FERC's regulations.³ This article will discuss that issue and survey the separation of functions doctrine as it applies to the present organization of the FERC's legal function.

I. THE DOCTRINE OF SEPARATION OF FUNCTIONS

A combination of prosecutorial, investigative, and judging functions in the same agency is not prohibited by due process considerations.⁴ However, Congress has provided for a separation of functions within federal agencies by restricting the role of certain adversarial employees below the level of agency heads.⁵

Separation of functions is an administrative law doctrine which has as its purpose the protection of the independence and objectivity of the administrative-adjudicative function by restricting agency personnel with inconsistent functions, such as prosecution, investigation, or advocacy, from advising decision-makers. The language of the Administrative Procedure Act ("APA") provides:

"An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings."⁶

The purpose of the provision is to prevent an advocate from judging his own case.⁷

The doctrine of separation of functions is different and distinct from the principle of *ex parte* communications which prevents off the record communications on the merits of a proceeding between, on the one hand, agency decision-makers

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¹"FERC Strengthens Management of Legal Operation: Office of Opinions and Review Merged With General Counsel." *FERC Monitor* #18 (Sept. 6, 1984), 11.

²5 U.S.C. § 551 et seq.

³18 C.F.R. § 385.2202.

⁴*Withrow v. Larkin*, 421 U.S. 35 (1975).

⁵"This subsection does not apply . . . (C) to the agency or a member or members of the body comprising the agency." 5 U.S.C. § 554(d)(2)(C).

⁶5 U.S.C. § 554(d).

⁷*Bonham's Case*, 8 Co. 114A, 118a (1610). See 3 Davis, *Administrative Law Treatise* 2d, 340-341 (1980).

and their advisors and on the other hand by "an interested person outside the agency."⁸ But both separation of functions and *ex parte* principles are aimed at promoting equal access to decision-makers and their advisors as well as decisions based on the record where all persons have an opportunity to respond, rather than on the basis of information or arguments which have been made in private. Separation of functions principles apply to agency staff while *ex parte* principles apply to non-agency parties.

II. THE ORGANIZATION OF THE FERC'S OFFICE OF THE GENERAL COUNSEL

A. *The Old Organization*

From the birth of the FERC in 1977, until September of 1984,⁹ the adjudicative trial function and the adjudicative advisory function had been separated in a number of ways. One division within the FERC, the Office of General Counsel, (OGC) was responsible for trying adjudications before Administrative Law Judges. Another, the Office of Opinions and Review ("OOR"), prepared Commission opinions on review of the ALJs' decisions. In addition, because the General Counsel and other parts of OGC were responsible for advising the Commission when it reviewed these decisions, separation between trial staff and advisory staff was maintained within OGC at the supervisory level up to but not including the General Counsel.

The trial function was supervised by the Chief Trial Counsel or the Deputy General Counsel for Litigation and Enforcement while the advisory function within OGC was supervised by the Chief Advisory Counsel or the Deputy General Counsel. Attorneys who participated in the trial of a case were not consulted or contacted by the opinion writers, OGC Advisory staff or Commissioners in connection with the Commission's decision. However, staff attorneys who performed trial and advisory functions reported to Assistant General Counsels who for the most part performed advisory duties.¹⁰

Under this organizational scheme, separation of functions was maintained because different supervisors were responsible for carrying out the trial and advisory functions and the same staff attorneys did not perform trial and advisory functions in the same case within OGC. Furthermore, the Commission opinions were prepared by a separate office which had no part in the trial function.

⁸5 U.S.C. § 557(d)(1)(A). The FERC's regulations preclude *ex parte* communications by any "person who is a party." 18 C.F.R. § 385.2201(a). "Party" does not include FERC staff. 18 C.F.R. § 385.102(C). The United States Supreme Court, however, has stated in dicta, probably incorrectly, that *ex parte* prohibitions apply to communications by agency officials. *Butz v. Economou*, 438 U.S. 478, 513-514 (1978).

⁹The FERC was created in 1977 under the Department of Energy Organization Act, 42 U.S.C. § 7101 et seq.

