

MOBILITY WORKX, LLC v. UNIFIED PATENTS, LLC, Appeal No. 2020-1441 (Fed. Cir. October 13, 2021). Before Newman, Schall, and Dyk. Appealed from Patent Trial and Appeal Board.

Background:

In an inter partes review (IPR) before the Board, Unified Patents challenged the claims of a patent owned by Mobility. The Board determined that several claims of the patent were obvious, and Mobility appealed the merits of the decision. In addition, Mobility requested a remand for a rehearing by the Director under *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), and for the first time on appeal, Mobility made constitutional challenges, alleging due process violations resulting from the Board's interests in instituting AIA proceedings in view of the Board's structure and funding. The USPTO intervened, and argued against Mobility.

Issue/Holding:

Do administrative patent judges (APJs) have an unconstitutional financial interest in instituting AIA proceedings, thereby constituting a violation of due process? No, dismissed.

Discussion:

After finding that Mobility did not forfeit its constitutional challenges by failing to raise such challenges before the Board, the Federal Circuit proceeded to find that Mobility's constitutional challenges were without merit. In this regard, the Federal Circuit considered Mobility's argument, that in view of *Tumey v. Ohio*, 273 U.S. 510 (1927), the Board has an impermissible financial interest in instituting AIA proceedings. In *Tumey*, the compensation of the mayor, who presided over trial proceedings, was contingent on the conviction of the defendant. That is, a defendant was required to pay fees, only if convicted, and those fees were also used to fund the village, of which the mayor served as the chief executive. Thus, the mayor in *Tumey* was found to have an impermissible financial interest in a defendant's conviction, thereby constituting a violation of a defendant's due process of law.

In accordance with the *Tumey* standard, Mobility asserted a two-part argument to support its constitutional challenges. First, it argued that the Board has an impermissible interest in generating fees to fund the USPTO and to ensure job security. In response to this argument, the Federal Circuit found, that unlike the mayor in *Tumey*, the APJs in the present case do not have a direct role in the budget of the agency. Instead, the President submits the budget, Congress ultimately sets the budget, and the Director of the USPTO merely submits budget requests. Thus, any role the APJ has in the budget is "too remote" to constitute a due process violation.

Second, Mobility argued that each APJ has a personal interest in obtaining a favorable performance review and bonuses, particularly because APJs can receive a performance bonus based on "decisional units" earned in excess of the required amount of units. However, as clarified by the USPTO, the number of decisional units represents the number of decisions authored, and does not depend on the outcome of those decisions, which is quite different from the facts of *Tumey*.

Thus, the Federal Circuit dismissed Mobility's constitutional challenges, but granted remand to the Board for Mobility to request a Director rehearing of the Board's decision under *Arthrex*.