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# LOUISIANA PUBLIC SERVICE COMMISSION V. CHEATHON: ERROR OF ALJ IN NOT CITING A PARTY FOR CONTEMPT FOR FAILURE TO APPEAR AT A HEARING

Kevin J. Riley\*

## I. Introduction

The power to directly cite for contempt in an administrative adjudication is not generally vested in an Administrative Law Judge (“ALJ”). However, ALJ’s appointed by federal agencies, and by agencies of many states, can indirectly exercise contempt power through a petition to the judiciary. In *Cheathon*, the Louisiana appellate court found error when an ALJ (“Referee” in Louisiana) who did have direct power, failed to exercise it.<sup>1</sup> This is a unique ruling for very little case law exists concerning the exercise of contempt power by ALJ’s, and rarer are reviewing court orders for a contempt citation when none was issued at the agency level. This note explores this ground breaking Louisiana case, and discusses administrative contempt power in general.

## II. Statement of the case

### A. Background

In a letter dated August 16, 1990, George E. Cheaton<sup>2</sup> was suspended from his job as a Transportation Enforcement Specialist for the Louisiana Public Service Commission (“LPSC”) for allegedly accepting and soliciting bribes from two Florida-based truckers in lieu of Mr. Cheaton issuing drivers violation tickets to them. The LPSC

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<sup>1</sup>*Louisiana Public Service Commission v. Cheathon*, 625 So.2d 703 (La. App. 1st Cir. 1993), writ denied, 631 So.2d 1166 (La. 1994).

<sup>2</sup>The reported opinion itself refers to the respondent in this case as Cheaton, but some of the case names refer to him as Cheathon. Where possible the “Cheaton” spelling has been used.

terminated Mr. Cheaton following an investigation into the matter.

Cheaton appealed his dismissal to the Louisiana Civil Service Commission ("Commission") on September 19, 1990. At the first hearing, held in February of 1991, both Florida truckers were present, however Mr. Cheaton failed to appear. The LPSC moved for a summary dismissal, claiming the truckers were present for identification testimony, and Mr. Cheaton's absence had prejudiced the LPSC's case. The Referee denied the motion because Mr. Cheaton had not been subpoenaed to appear at that hearing.

The time allocated for the hearing was spent addressing the issue of appointing authority, with the Referee subsequently ruling that Mr. Cheaton's dismissal was null and void because it was not effected by the proper appointing authority. The LPSC appealed to the Commission, which held the Referee had failed to take sufficient evidence on that issue. The case was remanded to a second hearing.

Mr. Cheaton was then subpoenaed to appear and testify at a second hearing on August 28, 1991. Once again he failed to appear, and again the hearing focused exclusively upon the issue of appointing authority. The Referee again found for Cheaton, and this time the Commission denied the LPSC's appeal. On appeal to Louisiana appellate court, the case was remanded to the Commission with a finding that there had been proper appointing authority.<sup>3</sup>

Mr. Cheaton's appeal of his termination was scheduled to be heard before a second Referee, on March 15 and 16, 1994. This Referee issued a subpoena for Mr. Cheaton to appear and testify on behalf of the LPSC at the hearing, and the record shows he did receive the subpoena.

Mr. Cheaton again failed to appear on the first day of the hearing, and the LPSC moved that Mr. Cheaton be held in contempt. The Referee failed to immediately rule on the motion, and at the end of the day, the LPSC withdrew its motion of contempt in favor of a motion to dismiss the appeal based on Mr. Cheaton's failure to appear. Due to the fact that the day had been devoted to preliminary matters, the Referee refused to dismiss the appeal based on Cheaton's non-

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<sup>3</sup>*Louisiana Public Service Commission v. Cheathon*, 625 So.2d 703 (La. App. 1st Cir. 1993), writ denied, 631 So.2d 1166 (La.1994).

appearance, but cautioned his attorney that Mr. Cheaton's failure to appear the next day would be dealt with more severely.

When Mr. Cheaton failed to appear on March 16, the parties agreed to present a limited amount of evidence in his absence. The LPSC again moved for dismissal of the proceedings for abandonment, but the Referee refused to rule on the motion, and rescheduled the hearing to resume on April 20, 1994. The LPSC appealed this decision to the Commission which again refused to dismiss Mr. Cheaton's appeal of his dismissal.

