

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

<b>ADMINISTRATIVE LAW JUDGE</b>	)	
<b>CLAUDIA A. BARBER,</b>	)	<b>Case No. 2016 CA 006576 P(MPA)</b>
<b>Petitioner</b>	)	
	)	
<b>v.</b>	)	
	)	<b>Judge Neal E. Kravitz</b>
<b>DISTRICT OF COLUMBIA COMMISSION</b>	)	
<b>ON SELECTION AND TENURE OF</b>	)	
<b>ADMINISTRATIVE LAW JUDGES, et al.,</b>	)	
<b>Respondents</b>	)	

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**ORDER DENYING PETITION FOR REVIEW OF AGENCY DECISION**

Claudia Barber is a former administrative law judge (ALJ) with the District of Columbia Office of Administrative Hearings (OAH). She has petitioned the court for review of an order of the District of Columbia Commission on the Selection and Tenure of Administrative Law Judges of the Office of Administrative Hearings (COST). In the order, issued on August 2, 2016, COST terminated Judge Barber’s employment as an ALJ on the ground that she violated the OAH Code of Ethics for ALJs by running as a candidate in two party primary elections for judicial office in Maryland.

Judge Barber has filed a brief and a supplemental brief in support of her petition. COST has filed a brief in opposition. Judge Barber has filed a reply.

**Factual and Procedural Background**

Judge Barber began serving as an ALJ with OAH in 2005. On January 20, 2016, she filed a Certificate of Candidacy, Candidate Information Sheet, and Statement of Organization for Campaign Finance Entities at the Maryland State Board of Elections, thereby declaring her candidacy for a judgeship on the Circuit Court for Anne Arundel County, Maryland. Beginning with early voting on April 14, 2016 and extending through the primary elections on April 26,

2016, Judge Barber then appeared on both the Democratic and the Republican primary ballots as a judicial candidate in Anne Arundel County.

In so doing, Judge Barber followed a typical course for Maryland Circuit Court judicial candidates, who run for office without formal party affiliation and enter both the Democratic and the Republican party primaries. Those primaries are “closed” – meaning that only registered Democrats may vote in Democratic party primaries and only registered Republicans may vote in Republican party primaries. Primary ballots do not specify that judicial candidates are running for office without affiliation with any political party.

OAH’s Chief ALJ, Eugene Adams, received a formal complaint against Judge Barber on February 4, 2016 based on Judge Barber’s candidacy in the Anne Arundel County judicial primaries. Chief ALJ Adams issued a Notice of Violation to Judge Barber on February 12, 2016, concluding that Judge Barber violated provisions of the OAH Code of Ethics for ALJs by participating as a candidate in the primaries. The Notice of Violation was referred to COST, which conducted a formal hearing on July 13, 2016.

COST issued a written order on August 2, 2016 finding Judge Barber in violation of Section V(U) of the OAH Code of Ethics for ALJs and removing her from her position as an ALJ. Section V(U) provides:

An Administrative Law Judge shall resign from judicial office when the Administrative Law Judge becomes a candidate either in a party primary or in a partisan general election except that the Administrative Law Judge may continue to hold office, while being a candidate for election to or serving as a delegate in a jurisdiction’s constitutional convention, if otherwise permitted by law to do so.

COST reasoned that, to Maryland primary voters, judicial candidates appear to be partisans running alongside party presidential candidates and others. More specifically, COST stated that

a resident of Anne Arundel County who works in Washington, D.C. and might have a matter before OAH reasonably could have inferred from either of the party primary ballots that Judge Barber was running as a partisan and that her presumed political views could affect her work as an ALJ. COST concluded that Section V(U) required Judge Barber's resignation from her position as an ALJ and that her failure to resign warranted her termination.

Due to jurisdictional uncertainties, Judge Barber filed petitions for review of COST's decision in both the District of Columbia Court of Appeals and this court. By agreement of the parties, this court held Judge Barber's petition in abeyance while the Court of Appeals considered whether it had jurisdiction to hear the matter.