¹⁰Although no similar formal separation appears to be maintained in the technical offices, informal separation between technical experts assigned to a case and technical advisory staff appears to be maintained.

B. *The New Organization*

Under OGC's new organizational structure the split in supervisory responsibility between advisors on adjudicated cases and trial staff on those cases has been eliminated by merging OOR into OGC. In addition, supervisory responsibility for the trial and advisory opinion writing functions in the major regulatory areas has been placed under Associate General Counsels, one for gas and oil matters and one for electric and hydroelectric matters. Reporting to these Associate General Counsels will be a number of Assistant General Counsels including one Assistant General Counsel with a trial staff. The remainder of the Assistant General Counsels and their staffs will be assigned advisory duties. The enforcement function will be placed under yet a third Associate General Counsel. The new structure provides for separation between the trial and advisory function at the staff and Assistant General Counsel level. However, these functions are combined at and above the Associate General Counsel level.

The new organization of OGC marks a departure from past practice to the extent that the same person supervises employees who are assigned to the trial of a case and supervises other employees who prepare Commission opinions in the same case. In addition, and perhaps more significantly, the combination of responsibility for adjudicative and advisory functions has been moved down from the General Counsel to the Associate General Counsels.

III. FERC PROCEEDINGS AFFECTED BY SEPARATION OF FUNCTIONS

A. *The Statutory Provisions*

The doctrine of separation of functions applies with certain enumerated exceptions¹¹ "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."¹² The provisions also apply to cases where adjudication is required by due process considerations under the United States Constitution.¹³

Although it is not always clear whether the statutory language requiring a "hearing" means the same thing as "on the record after opportunity for an agency hearing,"¹⁴ it seems clear that separation of functions prohibitions do not apply to rulemakings.¹⁵ In terms of FERC practice, most FERC adjudications also are exempt from the coverage of the APA's separation of functions requirements.¹⁶ For example, proceedings "in determining applications for initial licenses,"¹⁷

¹¹See, *infra* at ____.

¹²5 U.S.C. § 554(a).

¹³*Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Clardy v. Levi*, 545 F.2d 1241 (9th Cir. 1976).

¹⁴See generally, III Davis, *Administrative Law Treatise* 2d, § 10.7 (1979). Compare *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) with *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973).

¹⁵*Attorney General's Manual*, 50 (1947). See also, *Environmental Defense Fund v. EPA*, 598 F.2d 62 (D.C. Cir. 1978); *Marketing Assistance Program, Inc. v. Berglund*, 562 F.2d 1305 (D.C. Cir. 1977); *Hoffman-La Roche, Inc. v. Kleindienst*, 478 F.2d 1 (3rd Cir. 1973).

¹⁶The FERC's separation of functions regulations go beyond the requirements of the APA and may compel separation of functions in proceedings exempted by the statute.

¹⁷5 U.S.C. § 554(d)(2)(A).

proceedings “involving the validity or application of rates, facilities or practices,”¹⁸ and “a matter subject to a subsequent trial of the law and facts *de novo* in court”¹⁹ are not affected by the separation of functions bar. It is questionable whether a separate exemption is necessary for rate proceedings because they are defined as rulemakings under the APA.²⁰ In any event, the exemption would apply to rate proceedings under the Natural Gas Act,²¹ the Natural Gas Policy Act of 1978,²² Part II of the Federal Power Act²³ and Oil Pipeline Rate proceedings under the Interstate Commerce Act.²⁴

The exemption for proceedings subject to a trial *de novo* in court is not a specific exemption from the separation of functions requirements but is instead an exemption from the provisions of section 554 of the APA. Nevertheless, it is a provision that could have some importance in civil penalty cases under the Natural Gas Policy Act of 1978. The NGPA provides the FERC with authority to impose civil penalties for violations of the statute or the FERC's regulations.²⁵ However, the FERC only can enforce an order assessing civil penalties by instituting a proceeding in district court where the “court shall have authority to review *de novo* the law and the facts involved.”²⁶ Thus, a civil penalty assessment proceeding by the FERC would appear to be exempt from the APA's separation of functions requirement.