The LPSC again appealed the Commission's decision to the Louisiana appellate court, and this time the court reversed the decision of the Referee, and dismissed Cheaton's appeal. The appellate court also held that the Referee had abused her discretion by failing to sanction Mr. Cheaton for contempt. The court held that the Commission erred in its failure to sanction him for his refusal to appear at any of the three hearings. The court held that the Commission should have, at a minimum dismissed Cheaton's appeal, and then went on to assess all costs of the appeal to Mr. Cheaton.

### ***B. Discussion***

In determining that the Referee erred in her refusal to dismiss the appeal, the court looked to "Mr. Cheaton's willful failure to comply with the subpoena commanding his presence." The appellate court cited Louisiana statutory authority as vesting Civil Service Referees with contempt powers for enforcement of their subpoenas.<sup>4</sup> In this case, Mr. Cheaton's conduct was so flagrant and willful, that the court required the Referee to find him in contempt.<sup>5</sup> This despite a finding that wide deference was to be afforded a Referee's decision concerning enforcement of a subpoena.

Louisiana's Civil Service Rules vest the Civil Service

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<sup>4</sup>LA. CIV. SERV. RULE 13.21(a) ("The Commission . . . any referee appointed by the Commission .. shall have the power to order the appearance of witnesses. . .").

<sup>5</sup>*Cheathon*, 625 So.2d 703, at 707.

Commission and its Referees with the power to order the appearance of witnesses,<sup>6</sup> and to sanction violations of its orders by contempt.<sup>7</sup> In addition, an individual may be found by the commission to have forfeited his office or position by violation of a subpoena. The statutes only extend these subpoena and contempt powers to "any officer or employee in the classified service." As an employee of the Louisiana Public Service Commission, Mr. Cheaton was subject to the subpoena and contempt powers of the Referee.

Despite having the power to find Cheaton in contempt, the Referee failed to do so because she applied the wrong standard of compliance to his actions. The Referee held that since Mr. Cheaton was never called as a witness, he was not in contempt for failure to appear as ordered. However, the appellate court held that it was Mr. Cheaton's failure to appear that subjected him to a contempt ruling.<sup>8</sup> Regardless of whether or not he was actually called to testify, Mr. Cheaton violated the subpoena simply by failing to appear.

While the Referee may have applied an incorrect analysis to Mr. Cheaton's absence from the hearings, she was still to be afforded wide discretionary powers in finding contempt. Had Mr. Cheaton's absences not been so egregious and repeated, the appellate court may have felt constrained to simply cite the flawed analysis, but let the Referee's decision stand. However, Mr. Cheaton not only ignored three separate subpoenas, but also failed to appear after a direct warning from the Referee. This insolence appeared to induce the appellate court to reverse the Referee and require a sanction of Cheaton. The court looked to the willful and flagrant manner in which Cheaton disobeyed the Commission's subpoena, the repeated nature of his violations, and his failure to appear in an action brought by him.<sup>9</sup> The appellate court held this an abuse of the wide discretion afforded the Referee concerning

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<sup>6</sup>LA. CIV. SERV. RULE 13.21(a).

<sup>7</sup>LA. CIV. SERV. RULE 13.25(a) ("Any officer or employee in the classified service who willfully refuses or fails to appear before the Commission or its Referee in response to a subpoena . . . may be found by the Commission or the Referee to be guilty of contempt in accordance with these Rules . . .").

<sup>8</sup>*Cheathon*, 625 So.2d 703 at 707.

<sup>9</sup>*Id.* at 708.

enforcement of the subpoena.<sup>10</sup>

### III. Limited ALJ contempt power

In most cases the decision of an ALJ<sup>11</sup> is not a final decision, but merely a recommendation to the agency<sup>12</sup> from which the ALJ's authority springs. While in many cases the agency routinely adopts the decision of the ALJ, there is no final decision until the agency itself renders one. This lack of final judgment authority, and the fact that ALJ's are not part of the judicial branch, results in a reluctance to grant direct contempt power to ALJ's.

Despite many states refusal to grant contempt power to their administrative judges, a few do grant such power, whether in a general administrative definition statute, or the more common approach of vesting contempt power on a statute by statute basis.

#### A. General discussion of limited contempt power

While there exists only limited case law at the state level concerning the use of ALJ contempt power, there are statutory grants of such authority to ALJ's in some states. In many jurisdictions contempt power is only defined in extremely limited terms, however, some states do provide for broader exercise of this authority. For example, South Carolina and Texas bestow contempt power to ALJ's in statutes which apply this power to administrative judges generally.<sup>13</sup>

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<sup>10</sup>*Id.*

<sup>11</sup>Throughout the remainder of this note, the terms "ALJ" and "Administrative Judge" will be used to describe an administrative agency appointed official empowered to preside over an administrative adjudication. The many state and federal agencies may label these officials as; hearing officers, administrative law judges, ALJ's, or referees.

<sup>12</sup>Unless otherwise noted, the term "agency" will be used when referencing any statutorily created agency, commission, board, or other administrative office under state or federal law.

<sup>13</sup>S.C. CODE ANN. § 1-23-320(d) (1993) ("The administrative law judge division . . . shall have the power to punish as for contempt of court, by fine or imprisonment or both . . . [to enforce] any subpoena of the agency."); TEX. GOV'T. CODE § 2003.047(i) (1996) ("An administrative law judge, on the judge's own motion or on motion of a party and after

However, it is far more common for states to grant contempt power to their administrative law judges on a statute by statute basis.<sup>14</sup> These states only grant this power to specific judges, for certain types of hearings.<sup>15</sup>

The limited vesting of contempt power is made necessary in these states for several reasons. Often, a state may have established administrative adjudication in several different contexts which do not warrant or require contempt power. This lack of necessity, the potentially disparate administrative adjudication forums, and due process concerns, all add to states' reluctance to grant such power. The latter situation will be dealt with more extensively in a subsequent section examining contempt power at the federal level.

Some hearings do not require excessive amounts of discovery, or third party witnesses. In these situations, the absence of a party/witness simply results in the dismissal of the case, or a summary decision by the ALJ. Further, if the ALJ has no power or need to compel discovery, then the question of contempt power may simply never have arisen in the legislative history of the statute giving the ALJ his original authority to hear the case.

Another bar to states' granting of general contempt powers is the wide range of hearings and adjudications convened by the a multitude of agencies. As the importance of non-judiciary adjudications continues to grow, so does the authority granted to the ALJ's of many state agencies. However, there remain agencies with established adjudicatory procedures, some of which may not warrant vesting of direct contempt powers in the ALJ's conducting these hearings. For many states, agency inertia is sufficient to prevent the effective passage of statutes defining administrative law judges in general terms.

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notice and opportunity for hearing, may impose appropriate sanctions . . .").

<sup>14</sup>ARGASB, Rule III § J.(2) (1995); ARK. STAT. ANN. § 11-9-706 (1995); Colo. Rev. Stat. § 8-43-207 (1996); Miss. Code Ann. § 49-2-71 (1995); MONT. CODE ANN. § 40-5-226(14) and (15) (1995).

<sup>15</sup>ARGASB, Rule III § J.(2) (1995) (sanctions against foreign attorneys appearing in Alabama *pro hac vice*); ARK. STAT. ANN. § 11-9-706 (1995) (Workers' Compensation and related hearings); Colo. Rev. Stat. § 8-43-207(1)(p) (1996) (Workers' Compensation and related hearings); Miss. Code Ann. § 49-2-71 (1995) (environmental self-regulation hearings); MONT. CODE ANN. § 40-5-226(14) and (15) (1995) (family law statutes).

Both of the above mentioned reasons for limited vesting of ALJ contempt power also involve the retention of control by the state legislatures. This *ad hoc* method of granting authority provides the legislatures the ability to adjust their administrative systems as they see fit. When the need to compel discovery or to enforce subpoenas exists, the statutes creating the agency has likely already dealt with this issue.

### **B. Specific statutory grants of contempt power to ALJ's**

Seven states explicitly vest contempt power<sup>16</sup>, and the majority of these states (5) only bestow this power when defining specific administrative proceedings.<sup>17</sup> When contempt power is available, it is provided to ensure the efficient administration of agency business. The discussion of state statutes which follows, summarizes ALJ contempt power in various states.

In Mississippi, contempt power is available to an administrative hearing officer in hearings regarding environmental self-evaluation reports.<sup>18</sup> In this statute, the limited contempt power exists to prevent parties from divulging information from these reports, which previously was ruled to be privileged from reporting requirements.<sup>19</sup> The extent of this power is for "contempt orders and other sanctions," and is intended for use against a party or attorney when necessary to ensure compliance with the privilege ruling.<sup>20</sup> The statute bestows the same power on a

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<sup>16</sup>ARGASB, Rule III § J.(2) (1995); ARK. STAT. ANN. § 11-9-706 (1995); Colo. Rev. Stat. § 8-43-207(1)(p) (1996); Miss. Code Ann. § 49-2-71 (1995); MONT. CODE ANN. § 40-5-226(14) and (15) (1995); S.C. CODE ANN. § 1-23-320(d) (1993); TEX. GOV'T. CODE § 2003.047(i) (1996).