The Court of Appeals dismissed its case for lack of jurisdiction on April 17, 2017, concluding that the proceeding before COST was not a "contested case" within the meaning of the District of Columbia Administrative Procedure Act. *Hines v. D.C. Comm'n on Selection and Tenure of Admin. Law Judges of the Office of Admin. Hearings*, Nos. 16-AA-735 & 16-AA-867, Mem. Op. & J. at 1 (D.C. Apr. 17, 2018). The Court of Appeals noted that "[i]n general, initial judicial review of decisions concerning the selection or tenure of District employees is properly sought in Superior Court." *Id.* at 2, n.1. The Court also noted, however, that COST had argued that Judge Barber has no right to judicial review (in any court) of the merits of the termination decision – a question on which the Court of Appeals specifically stated it was "express[ing] no view." *Id.*

The parties have filed briefs in this court following the dismissal of Judge Barber's petition in the Court of Appeals. Judge Barber argues that COST erred in finding a violation of Section V(U) based on her participation as a candidate in the Maryland judicial primaries. She argues further that COST conducted the hearing on the Chief ALJ's Notice of Violation in a

manner inconsistent with her constitutional rights and that COST's decision terminating her employment was invalid because COST's chair, Judge Yvonne Williams, lacked a proper appointment to the agency at the time the decision was issued.

COST contends in response that its decision terminating an ALJ's employment is final and unreviewable. It contends further that it properly found a violation of Section V(U), that its hearing procedures adequately protected Judge Barber's rights, and that the alleged irregularity in Judge Williams' appointment does not warrant the reversal of its decision.

The court has carefully considered the parties' arguments, COST's order, and the entire administrative record. For the following reasons, the court concludes that COST's order terminating Judge Barber's employment as an ALJ based on her violation of Section V(U) of the OAH Code of Ethics for ALJs is final and not reviewable in this or any other court.

### **Discussion**

“The Superior Court is a court of general jurisdiction with the power to adjudicate any civil action at law or in equity involving local law.” *Martin v. District of Columbia Courts*, 753 A.2d 987, 991 (D.C. 2000) (citing *Powell v. Washington Land Co., Inc.*, 684 A.2d 769, 770 (D.C. 1996)) (internal quotations omitted). “A ‘strong presumption’ exists in favor of judicial reviewability which may be rebutted only by clear and convincing evidence of a contrary legislative intent.” *Id.* (citing *District of Columbia v. Sierra Club*, 670 A.2d 354, 357-59 (D.C. 1996)) (internal quotations omitted). “Such contrary legislative intent may be found where the legislature committed the challenged action entirely to official discretion, or where the legislature precluded judicial review, explicitly or implicitly, by statute.” *Id.*

COST has clearly and convincingly established the requisite contrary legislative intent. First, COST's enabling statute expressly provides that “COST shall have final authority to

reappoint, discipline, and *remove* Administrative Law Judges.” D.C. Code § 2-1831.06(b) (emphasis added). This statutory language plainly suggests that the D.C. Council intended to commit the removal of ALJs entirely to COST’s discretion. Second, and equally important, ALJs are defined by statute as “Excepted Service” employees, *see* D.C. Code § 1-609.08(15), who, also by statute, “do not have any job tenure or protection” or “any right to appeal [a] termination,” D.C. Code § 1-609.05; *see also Johnson v. D.C. Office of Employee Appeals*, 912 A.2d 1181, 1183 (D.C. 2006) (affirming that “members of the Excepted Service have no right to appeal when they lose their jobs”). The plain language of these statutory provisions evinces a clear legislative intent to preclude judicial review of COST’s termination decision.

