No. 19-7121

In the Supreme Court of the United States

ORIGINAL

JAY F. SHACHTER,
Petitioner,

v.

Department of Streets and Sanitation
and Department of Administrative Hearings
of the CITY OF CHICAGO, A municipal corporation,
Respondents

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On Petition for a Writ of Certiorari
to the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Jay F. Shachter
6424 North Whipple Street
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Petitioner

Question Presented For Review

Whether, in the City of Chicago, the adjudication of municipal ordinance infractions violates the due process requirements of the United States Constitution. In Chicago, accusations of municipal ordinance violations are adjudicated by a cadre of administrative hearing officers who are nonemployee contractors, and whose contracts last no longer than a day. They are hired, or not, from one day to the next, at the pleasure of the City. State supreme courts are split on this question. The supreme courts of California, South Carolina and West Virginia have ruled that such conditions of employment undermine judicial independence, and are constitutionally impermissible. The Illinois Supreme Court permits them.

Parties Involved

The parties involved are identified in the caption of the case.

Corporate Disclosure Statement

Petitioner is not a corporation. The two nominal Respondents in this case are two different departments of the same municipal corporation, and were captioned separately in the lower court proceedings only to be in strict compliance with 735 ILCS 5/3-107(a).

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TABLE OF CITED AUTHORITIES

Citation to Lower Court Opinions

Shachter v. Chicago, 2019 IL App (1st) 172874-U; appeal denied, No. 125015 (September 25, 2019)

Basis for Jurisdiction

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a) to review the final judgment of the Illinois Appellate Court (Appendix A), which the Illinois Supreme Court allowed to stand in an order dated September 25, 2019 (Appendix C). The 90-day period in which to petition for a writ of certiorari expired on December 24, 2019, which, pursuant to Rule 30.1, was extended to December 26, 2019.

Constitutional Provisions Involved

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law."

Statement of the Case

In late 2013, Chicago sent Shachter three notices of ordinance violation, alleging that on three separate occasions, Shachter was in violation of Section 7-28-120(a) of Chicago's Municipal Code ("the ordinance"), which prohibits a property owner from having plants on his or her property whose average height exceeds 10 inches, if such plants are "weeds"; the notices of violation stated that the accusations could be contested at administrative hearings in Chicago's Department Of Administrative Hearings.

All three cases were continued to a consolidated hearing date of January 29, 2014.

On the day that the Parties agreed to the consolidated hearing date, Shachter asked the administrative hearing officer if he would be keeping the case, and the administrative hearing officer replied (Appendix E):

> ... it's up to the Department of Administrative Hearings to schedule judges for particular days and times. I might not be scheduled at all that day — or, you know, I might be scheduled for a hearing at another facility at that date and time. So I — I don't have any control over that.
>
> As an independent contractor, I just let the City know when I'm available to come and they let me know if they have a need, you know, on that particular date and time.

On January 29, 2014, Chicago found Shachter liable for all three of the alleged violations, and imposed a fine of $1800, plus $120 in administrative costs.

On March 4, 2014, Shachter filed a five-count Complaint in the Circuit Court of Cook County, Illinois, comprising four Counts in Declaratory Judgement, and one Count in Administrative Review. One of the four Counts in Declaratory Judgement (Count 4) sought a declaration that the system of administrative hearings established by Chicago to adjudicate allegations of ordinance violations is violative of due process, because it violates minimal standards of judicial independence of the administrative hearing officers. This is the only Count from the original complaint that Shachter is presently seeking leave to appeal.

On September 14, 2014, Chicago moved to dismiss, with prejudice, the four Counts in Declaratory Judgement. The motion was fully briefed, and on September 30, 2015, the Honorable Mary Lane Mikva, of the Circuit Court of Cook County, Illinois, granted the motion, and dismissed, with prejudice, the four Counts in Declaratory Judgement. At this point, only the Count in Administrative Review remained.

On March 3, 2016, the Parties agreed — and the Court entered an Agreed Order, memorializing the Parties' agreement, and giving it effect — that the three administrative hearings under review were to be remanded for rehearing to Chicago's Department of Administrative Hearings, with instructions not to consider the condition of property adjoining Shachter's property but not belonging to him, which had been wrongly considered on January 29, 2014.

On September 8, 2016, Chicago again found Shachter liable for all three ordinance violations, and imposed a fine of $1800, plus $120 in administrative costs.

On March 30, 2017, Shachter re-argued to the Honorable Celia Gamrath of the

Cook County Circuit Court (Judge Mikva had been promoted to the Illinois Appellate Court and was no longer serving on the Cook County bench), in his (second) Specification Of Errors, that Chicago's judicial procedures violate due process.

On June 23, 2017, the Honorable Celia Gamrath upheld the decision of Chicago's Department of Administrative Hearings.

On July 24, 2017, Shachter filed a Motion To Reconsider, which was denied on October 11, 2017.

On November 13, 2017, Shachter filed a Notice Of Appeal to the Illinois Appellate Court, First District, where the Honorable Mary Lane Mikva, unbeknownst to Shachter, was assigned to serve on the 3-judge panel that heard motions on the case. On May 6, 2019, when Shachter found out (after noticing for the first time that all the Appellate Court orders in his case had been signed by Judge Mikva) that the Appellate Court had assigned Judge Mikva to the 3-judge panel that was handling the appeal from her own Circuit Court judgements, Shachter moved that the Illinois Appellate Court, First District, recuse itself pursuant to Illinois Supreme Court Rule 63C(1), and transfer the case to the Second, Third, Fourth or Fifth District. The Appellate Court (in an order that was *not* signed by Mary Lane Mikva), denied this motion swiftly, and on May 28, 2019, it issued an unpublished Order (also not signed by Mary Lane Mikva) affirming the lower tribunals (Appendix A).

On July 2, 2019, Shachter filed a Petition For Leave to Appeal with the Illinois Supreme Court, which the Illinois Supreme Court denied on September 25, 2019 (Appendix C), thus rendering the case appealable to the United States Supreme Court, pursuant to 28 U.S.C. § 1257(a).

This Petition for a Writ of Certiorari is timely filed on December 26, 2019.

Reasons For Granting the Writ

This case began with an administrative law judge employed by the city of Chicago describing his conditions of employment in the following language:

> ... it's up to the Department of Administrative Hearings to schedule judges for particular days and times. I might not be scheduled at all

> that day — or, you know, I might be scheduled for a hearing at another facility at that date and time. So I — I don't have any control over that.
>
> As an independent contractor, I just let the City know when I'm available to come and they let me know if they have a need, you know, on that particular date and time.

In other words: if Chicago was satisfied with the previous day's work of an administrative hearing officer, Chicago will call him for another day, and he will be paid for another day. If Chicago was not satisfied with his previous day's work, he will not be called for another day, and he will not be paid for another day. The administrative hearing officers are independent contractors, not employees, and therefore they enjoy no legal protection in Illinois against retaliatory discharge (see *Bajalo v. Northwestern University*, 369 Ill.App.3d 576). Moreover, they are hired as day laborers, with no contract lasting longer than a day, so there is not even any contract to terminate; the government entity that was displeased with your ruling yesterday just refrains from hiring you again today.

Shachter believes that such a system undermines judicial independence in three ways. First of all, it gives the magistrate a substantial pecuniary interest in the outcome of a case, because his continued employment depends on his pleasing his employer, the City of Chicago, who is also the Petitioner in all of the cases before him. Second of all, it allows Chicago to select the magistrates that are naturally sympathetic to Chicago, and hostile to those whom Chicago accuses of violating her ordinances. There is also a third factor which does not appear in the cases in other jurisdictions to which this case will be compared: Chicago controls the assignments of the administrative hearing officers, to the extent that a hearing officer doesn't even get to hold on to a continued case; a case that is continued from one hearing date to another, if Chicago didn't like what the hearing officer has done so far, can, at Chicago's discretion, be taken from the original hearing officer and given to another one, even without subjecting the original hearing officer to any loss of income. This allows Chicago to create a structural bias in her favor, in addition to the bias that she inculcates within the individual hearing officers.

The Illinois Supreme Court has upheld the constitutionality of these procedures

and conditions of employment. In contrast, the California Supreme Court has not. In *Haas v. County of San Bernardino*, 27 Cal.4th 1017, 119 Cal.Rptr.2d 341, 45 P.3d 280 (2002), the California Supreme Court held that California counties appointing "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" (*Haas*, 45 P.3d 280 at 283). In *Haas*, the county revoked a business owner's license to operate, and the owner appealed to a hearing officer chosen by the county, who would only be paid for the hearing at hand, although the county indicated that it might use the services of the hearing officer in the future. The California Supreme Court, after an extensive analysis that will not be summarized here, ruled that when hearing officers are placed in situations like that, it violates due process. It should be noted that *Haas* was decided seven years before the Court handed down its decision in *Caperton v. Massey*, 556 U.S. 868, which *expanded* the requirements of due process. *Haas* was decided according to the pre-*Caperton* standards of *Withrow v. Larkin*, 421 U.S. 35. *A fortiori*, in a post-*Caperton* era, the procedures and conditions of employment currently in force in the city of Chicago should certainly be found to be unconstitutional.

In *State ex rel. Shrewsbury v. Poteet*, 157 W. Va. 540 (1974), the Supreme Court of West Virginia invalidated a West Virginia statute that allowed a justice of the peace to collect a $5 fee for every case that was brought before him, on the grounds that plaintiffs naturally bring their cases before the justices from whom they expect a favorable ruling, and the $5 fee encourages justices to rule in favor of plaintiffs, in order to attract more business from them. In *State ex rel. McLeod v. Roger A. Crowe*, 272 S.C. 41 (1978), the Supreme Court of South Carolina invalidated a similar statute allowing a magistrate to collect a $10 fee for each case brought to him.

