COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1074 **Cir. Ct. No. 2012CV3289**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL. ERIC T. ALSTON,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Eric T. Alston appeals the circuit court's order denying his petition for certiorari review of his probation revocation. Alston argues that his due process rights were violated because the hearing examiner who revoked his probation was not impartial. He also argues that the district attorney

should not have been allowed to participate on behalf of the Department of Corrections at the revocation hearing. We affirm.

¶2 Alston was convicted in three separate cases of two counts of battery, one count of child abuse, and one count of criminal damage to property, all as a repeater. He was placed on probation. After eighteen months, the Department initiated revocation proceedings against Alston. At the revocation hearing, Alston's probation agent testified about Alston's rule violations. An assistant district attorney then asked for permission to represent the Department for the remainder of the hearing. The probation agent explained that the request was being made because Alston had been part of a new program while on probation, called the Special Investigation Unit, which was a collaborative effort of multiple agencies designed to address the needs of chronic offenders in the community by providing them with additional resources to deter them from reoffending, while simultaneously warning them that the Department would vigorously seek revocation and the lengthiest sentences possible if they violated the rules of their probation.

¶3 Over Alston's objection, the hearing examiner allowed the district attorney to participate, explaining that she was aware of the program because she had attended an educational program about it.

> It was two law enforcement officers, if I remember correctly, and they gave an informational presentation. And it may have been at the request of our agency, and it may have been initiated by someone else. I don't know, I just went along with the other [hearing examiners] in my office and we were given information about this program right around the time that it came out in the newspaper. And the summary of it as I remember it is we were told about the vast resources that were being provided to these folks that were at high risk, and that the program was intended as a last chance, and that violations should be treated as sort of a last straw. And in the case of

> supervision that it would be expected that they wouldn't be given another chance. In other words, [they] would be revoked, and in the case of a criminal case they would be prosecuted. What I didn't hear is that we're expected, that they expected us to revoke people when the violations weren't proven, so I think to that extent, I mean I don't think at any point that they suggested that we revoke people that hadn't done anything. So there's part of my decision making that's not relevant to what their program was about, part of it that I guess you could say is [relevant].

¶4 Alston first argues that his due process rights were violated because the hearing examiner attended the informational presentation on the Special Investigative Unit program and thus was not impartial. In the alternative, Alston argues his due process rights were violated because there was an impermissibly high *risk* of bias, even if the hearing examiner was not in fact biased. As a matter of constitutional due process, a person is entitled to a fair and impartial decision-maker at an administrative hearing. ***Guthrie v. WERC***, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983). Due process may be violated by actual bias or unfairness or, in very limited circumstances, "'when the risk of bias is impermissibly high.'" ***Marder v. Board of Regents***, 2005 WI 159, ¶27, 286 Wis. 2d 252, 706 N.W.2d 110 (citation omitted).

¶5 As the excerpt from the hearing shows, the hearing examiner explained that she would decide the Department's petition to revoke Alston like she would any other revocation petition; she would impartially examine whether the violations were proven, regardless of Alston's participation in the Special Investigative Unit program. The hearing examiner's statement shows that she was not biased in fact. We also wholly reject the idea that Alston's due process rights were violated even if the hearing examiner was not, in fact, biased because there was an impermissibly high risk of bias. Members of the legal profession, including members of the judiciary, regularly attend educational seminars and

meetings to stay abreast of current developments in law and legal policy, including information about stakeholders in the legal system and new programs that are designed to more effectively serve the citizenry. Alston does not argue that anything specific to his case was presented at the meeting the hearing examiner attended. Because the meeting provided general information about the program, not specific information about particular participants, we conclude that the hearing examiner's attendance did not create an impermissibly high risk of bias in violation of the due process clause.

¶6 Alston next argues that the district attorney did not have authority to represent the Department at the revocation hearing. He points to WIS. STAT. § 978.05 (2011-12),[1] which lists the duties of district attorneys. He contends that by explicitly listing the duties in the statute, the legislature intended that the authority of district attorneys be limited to those duties alone. *See* ***State v. Cetnarowski***, 166 Wis. 2d 700, 710, 480 N.W.2d 790 (Ct. App. 1992) (the express mention of one matter excludes other similar matters not mentioned). Alston therefore contends that the hearing examiner's decision to allow the district attorney to participate was contrary to law.

¶7 There is nothing in WIS. STAT. § 978.05 that suggests that the list of district attorney duties is exclusive, and that it would therefore be contrary to law for the district attorney to undertake functions beyond the scope of that list. To the contrary, the core duties of a district attorney listed in the statute necessarily encompass activities related to those specific functions, like public education and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

engaging in cooperative efforts with other agencies, such as the Special Investigative Unit program. We are aware of no case or other legal authority for the proposition that the actions of district attorneys are circumscribed in the way that Alston suggests. A hearing examiner has substantial power under the administrative code to conduct a revocation hearing in the manner he or she sees fit. *See* WIS. ADMIN. CODE § HA 2.05(6). The hearing examiner's decision to allow the district attorney to participate during a portion of the hearing was consistent with those discretionary powers. Alston has not persuaded us that the district attorney did not have authority to appear on the Department's behalf during the hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.