Judge Barber argues that COST’s decision terminating her employment is nonetheless reviewable under a municipal regulation, 6-B DCMR § 3737.3, that makes a COST decision removing an ALJ “reviewable only to the same extent as a decision of the District of Columbia Commission on Judicial Disabilit[ies] and Tenure giving an evaluation of ‘Unqualified.’” The court is not persuaded. A regulation promulgated by an administrative agency cannot trump a duly enacted statute with which the regulation is inconsistent, and even if it could, the regulation cited by Judge Barber purports to incorporate an appellate procedure that does not exist. By statute, when the Commission on Judicial Disabilities and Tenure determines that a judge of a District of Columbia court is “unqualified” for reappointment, the President “shall not submit to the Senate for advice and consent” the renomination of the judge and the judge “shall not be eligible for reappointment or appointment as a judge of a District of Columbia court.” D.C. Code § 1-204.33. The decision of the Commission on Judicial Disabilities and Tenure is thus final, without any procedure for any type of review. Indeed, the only actions of the Commission on Judicial Disabilities and Tenure that are subject to review are decisions to suspend, retire, or

remove judges under D.C. Code § 11-1526; yet even for those decisions, judicial review is available only if an aggrieved judge files a notice of appeal with the Chief Justice of the United States, *see* D.C. Code § 11-1529(a), a procedure that is certainly inapplicable to a COST decision to remove an ALJ.

The court therefore concludes that COST's decision terminating Judge Barber's employment as an ALJ is not reviewable. Judge Barber's petition for review accordingly must be denied.

Given this conclusion, the court need not resolve Judge Barber's substantive and procedural claims. In an effort to be complete, however, the court will briefly address Judge Barber's principal contentions in accordance with the standard of review set forth in Rule 1(g) of the Superior Court Rules of Agency Review. Rule 1(g) provides that the court must base its consideration of the petition and response "exclusively upon the administrative record" and that the court "shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law."

#### Violation of Section V(U)

Judge Barber contends that COST erred in finding a violation of Section V(U) of the OAH Code of Ethics for ALJs. The court disagrees. Section V(U) provides that an ALJ must resign from her position when she "becomes a candidate . . . in a party primary." It is undisputed that Judge Barber was a candidate in the April 2016 Democratic and Republican party primaries for a judgeship on the Circuit Court for Anne Arundel County, Maryland. It thus was not error (and certainly not clear error) for COST to determine that Judge Barber's failure to resign her position as an ALJ constituted a violation of Section V(U).

### Constitutional Arguments

Judge Barber also contends that COST violated her due process rights by failing to meet with her before formal proceedings were initiated, by excluding witnesses from the hearing on July 13, 2016, by engaging in improper *ex parte* communications with Chief ALJ Adams, and by failing to include advice about appeal rights in its final order. She argues further that COST's application of Section V(U) limits the persons who are able to run in Maryland judicial elections in a manner inconsistent with the Privileges and Immunities Clause and infringes her Fifth and Fourteenth Amendment rights to pursue her chosen career.

The court is not persuaded that any of these alleged constitutional violations would warrant reversal even if COST's decision were reviewable. Judge Barber has not established that COST's failure to meet with her before formal proceedings were initiated was improper or prejudicial to her defense of the Notice of Violation, and she has not shown that COST, which had affidavits and declarations from her proposed witnesses, precluded the testimony of any of those persons in a manner inconsistent with its mandate to "exclude irrelevant, immaterial, and unduly repetitious evidence," *see* D.C. Code § 2-509; 6-B DCMR 3735.8. Judge Barber also has not cited to any clearly improper or material *ex parte* communications COST may have had with Chief ALJ Adams – by statute, a non-voting *ex officio* member of the agency, *see* D.C. Code § 2-1831.07(a) – and given this court's conclusion about the finality of COST's decision, COST was not obligated to advise Judge Barber about any right of appeal. COST's decision, moreover, did not treat Judge Barber differently on account of her residence outside the District of Columbia or unlawfully interfere with her right to pursue her career of choice; the agency simply enforced an entirely reasonable ethics rule requiring that ALJs resign their judicial positions before running

for office in party primaries, so as to avoid the mixing of judging and politics and the appearance of political influence in the important work of OAH.