One *caveat* should be added. The legislative history to the APA cautions that these exemptions should not be read to bless inequitable procedures, particularly in cases which tend to be accusatory and which involve contested factual issues.²⁷ “By and large most agencies routinely separate functions in initial licensing and ratemaking adjudications so the question seldom arises.”²⁸ Nevertheless, there would seem to be few important FERC proceedings in which the APA mandates separation of functions.

B. *The FERC Regulations*

The FERC's regulations ignore the exemptions from separation of functions which are set forth in the APA except for rulemaking proceedings. Rule 2202 of the FERC's Rules of Practice and Procedure²⁹ applies “in any proceeding in which a Commission adjudication is made after hearing. . .” Neither hearing nor adjudication are defined in the FERC's rules of practice but at a minimum it would appear to apply to any proceeding set for hearing under 18 C.F.R. Part 385, Subpart E, which governs hearings before Administrative Law Judges.

¹⁸5 U.S.C. § 554(d)(2)(B).

¹⁹5 U.S.C. § 554(a)(1).

²⁰n. 15 *supra*.

²¹15 U.S.C. § 717 *et seq.*

²²15 U.S.C. § 3301 *et seq.*

²³16 U.S.C. § 824 *et seq.*

²⁴49 U.S.C. § 1 *et seq.*

²⁵15 U.S.C. § 3414(b)(6).

²⁶15 U.S.C. § 3414(b)(6)(F).

²⁷Asimow, “When the Curtain Falls: Separation of Functions in Federal Administrative Agencies (Report for the Administration Conference of the United States) 28 (1980). Hereinafter cited as Asimow.

²⁸*Id.*

²⁹18 C.F.R. § 385.2202.

The definition of separation of functions would suggest that the FERC has flexibility on the separation of functions issue as long as it has discretion not to hold a "hearing." But once the FERC sets a case for hearing, separation of functions, in accord with its regulations is required because an agency must comply with its own Regulations.³⁰

IV. WHO MAY NOT ADVISE

The FERC's regulations require separation of functions:

In any proceeding in which a commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion on decision except as a witness or counsel in public proceedings.³¹

This regulation is almost identical to Section 554(d) of the APA, *supra*.³²

The purpose of separation of functions provisions are to promote unbiased decision-making. To that end, it excludes from advising

employees of the agency who have had such previous participation in an adversary capacity in that or a factually related case that they may be "disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."³³

Clearly, the bar against advice from those "engaged in the performance of investigative or prosecuting functions,"³⁴ or "assigned to work upon the investigation or trial of the proceeding"³⁵ reaches attorneys and technical experts who search out the facts, assist in preparing a case, testify as expert witnesses, and argue positions because those people have the will-to-win that prevents impartial advice in the same case or a factually related adjudicated case. But what of their supervisors: Does the mere supervision of investigative or trial staff constitute a bar? The signing of a pleading? If some involvement is necessary to lead to disqualification how much is necessary?

A. May an uninvolved supervisor advise?

Whether an uninvolved supervisor may advise is an important question. The APA speaks to one "engaged in the performance" of prosecuting or investigating functions "in a case"³⁶ and the FERC's Regulations speak to persons "assigned to work upon the investigation or trial"³⁷ of a proceeding. Both of these provisions

³⁰Morton v. Ruiz, 465 U.S. 199, 235 (1974).

³¹18 C.F.R. § 385.2202.

³²5 U.S.C. § 554(d)(2).

³³Attorney General's Manual 57.

³⁴5 U.S.C. § 554(d).

³⁵18 C.F.R. § 385.2202.

³⁶5 U.S.C. § 554(d).

³⁷18 C.F.R. § 385.2202.

would seem to be aimed at persons who have taken an advocacy position and have a commitment to a particular position, not a supervisor of such a person especially if the supervisor has no input into the case.

