

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-060

JULY TERM, 2019

Gabriel Martinez* v. Town of Hartford	}	APPEALED FROM:
	}	
	}	Property Valuation and Review Division
	}	
	}	DOCKET NO. 2017-38

In the above-entitled cause, the Clerk will enter:

Homeowner appeals from a hearing officer’s valuation of his property for purposes of the 2017 Town of Hartford grand list. In the context of this appeal, homeowner reiterates challenges based on the hearing officer’s asserted undisclosed conflicts of interest and makes a new claim, based on materials homeowner says he discovered in the file on appeal, that the hearing officer engaged in improper ex parte communications with the Town’s representative. We construe homeowner’s newly raised arguments, in concert with the arguments he has already made concerning claims that the hearing officer had undisclosed conflicts, as a motion to disqualify the hearing officer, vacate her decision, and allow another hearing before a different hearing officer. See generally General Rule for Executive Branch Administrative Hearing Officers, Code of Vt. Rules 10 000 02, <http://www.lexisnexis.com/hottopics/codeofvtrules> (establishing “standards for ethical conduct of hearing officers, and guidelines and oversight for administrative hearing officers in the Executive Branch”). We remand this case to the Property Valuation and Review Division to make findings regarding this motion.

As homeowner asserts, “[i]t is beyond dispute that a fair trial before an impartial decisionmaker is a basic requirement of due process, applicable to administrative agencies as well as to the courts.” In re JLD Props. of St. Albans, LLC, 2011 VT 87, ¶ 6, 190 Vt. 259 (quotation and alteration omitted). The property-valuation hearing here, “like any quasi-judicial administrative proceeding[], must faithfully observe the rudiments of fair play.” Id. (quotation omitted). “[I]t is settled that due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.” Id. (quotation omitted).

Homeowner alleges, and the Town acknowledges, that the hearing officer engaged in plainly inappropriate conduct. She undisputedly had ex parte communications with the Town Assessor, who valued the property and represented the Town at the property valuation

and review (PVR) merits hearing, and did not disclose these exchanges to appellant. This is prohibited by law. See 3 V.S.A. § 813 (“Unless required for the disposition of ex parte matters authorized by law, members or employees of any agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate.”); 32 V.S.A. § 4466 (noting that Vermont Administrative Procedures Act governs appeals before hearing officer); General Rule for Executive Branch Administrative Hearing Officers, Code of Vt. Rules 10 000 02, Canon 2 (“A Hearing Officer Shall Avoid Impropriety and the Appearance of Impropriety in all Activities.”), *id.* Canon 3-101(A) (hearing officers shall not “initiate, permit or consider ex parte communications,” with exceptions not relevant here).

Homeowner also alleges that the hearing officer and the Town’s assessor (whose valuation was the subject of the appeal and who represented the Town in the PVR proceeding) traveled together by car to the site visit, which took approximately fifty minutes roundtrip. Finally, homeowner contends that the hearing officer did not advise him that she knew the Town’s assessor and had served on a board with her until at least May 2018. The Town admits that the car ride occurred but asserts that the hearing officer and assessor did not converse during the ride. It also asserts that the hearing officer disclosed to homeowner at the hearing that she had served on a board with the Town’s assessor but that this disclosure was inadvertently not recorded. Homeowner denies that this occurred. As is evident, there are disputed facts regarding these issues which must be resolved by a factfinder.*

We emphasize, however, that even without these findings, the hearing officer’s actions, considered together, raise serious concerns about whether she has upheld the integrity and independence of the administrative-hearing process and whether any reasonable person could conclude that she acted “in a manner that promotes public confidence in the integrity and impartiality of the administrative process.” Code of Vt. Rules 10 000 02, Canon 1, 3. A hearing officer must disqualify herself “in any proceeding in which the hearing officer’s impartiality might reasonably be questioned.” *Id.* Canon 3-102.

Because disputes of fact remain, we remand this case to the Property Valuation and Review Division to consider homeowner’s request that the hearing officer be disqualified

* Homeowner raised these latter two allegations—that the Town’s assessor traveled to the site visit with the hearing officer and that the two had an undisclosed prior working relationship on a board—in a motion to reconsider, which the hearing officer denied as untimely. We need not address the timeliness question because the newly discovered ex parte communications call into question the hearing officer’s conflicts and disclosures more generally, and homeowner has timely raised this challenge. Cf. V.R.C.P. 40(e) (stating that if cause or ground of motion to disqualify is not known within time designated by rule, motion must be made “as soon as practicable after the cause or ground becomes known”). Even if homeowner’s motion to reconsider was not timely, the questions are now properly before the hearing officer in the context of our remand.

from this case, her decision vacated, and that a new hearing be held before a different hearing officer. See generally Velardo v. Ovitt, 2007 VT 69, ¶¶ 15-34, 182 Vt. 180 (describing factors relevant to determining appropriate remedy for judge's failure to disqualify himself or herself).

Remanded for additional proceedings consistent with this opinion.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice