GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

LEGAL COUNSEL DIVISION

MEMORANDUM ~~**PRIVILEGED & CONFIDENTIAL**~~

TO: **Janet M. Robins**
Deputy Attorney General
Legal Counsel Division

FROM: **Mary Shields** MMS
Assistant Attorney General
Legal Counsel Division

DATE: **June 16, 2015**

SUBJECT: **Legal Advice Regarding Term Limits for Administrative Law Judges (AL-15-357)**

This memorandum responds to your request that this Office offer legal advice on whether newly-legislated term limits can be imposed on Administrative Law Judges ("ALJs") who were appointed before the new terms limits were enacted. Specifically, sections 11(c) and 13(a) of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code §§ 2-1831.08(c) and 2-1831.10 (2012 Repl.)) currently states that ALJs are to be appointed to six-year terms. The Office of Administrative Hearings Administrative Law Judge Term Limit Amendment Act of 2015, B21-158 § 3012 (2015) ("ALJ Term Limit Act"), currently under Council review, would shorten the term length to five years. If the ALJ Term Limit Act is enacted as proposed, are ALJs who were appointed prior to its enactment subject to the new, shortened terms or may they serve out the six-year terms in place when they were appointed to the position?

Summary of Conclusion

Having reviewed the law applicable to this inquiry, I conclude that the ALJs appointed prior to the enactment of term limit changes are likely entitled to serve the entirety of the six year term to which they were appointed. The ALJ Term Limit Act does not contain a specific retroactive application, and according to both Federal and D.C. courts, laws are not presumed to apply retroactively.[1] Laws that affect substantive rights established prior to the law are considered

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[1] *See, e.g., Landgraf v. USI Film Products,* 511 U.S. 244, 273 (1994); *Lacek v. Washington Hosp. Ctr. Corp.,* 978 A.2d 1194, 1197 (D.C. 2009).

"retroactive."[2] Employees who may only be terminated for cause, even for a limited term, have a property right in continued employment for the duration of the term, and may not be removed without proper due process.[3] Under D.C. Code § 1-1831.08(c), District ALJs are appointed initially to two year terms and then are eligible to be reappointed to six-year terms thereafter. Under D.C. Code § 1-1831.10(d), ALJs may only be removed for cause. To apply the new five-year term limit on previously appointed ALJs would diminish their established property right in their position for the six-year term and thus would apply retroactively.[4] A court will not presume such an interpretation of the law without an explicit provision providing for retroactive application.[5] Therefore, the currently proposed version of the ALJ Term Limit Act must be interpreted as applying only to terms initiated after the law is enacted.

Discussion

The prevailing judicial view is that public employees that are removable only for cause have a constitutionally protected property right in their position during the term.[6] Furthermore, courts have also found that a government officer who is appointed to a specified term has a protected interest in that position for the duration of the term.[7] When there is a protected property interest, the employee may not be removed from his or her position without regard to due process; generally this requires some type of notice and pre-termination opportunity to respond to the grounds for the proposed termination.[8]

Courts presume that a law will operate only prospectively unless its language expressly states or implies that the legislature intended it operate retroactively.[9] A statute is considered to be retroactive in effect when affects substantive rights that vested before the statute's enactment.[10] If retroactive application is clearly intended, the retroactive application must serve a rational legislative purpose.[11] While this standard is deferential to the legislature's determination, the law must still adhere to the Constitution.[12] Explicitly retroactive provisions do not raise Due Process Clause issues, however, because its requirements are satisfied by the legislative process.[13]

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[2] *See Landgraf*, 511 U.S. at 270; *Lacek*, 978 A.2d at 1197.
[3] *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Reagan v. United States*, 182 U.S. 419, 425 (1901); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972).
[4] *See Landgraf*, 511 U.S. at 270.
[5] *See id.*, *Lacek*, 978 A.2d at 1197.
[6] *See Loudermill*, 470 U.S. at 538-39 (finding that an Ohio statute which stated employee could only be dismissed for certain causes established employee's property right to the position); *Roth*, 408 U.S. at 578.
[7] *See Reagan*, 182 U.S. at 425 (stating that where the term of office is fixed, removal of the officer requires notice and hearing); 99 A.L.R. 336(III)(b)(3).
[8] *See Loudermill*, 470 U.S. at 542.
[9] *See Landgraf*, 511 U.S. at 270; *Lacek*, 978 A.2d at 1197; *Bank of Am., N.A. v. Griffin*, 2 A.3d 1070, 1074 (D.C. 2010).
[10] *See Landgraf*, 511 U.S. at *270; I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001); *Lacek*, 978 A.2d at 1197.
[11] *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (upholding a clear retroactive provision because it would prevent avoidance of the penalty the new law would impose); *Landgraf*, 511 U.S. at 268 (noting that giving "comprehensive effect to a new law Congress considers salutary" is a sufficient reason to uphold an explicit retroactive provision); *D.C. v. Beretta U.S.A. Corp.*, 940 A.2d 163, 174 (D.C. 2008); *Jung v. Ass'n of Am. Med. Colleges*, 339 F. Supp. 2d 26, 45 (D.D.C. 2004), *aff'd.*, 184 F. App'x 9 (D.C. Cir. 2006).
[12] *See Landgraf*, 511 U.S. at 272; *Beretta U.S.A.*, 940 A.2d at 174, 179.
[13] *See Beretta U.S.A.*, 940 A.2d at 175-76 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982)).

Under the Office of Administrative Hearings Establishment Act of 2001, the Commission on Selection and Tenure of Administrative Law Judges of the Office of Administrative Hearings ("Commission") appoints ALJs to initial terms of two years, after which they are eligible for reappointments to six-year terms.[14] During a term of office, an ALJ is subject to discipline and removal only for cause, with a right to notice and hearing before the Commission.[15]

The ALJ Term Limit Act would amend the current law to shorten all six-year ALJ terms to five-year terms.[16] The law does so by replacing each instance in the current law that states "6 years" with "5 years." It does not amend the "removal only for cause" provision, nor does it currently contain a provision explicitly stating that it applies retroactively.

ALJs who are currently serving their duly appointed six-year terms may claim a protected property interest in their position both because under the D.C. Code, they are appointed to serve a definite term and because they may only be removed "for cause."[17] If the ALJ Term Limit Act were to apply to ALJs currently serving six-year terms, such that their current terms were shortened to 5-year terms, this would amount to a retroactive application as it would affect a substantive right – the property right to the position during the appointed six-year term – that is already vested in current ALJs. The proposed law does not explicitly state that it is to apply retroactively to terms that began before its enactment. In accordance with *Landgraf* and *Lacek*, D.C. courts will therefore presume that this law is to apply only prospectively, to judges appointed (or reappointed) after the law's enactment.[18] If the ALJ Term Limit Act did include an explicit retroactive-application provision for the new term limit, a court is more likely to uphold the provision as long as there is an indication that the legislature had a rational reason to apply the new term limits retroactively.

If you have any questions regarding this memorandum, please contact Mary Shields,* Assistant Attorney General, Legal Counsel Division, at 724-6152.

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[14] D.C. Official Code § 2-1831.08.
[15] § 2-1831.10.
[16] B21-158 § 3012 (2015).
[17] *See Loudermill,* 470 U.S. at 538; *Reagan,* 182 U.S. at 425; *Roth,* 408 U.S. at 578.
[18] *See Landgraf,* 511 U.S. at 270; *Lacek,* 978 A.2d at 1197.

*Admitted to practice only in New York. Practicing in the District of Columbia under the direct supervision of Janet M. Robins, a member of the D.C. Bar, pursuant to D.C. Court of Appeals Rule 49(c).