The Attorney General's Manual suggests that an argument can be made that personal participation of some sort may be necessary before disqualification is required. It states that an agency "may in a particular case consult with staff members who in fact have not performed investigative or prosecuting functions in that or a factually related case."³⁸ In addition, the provisions of the APA³⁹ seem to suggest that other reporting combinations are proper.⁴⁰

The case law, however, is inconclusive. In an early case, *Columbia Research Corp. v. Schaffer*,⁴¹ in an opinion by Judge Learned Hand, the court disqualified the Post Office's General Counsel from rendering an appellate decision in a mail fraud case because he was the supervisor of the attorney who investigated and prosecuted the complaint. Nowhere does the case mention that the General Counsel had any part in, or in any way participated in, the investigation or prosecution. A similar result was reached in *Oil Shale Corp. v. Morton*,⁴² where the court condemned a procedure under which the Solicitor of the Department of the Interior acted as an appellate decision-maker in a proceeding where the Solicitor's Office had advised against Oil Shale Corp. in an earlier phase of the case.

Columbia Research casts doubt on the validity of automatic disqualification. Similarly, *dicta* in *International Paper Co. v. FPC*⁴³ states that no "prejudice resulted from [an] alleged error in allowing the General Counsel or his assistant to approve a stipulation of facts"⁴⁴ and to subsequently advise on the same matter. This *dictum*, however, is of limited value because the objection to the General Counsel's participation was found to be untimely. On the other hand, in *Amos Treat & Co. v. SEC*⁴⁵ the court disqualified a commissioner who had limited prior contacts as a staff member in connection with earlier phases of the same case.

If any lesson can be drawn from these cases, it is that the prevalent concern is not with advisors,⁴⁶ but rather with decision-makers.⁴⁷ Nevertheless, given the purpose of the separation of functions doctrine (to provide for impartial dispassionate advice and decisions)⁴⁸ it seems unlikely that the courts will follow an

³⁸Attorney General's Manual 57.

³⁹5 U.S.C. § 554(d)(2) provides that an employee of an agency that presides at the reception of evidence pursuant to section 556 may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."

⁴⁰Asimow at 21, n.70.

⁴¹256 F.2d 677 (2nd Cir. 1958).

⁴²370 F.Supp. 108 (D.Col. 1973).

⁴³438 F.2d 1349 (2nd Cir. 1971).

⁴⁴438 F.2d at 1358.

⁴⁵306 F.2d 260 (D.C. Cir. 1962).

⁴⁶*International Paper Co. v. FPC*, *supra* n. 43, *American Tel. & Tel. v. FCC*, 449 F.2d 439 (2nd Cir. 1971).

⁴⁷*Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980) (Administrative Law Judge); *Au Yi Lau v. INS*, 555 F.2d 1036 (D.C. Cir. 1977); *R.A. Holman & Co., Inc. v. SEC*, 366 F.2d 446 (2nd Cir. 1966); *Amos Treat & Co. v. SEC*, *supra* n. 45.

⁴⁸Attorney General's Manual 57.

automatic disqualification rule regarding supervisors but instead will require some proof of adversarial involvement⁴⁹ or access to non-record information.⁵⁰

B. An Involved Supervisor May Not Advise – But When Is One Involved?

The case law suggests that a supervisor who is involved in the prosecution of an adversarial proceeding, or one set for hearing, may not advise the decision-maker if the supervisor is “assigned” to the trial of the case. It seems unlikely that the new Associate General Counsels often will be assigned to a case as the staff attorney on the case. However, to the extent they are so “assigned” it would seem clear that they will have developed the will to win which prevents the bringing of dispassionate judgment.⁵¹

In those circumstances it would seem that the Associate General Counsel who also is the staff attorney should take no part in drafting or reviewing the Commission’s opinion. Neither should they communicate with the advisory attorneys, either superiors or subordinates, Commissioners or Commissioner’s assistants with respect to the merits of the case. The FERC’s separation of functions rule would apply and compliance would be assumed on behalf of the agency.⁵²

But what of situations where the supervisors participation is not so direct? Two recent cases, suggests that merely signing a brief is sufficient to disqualify a person from any further role in the decision-making process.⁵³ But another holds to the contrary.⁵⁴