<sup>17</sup>ARGASB, Rule III § J.(2) (1995); ARK. STAT. ANN. § 11-9-706 (1995); Colo. Rev. Stat. § 8-43-207 (1996); Miss. Code Ann. § 49-2-71 (1995); MONT. CODE ANN. § 40-5-226(14) and (15) (1995).

<sup>18</sup>Miss. Code Ann. § 49-2-71 (1995) ("Discovery and admissibility in evidence of environmental self-evaluation reports; divulgence or dissemination of information in reports; exemption from Public Records Act.").

<sup>19</sup>MISS. CODE ANN. § 49-2-71(3)(b) (1995) ("... The court or hearing officer also may issue such contempt orders and sanctions against the offending party or such party's legal counsel as may be necessary to ensure compliance.").

<sup>20</sup>*Id.*



court or a hearing officer, implying that contempt orders includes the same powers of contempt as a Mississippi court. This limited application of contempt power is common among the states that grant this power on an *ad hoc* basis. This allows the legislature to carefully craft the scope and effect of the contempt power, and ensure that it serves the specific purpose for which it is intended.

Arkansas, and Montana both limit the sanctions allowable for a contempt holding, to monetary fines. In Arkansas, the ALJ in a Worker's Compensation Commission adjudication can fine up to \$10,000 for contempt, while in Montana an ALJ conducting a hearing under the states family law statutes can level contempt fines for up to \$500 for each count.<sup>21</sup>

Generally, states in this category only direct contempt power towards the actions of a party to a hearing or adjudication. Of the states granting limited contempt powers, Alabama alone allows ALJ's direct contempt powers over attorneys' professional misconduct.<sup>22</sup> However, this seeming aberration may be explained by the presence in the statute of language outlining the rulings and procedures for foreign attorneys appearing *pro hac vice* in the state of Alabama. While a departure from the normal scope of *ad hoc* contempt power, this statute may be aimed at resolving a certain problem under distinct circumstances

Even the contempt power at issue in the *Cheaton*<sup>23</sup> was limited

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<sup>21</sup>ARK. STAT. ANN. § 11-9-706 (1995) ("...then said person or party, at the discretion of the administrative law judge or the commission, may be found to be in contempt of the commission and may be subject to a fine not to exceed ten thousand dollars (\$10,000)."); MONT. CODE ANN. § 40-5-226(14) (1995) ("An affidavit of the facts constituting a contempt must be submitted to the hearings officer, who shall review it to determine whether there is cause to believe that a contempt has been committed. If cause is found the hearings officer shall issue a citation requiring the alleged contemnor to appear and show cause why the alleged contemnor should not be determined to be in contempt and required to pay a penalty of not more that \$500 for each count of contempt. . . ."); MONT. CODE ANN. § 40-5-226(15) (1995) ("... If the hearings officer finds the alleged contemnor in contempt, the hearings officer may impose a penalty of not more than \$500 for each count found. . . .").

<sup>22</sup>ARGASB, Rule III § J.(2) (1995) ("... If a foreign attorney engages in professional misconduct during the course of an appearance, the judge or hearing officer or the administrative agency before which the foreign attorney is appearing may revoke permission to appear *pro hac vice* and may cite the attorney for contempt. . . .").

<sup>23</sup>625 So.2d 703, 707 (1993).

in its applicability by state statutory and constitutional restrictions. In *In re Lauricella*,<sup>24</sup> the Louisiana appellate court held that the ALJ had incorrectly exercised contempt power where the target of the contempt order was not a member of the Louisiana Civil Service.<sup>25</sup> The court held that the statutory grant of contempt power only extended to those persons within the jurisdiction of the Louisiana Civil Service Commission, of which Mr. Lauricella was not.<sup>26</sup> In this situation, not only did the statute limit the ALJ's contempt power, but the Louisiana Constitution also affected the jurisdiction allowed over the sanctioned individual.<sup>27</sup>

#### IV. Due process concerns over non-judiciary contempt power

Presently, federal ALJ's do not have direct contempt power, and must petition the district court for the use of contempt sanctions in enforcing ALJ and agency discovery orders and subpoenas.<sup>28</sup> This has been enforced by numerous appellate courts, with the Supreme Court refusing to hear the issue as of yet.<sup>29</sup>

Federal agencies do routinely take actions which deprive private parties of property. However, these actions are allowed only as delegated by Congress.<sup>30</sup> While agencies are allowed to exercise some discretion in their administration of delegated authority,<sup>31</sup> they are allowed this discretion to carry out the "general policy and purpose" of

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<sup>24</sup>*In re: Investigation of John L. Lauricella, Jr.*, 546 So. 2d 207 (La. App. 1989).