Even 45 years ago, $5 was not a large amount of money. Nevertheless, this is what the *Shrewsbury* court wrote, in striking down the statute:

> It is essential to the fair and proper administration of justice that courts, whether the highest in the land or the most minor, be completely independent, absolutely free from influence and wholly without any pecuniary interest, however remote, in any matter before them.

(*Shrewsbury*, 157 W. Va. 540 at 545–546). In the present case, unlike in *Shrewsbury*

and *McLeod*, there is only one plaintiff, the City of Chicago. But that is an insubstantial difference. In both the present case and in the cases to which it is compared, the plaintiff chooses what magistrate will hear his case, and the more often a magistrate is chosen, the more he is paid. The Supreme Court of West Virginia recognized forty-five years ago that this is an impermissible violation of the Fourteenth Amendment. The Illinois Supreme Court has still not recognized it.

In the Federal district courts, the current interpretation of the law is that even a two-year employment contract for administrative hearing officers is constitutionally impermissible. The following quote from *Lucky Dogs LLC v. City of Santa Rosa*, 913 F. Supp. 2d 853 at 861 (N.D. Cal. 2012) — a post-*Caperton* decision — is worth presenting at length:

> Judicial independence is a structural characteristic, not an empirical one. The question is whether the conditions of an official's employment tend to promote independent judgment, not whether a particular decision was affected by the official's cognizance of current events. See *Cleavinger*, 474 U.S. at 203–04, 106 S.Ct. 496 (noting that members of a prison disciplinary committee are not independent because they are "direct subordinates of the warden"); see also *Stern v. Marshall*, ___ U.S. ____, 131 S.Ct. 2594, 2609, 180 L.Ed.2d 475 (2011) (explaining that the life tenure and salary protections of Article III were adopted to create the conditions under which judges would be likely to act free from improper influence).
>
> 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. 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.

There is a great gulf between the conditions presently allowed by the Federal district court for Northern California, and the Supreme Court of Illinois. The Federal court does not presently allow local administrative hearing officers to have two-year contracts, while the Illinois Supreme Court presently considers even one-day contracts to be permissible.

Petitioner stresses that his argument is *not* merely that the administrative hearing officers are paid by Chicago. Petitioner understands that the administrative hearing officers have to be paid by someone. In a venue where Chicago is the Petitioner in *every* case, and where every successful prosecution results in a fine accruing to Chicago, it would certainly be better if the administrative hearing officers were paid by the county, or by the state; but the courts of this land have repeatedly allowed such hearing officers to be paid by the same governmental entity that collects the fines from successful prosecutions. Petitioner's argument is, and in the lower courts consistently has been, *not* that the administrative hearing officers are paid by Chicago, but that they are day laborers, working under conditions that completely undermine judicial independence. This is clearly stated in Count 4 of the original Complaint, filed in early 2014 (Appendix D).

Even if this case involved settled law, there would be strong public policy reasons in favor of granting a writ of certiorari. The Court can take judicial notice of the fact that Chicago is the third largest city in the United States, and that her central administrative hearing facility at 400 West Superior Street (there are two smaller ones in other parts of the city) is larger and busier than nearly every courthouse in the country. If Chicago has been collecting millions of dollars in fines through constitutionally im-

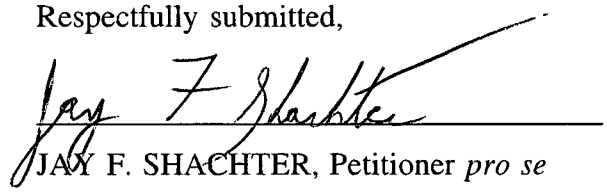
permissible means, it is appropriate for the Court to put a stop to that vast unconstitutional enterprise, even if the matter involves settled law.

But, in fact, as shown above, the matter does *not* involve settled law. What is settled law is the abstract principle that evidence of actual bias is not necessary, to render repugnant to due process the decisions in which a magistrate participates; it need merely be shown that "under a realistic appraisal of psychological tendencies and human weakness," a judge's interest poses "a risk of actual bias" (*Caperton*, 556 U.S. 868 at 870, quoting *Withrow*, 421 U.S. 35 at 47). But the Court has given scant and rare guidance to the country's courts on how this abstract principle shall be applied to actual cases. In particular, there has been no guidance from this Court on how judicial independence is implicated by the length of a magistrate's contract with the governmental entity that pays him, and whose cases he hears. One would think that common sense informs everyone that hearing officers cannot be day laborers, who are hired from one day to the next by the governmental entity whose cases they hear; but the lack of guidance from this Court has enabled the Illinois Supreme Court to allow Chicago to do exactly that, while in other parts of the country, even two-year contracts are constitutionally impermissible. *The meaning of the Fourteenth Amendment cannot be different in different parts of the country*, and the Court's guidance is needed so that the due process rights granted by the Fourteenth Amendment shall be the same everywhere.

Conclusion

For reasons of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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