However, one commentator has concluded “that purely nominal participation — by signing off on a document without any serious role in preparing or reviewing it — should not automatically disqualify the individual who signs it.”⁵⁵ And it is certainly true that such a sign off does not lead to the adversarial mindset at which the separation of functions doctrine is aimed. But one might ask, “How can one tell what the signature means? Or for that matter, a name on a trial brief?” It has been recommended that agencies avoid nominal participation on the ground that it creates the “appearance of unfairness.”⁵⁶ But more pragmatic reasons would seem to support such a recommendation. An adversely affected party would have no way of knowing the scope of participation represented by a supervisor’s name or signature in a trial brief. The only method of gaining information on the scope of participation would, therefore, be by seeking to depose the supervisor involved.⁵⁷ Consequently, an agency would be well advised to avoid this potential headache by avoiding formal sign-offs.

⁴⁹*See, e.g.,* International Paper v. FPC, *supra*, n.43 (Not adversarial-no disqualification); Amos Treat & Co. v. SEC, *supra*, n.45 (Adversarial-disqualification).

⁵⁰Grolier, Inc. v. FTC, *supra* n. 47; (access to non-record information).

⁵¹Attorney General’s Manual 57.

⁵²Hortonville Joint School District No. 1 v. Hortonville Educational Ass’n, 426 U.S. 482 (1976); Withrow v. Larkin, *supra* n.4.

⁵³American General Ins. Co. v. FTC, 589 F.2d 462 (9th Cir. 1979), Trans World Airlines, Inc. v. CAB, 254 F.2d 90 (D.C. Cir. 1958). But see Camero v. United States.

⁵⁴Carmero v. United States, 375 F.2d 777 (Ct. Cl. 1967).

⁵⁵Asimow, 25a.

⁵⁶*Id.*

⁵⁷It is not clear what procedural vehicle would be available to gain the authority to take a deposition.

Another area of concern to the courts is access to extra-record evidence which was expressed in *Grolier, Inc. v. FTC*.⁵⁸ It is possible that an Associate General Counsel could have access to such material in connection with his or her supervisory duties particularly with regard to settlement negotiations in a adjudicated case. The FERC has long regarded settlements as a favored device and has protected the integrity of the process by providing that "[a]ny discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence."⁵⁹ This prohibition effectively precluded the advisory staff from having access to the information provided and positions taken in settlement conferences because of the previous separation between trial and advisory staff.

But under the OGC's new organization, the Associate General Counsels will, depending on their involvement in a particular case, have access to the information made available in settlement discussions. There is, of course, no way of knowing whether such information will be communicated or considered in the advisory context; but the potential exists.

Of course, the FERC's General Counsel could have been privy to settlement information in the past, but because of the large caseload at the FERC it is unlikely that any meaningful details of settlement discussions would have reached his ears. However, with the caseload split along functional lines, it is arguably unlikely that the information made available to an Associate General Counsel will be as limited. Indeed, one would assume that the purpose of the reorganization is to provide better managerial control and consistent policy direction within the substantive areas and, accordingly, that the Associate General Counsels will be responsible for directing the trial and advisory process for the more difficult cases. Under these circumstances, separation of functions would seem to be more of a concern, not less.

V. CONCLUSION

Neither the APA nor the FERC's regulations prevent a combination of adjudicatory and advisory functions in the same office. In fact, this combination has existed within FERC's OGC in the past, although at a higher organizational level. There is no real question that a combination of trial and advisory functions in the same person in connection with the same case is troublesome and seemingly, in violation of the APA, the FERC's regulations or both.

The real question appears to be how to gain assurance that the rules are being followed without the need to inquire on a case-by-case basis. There seem to be two available avenues. One is to rest on the assumption that agencies act in good faith. In the alternative, seek publication from the FERC of a statement "of the general course and method by which its functions are channeled and determined."⁶¹ Such publication may provide clear assurance that the rules are being followed; at a minimum it requires the FERC to focus on the problem.

⁵⁸*Supra* n.47.

⁵⁹18 C.F.R. § 385.602(e)(2).

⁶⁰Attorney General's Manual, p.58.

⁶¹5 U.S.C. § 552(a)(1)(B).