<sup>25</sup>*Id.* at 209.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>Administrative Procedure Act, 5 U.S.C. § 555(d) (1976) ("On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law.").

<sup>29</sup>*NLRB v. International Medications Systems, Ltd.*, 640 F.2d 1110, 1115-16 (9th Cir. 1981), cert. denied, 102 S. Ct. 1712 (1982.) See also *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1032 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *United States v. Friedman*, 532 F.2d 928, 934-35 (3d. Cir. 1976).

<sup>30</sup>*J.W. Hampton, Jr., & Co., v. United States*, 276 U.S. 394 (1928).

<sup>31</sup>*Mistretta v. United States*, 488 U.S. 361 (1989).

that Congressional Act.<sup>32</sup> Even though the ultimate goal of a contempt citation is to carrying out an Act of Congress, the real purpose is to carry out an order of the ALJ. Administrative law judges do not make agency policy, nor do they have authority to render a final decision in many administrative agencies. Therefore, contempt sanctions have been argued to be authority delegated to carry out a Congressional Act.

One caveat to this entire due process argument is that the Supreme Court is loath to overturn a Congressional delegation of authority, and has not done so for over sixty years.<sup>33</sup> Should Congress decide to vest direct contempt power in the federal administrative law judges, it seems unlikely that the Supreme Court would stray from its long approval of such delegation.

#### **V. Administrative judicial economy through ALJ contempt power**

Despite concerns over due process violations, vesting contempt power in ALJ's would arguably increase the overall efficiency of administrative decision-making. These efficiencies would result in removing extra layers of judicial procedure currently necessary for enforcement of administrative subpoenas through the judiciary. Bestowing contempt power upon the ALJ's would not only ensure that contempt enforcement realizes a faster turnaround time, but parties would be less likely to commit the violations of ALJ and agency orders which might result in contempt citations.

In addition to procedural efficiencies, direct contempt power would put teeth into administrative adjudications, thwarting the stalling techniques presently employed by some parties to adjudication. The present system ensures the parties that there will be considerable delays in enforcing discovery in administrative adjudications. Where a delay in production orders can mean thousands or millions in increased profits, parties could even be encouraged to holdup an adjudication

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<sup>32</sup>*Id.* at 365, citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

<sup>33</sup>*Id.* at 366.

through contempt citations.

A prime example of the potential evils lurking beneath the present enforcement of ALJ powers of contempt is illustrated by *UAW v. NLRB*.<sup>34</sup> In this case the United Automobile Workers (“UAW”) brought suit against Gyrodyne Company (“Gyrodyne”) alleging an unfair labor practice in the dismissal of 30 union members during union organization efforts.<sup>35</sup> The suit dragged on for seven years while Gyrodyne refused to produce subpoenaed documents.<sup>36</sup> During this time, no action could be taken against Gyrodyne for its blatant union blocking activities because final authority to sanction rested in the federal courts.<sup>37</sup> Gyrodyne’s efforts to block the union were eventually supported by the federal system for enforcement of agency subpoenas, but the delay in justice delivery obviously had serious interim consequences.

## VI. Conclusion

*Louisiana Public Service Commission v. Cheathon*<sup>38</sup> provides a rather unusual treatment of ALJ contempt powers for it is rare for a court to find abuse of discretion in not finding a party in contempt.. However, this case does show that at least one state is willing to actively enforce contempt powers which are vested in its administrative agencies. This case provides valuable support for the use of such power by Referees in Louisiana.

Contempt power is only infrequently bestowed upon ALJ’s in this country, whether at the state or federal level. The fact that this power does exist, and has received endorsement by the state and federal judiciary, shows potential for the increased use of such power. As the United States seeks to improve the efficiency and effectiveness of its

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<sup>34</sup>*UAW v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).

<sup>35</sup>*Id* at 1332.

<sup>36</sup>*Id* at 1333.

<sup>37</sup>*Id* at 1347.

<sup>38</sup>625 So.2d 703 (La. App. 1st Cir. 1993), write denied, 631 So.2d 1166 (La.

judicial processes, increased usage of administrative adjudication is inevitable. If these efficiencies are to be fully realized then judicial courts will have to be further removed from the process, and ALJ contempt power given increased autonomy.