

5. Why the author of the LEC Report did not testify--and its impact on fairness

We have addressed the LEC Report in its evidentiary context. We conclude here by examining, in the context of fairness, why Lelito, the report's author, did not testify as a witness for the ten residents group.

Lelito was unavailable to testify for the group on account of Easton's conduct and not on account of any failure by the group to make the witness available. The conduct in question is ascribed to two actors--Easton's administrator (Kevin Paicos), who determined that the town would terminate its relationship with Lelito and his firm on other, unrelated projects based upon his work for the group regarding the proposed library addition, and Easton's counsel (Attorney Gregor McGregor), who delivered a "heads up" message about this to Mr. Lelito during the site visit.

We do not police the legal profession or the conduct of municipal officials, and we do not determine here, thus, whether the conduct in question comported with applicable ethical rules and standards. We have, however, broad authority under [310 CMR 1.01\(5\)](#) to insure the fairness of adjudicatory proceedings, and we have asserted that authority, most recently to curb repeated abusive filings directed by a private party against the Department's General Counsel. Matter of Stahl, Docket No. 2001-056, Decision and Order re Discovery and Motion to Strike (July 9, 2002). We proceed here under the same authority, and for the same purpose of insuring fairness.

***22** Although the conduct in question occurred prior to the adjudicatory appeal, it had an impact on this appeal nonetheless. It constrained the ten residents group's ability to call as a witness the expert who had performed field work for it, including stream flow observations, and who had prepared a report for the group regarding stream flow. The report was the group's sole source of observational evidence over an important time period, and those observations were uncontradicted. Its author's unavailability as a witness jeopardized the group's ability to present as evidence in this appeal not only its expert's conclusions regarding stream flow but also his raw observational data. There is no evidence of another witness with similar qualifications who observed stream flow on the same days. Indeed, although the group was able to secure another wetlands scientist (Garner), he was unable to duplicate Lelito's observations because he did not observe the stream when Lelito did.^[FN27]

We have already noted that these observations furnished the only evidence in the record regarding stream flow during that time. This evidence would have been lost to the group and to the record if Lelito had not prepared a report recording his observations, or if the report had been stricken. This loss of evidence would likely matter little if, as the Remand Decision instructs, "reliable observation of flow in each season is not enough to support a conclusion that a stream is perennial." If, however, that rule did not apply here (which we believe to be the case), the loss of Lelito's observational evidence would have undercut the group's direct case irreparably. It would do so now if this evidence were to be excluded or given no weight retroactively.

The conduct in question had the potential, as well, to affect witness availability in other adjudicatory appeals.

As the group's counsel noted during oral argument, the attorneys and consultants who participate in matters before the Department, such as this one, comprise "a small community of people who talk to one another."^[FN28] Indeed, many of the attorneys who appear before this tribunal, including counsel for the group and for Easton, and many of the consultants who appear here as experts, including Lelito, do so relatively frequently. Many of them have represented government entities at one time or another, including towns, cities and various local boards, agencies and commissions. Many of them have performed consulting work in one form or another for these government entities. Beyond the confines of this tribunal, many of them have developed effective working relationships over the years with state and municipal agencies.

As we do not police the conduct of the legal or consulting professions, so, too, we do not police the conduct of the "small community" of permit process participants. Nor do we determine the pros and cons of having in place a "small community" of consultants and attorneys who "talk to one another,"

or of the local legal and consulting cultures that this engenders.^[FN29]

***23** We remain on guard, however, against any conduct that threatens the fairness of proceedings in this tribunal, including private "enforcement" within the "small community" whose effects spill over into an ongoing adjudicatory appeal.

The potential compromise of fairness here was the group's possible loss of irreplaceable stream flow observation testimony. Fairness was not compromised in this manner only because ALJ Palace refused to strike the LEC Report or give it no weight. Fairness may have been compromised nonetheless in another respect; the group lost access to witness testimony that might have strengthened its direct case, perhaps sufficiently to have convinced not only ALJ Palace, but the Commissioner as well, that the evidence sufficed to show perennial stream flow.

Although she did not deny the motion specifically for this reason, ALJ Palace would have been justified in sanctioning Easton based upon its conduct and its impact on the group's ability to present testimony regarding stream flow on the days when Lelito observed it. The range of potential sanctions that ALJ Palace could have imposed is broad, see [310 CMR 1.01\(10\)](#), and could have included an order precluding Easton from contesting the LEC Report. She might very well have imposed a sanction if these matters had been placed squarely and completely before her at the hearing, as they were in Attorney Hall's July 12, 2002 affidavit and during the oral argument before us.

Disposition

For the reasons set forth above, we return this matter to the Commissioner so that she may issue a final decision.

Kristin M. Palace
Administrative Law Judge

James M. Rooney
Administrative Law Judge

Mark L. Silverstein
Administrative Law Judge