#### Judge Williams' Appointment

Finally, Judge Barber argues that COST's decision is invalid because Judge Williams lacked a proper appointment to her position as Chair at the time COST issued its decision. The court is not persuaded.

The membership of COST and the terms to which its members can be appointed are governed by statute. COST consists of three voting members – one appointed by the Mayor, one by the Chairman of the Council, and one by the Chief Judge of the Superior Court. D.C. Code § 2-1831.07(a). The initial term of the member appointed by the Chief Judge of the Superior Court was to expire on April 30, 2006, *see* D.C. Code § 2-1831.06(d), followed by subsequent terms of three years, *id.* § 2-1831.06(c). COST members are eligible for reappointment at the end of each term, *id.*, and if a vacancy exists after the start of any three-year term of office, the person appointed to fill the vacancy is to be appointed to serve the unexpired portion of the term, *id.* § 2-1831.06(c).

Then-Chief Judge Lee F. Satterfield appointed Judge Williams to COST on December 16, 2013, in the middle of a three-year term. The appointment letter stated that Judge Williams' term would expire on December 16, 2016. Chief Judge Robert E. Morin reappointed Judge Williams on August 1, 2017, *nunc pro tunc* to December 16, 2016.

Judge Barber contends that Judge Williams served on COST without proper authority between April 30, 2015 and December 16, 2016 because Judge Williams' initial appointment should have extended only through April 30, 2015 and because Judge Williams was not reappointed until December 16, 2016. Judge Barber may be correct about this, given that the



terms of the Superior Court judge on COST were to expire on April 30 of 2006, 2009, 2012, and 2015. *See* D.C. Code § 2-1831.07(c), (d). But even if there was a defect in Judge Williams' appointment at the time of COST's decision in this case, Judge Barber has not met her burden of showing that the defect was prejudicial. The court has already determined that COST's decision was consistent with the law and evidence in the administrative record, and the de facto officer doctrine likely preserves COST's decision even if Judge Williams' participation was pursuant to what was in reality an expired appointment.

Under the de facto officer doctrine, "the acts of public officials acting under color of title are presumed to be valid, even though it is later discovered that the legality of that person's appointment or election to office is deficient"; in such a case, a judge is a judge de facto, if not a judge de jure. *See Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 77 (2003); *see also Baker v. State*, 833 A.2d 1070, 1075 (Md. 2003). The doctrine has been applied broadly by state courts, including in situations in which judges make decisions after the expiration of their terms of office, *see Baker*, 833 A.2d at 1081-86 (listing state courts that have used the de facto officer doctrine to validate actions taken by de facto judges), and the Supreme Court has applied the doctrine in cases in which there have been technical errors in otherwise lawful appointments, as opposed to circumstances in which appointments never lawfully could have been made at all, *see Nguyen*, 539 U.S. at 79; *Baker*, 833 A.2d at 1078.

It is undisputed that Judge Williams was lawfully appointed on December 16, 2013 to serve on COST and that she could have been lawfully reappointed to a full three-year term beginning on April 30, 2015. The irregularities in the dates of Judge Williams' appointment and reappointment are thus nothing more than technical errors in an otherwise lawful series of

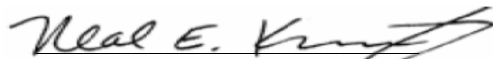
appointments. The de facto officer doctrine would therefore preserve the validity of COST's decision in this case were the matter subject to judicial review.

**Conclusion**

For the foregoing reasons, it is this 28<sup>th</sup> day of February 2019

**ORDERED** that the petition for review is **denied**. It is further

**ORDERED** that the status hearing currently set for March 9, 2019 is **canceled**.



Neal E. Kravitz, Associate Judge  
(Signed in Chambers)

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*Via CaseFileXpress*