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New Jersey's Office of Administrative Law: The Importance of Initial Choices

By Jeff S. Masin*

In 1978, the New Jersey Legislature enacted and Governor Brendan T. Byrne signed legislation establishing the New Jersey Office of Administrative Law (OAL).¹ The passage of this legislation came thirty years after the first legislative attempt to separate the administrative hearing process, and those who administered it, from the agencies that in many instances prosecuted and in all cases had the ultimate authority to decide these administrative contests.² The OAL officially opened for business on July 2, 1979, when the first group of forty-one judges was sworn in by Governor Byrne.³ Over the past twenty-three years the OAL,

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1. Act of July 6, 1978, ch. 67, 1978 N.J. Laws 374 (codified as N.J. STAT. ANN. § 52:14 F-1 (West 2003)).

2. An attempt to establish an independent corps of hearing officers had been proposed as early as 1948, following the adoption of New Jersey's new Constitution in 1947. However, that attempt failed, as noted in Justice Nathan Jacobs' dissent in the seminal case of *Mazza v. Cavicchia*, 105 A.2d 545, 566 (N.J. 1954).

3. Governor Byrne was a former superior court judge, former president of the Board of Public Utilities and former Essex County Prosecutor. As one who had sat at the head of executive branch agencies and in the judiciary, Governor Byrne brought a unique perspective to the issue of an independent, highly professional corps of administrative judges. In New Jersey's constitutional framework with its "strong" governor who appoints all cabinet officers, his support for the concept, both with the legislature and within the executive branch, was vital to the success of both the legislation and the office itself.

tasked not only to conduct contested case hearings, but also to supervise the rulemaking process and to publish the Administrative Code,⁴ has grown from a new agency initially viewed by many with suspicion and concern into a well-recognized, respected and vital part of the New Jersey justice system. This article will consider the structure of the OAL and those elements that I believe have contributed to its success and its recognized position as a national model for “central hearing panels.”⁵ At the same time it will recognize that there are factors in the New Jersey structure that are, if

4. The legislation establishing the OAL also transferred to the new agency the duties and responsibilities of the existing Division of Administrative Procedure, then a part of the Department of State. The director of the OAL was empowered to “[a]ssist agencies in the preparation, consideration, publication and interpretation of administrative rules required or appropriate pursuant to the ‘Administrative Procedure Act,’” N.J. STAT. ANN. § 52:14 F-4.2i (West 2003). The OAL is the official publisher of the *New Jersey Administrative Code* and the *New Jersey Register*. While this article focuses upon the OAL’s role in executive branch administrative adjudication, the Rules and Publications section of the OAL has brought to the process of rulemaking an extraordinary professionalism and expertise. The additional responsibility for the Administrative Code is reflected in the agency’s designation as the “Office of Administrative Law,” as opposed to the more common name “Office of Administrative Hearings,” which is generally used in other states to designate those offices whose function encompasses only the administrative hearing process.

5. The term “central hearing panel,” often shortened in practice to “central panel,” generally signifies an agency detailed to conduct administrative hearings for a number of transmitting agencies. It is an agency that is in some fashion made independent of the agencies for which it hears cases, at least in regard to the appointment processes for its judges and the independence of the judges from the influence of the transmitting agencies over the decisions the judges render. The number of transmitting agencies for which the central panel hears cases varies greatly from panel to panel, but the concept of a “central” panel seems to imply that the cases come from more than one agency of the state. The opposite of a central panel is generally a hearing process in which the hearer, by whatever title designated, is employed by the agency for which he or she conducts the hearings. In such cases, the hearer generally does not hear cases for other agencies, although there are variations in which an in-house hearing unit may be asked by another agency to hear some cases for it. When established, New Jersey’s OAL became the eighth central panel in the United States, following California (1945), Missouri (1965), Massachusetts (1974), Florida (1974), Minnesota (1975), Tennessee (1975), and Colorado (1976). Today there are twenty-three states with some form of central panel, in addition to those established in New York City, Chicago and Washington, D.C.

not entirely unique, at least quite different from the other models for central hearing panels

The major purpose of the legislation creating the New Jersey Office of Administrative Law was “to bring impartiality and objectivity to agency hearings and ultimately to achieve higher levels of fairness in administrative adjudications.”⁶ The legislature “intended to create a corps of independent professionals, who were not simply hearing officers under a different title, but had greatly expanded duties.”⁷ As a first step in developing the proper atmosphere in which the OAL could carry forward this mandate, the legislation establishing the OAL placed the agency “in but not of” the Department of State.⁸ New Jersey’s Constitution requires that all state agencies must be allocated to one of the authorized cabinet agencies,⁹ but the legislation provided that despite the allocation to the Department of State, “the office shall be independent of any supervision or control by the department or by any personnel thereof.”¹⁰ Throughout its existence, the OAL has operated free from control or interference by any state agency or personnel in its administrative and adjudicative functions, except for budgetary purposes, the Department of Treasury, and for general personnel policies, the Department of Personnel. In addition, the director reports to the governor (more practically, the governor’s counsel) despite the fact that the OAL is assigned to a cabinet officer that heads the agency. The statutory language recognizing the full independence of the OAL from agency control despite its allocation to an agency, has been an invaluable asset in assuring that the agency’s lack of standing as a separate, cabinet-level agency has not hampered its ability to maintain the necessary distance from even the agency to which it is assigned.¹¹

6. *Unemployed-Employed Council of N.J., Inc. v. Horn*, 428 A.2d 1305, 1307 (N.J. 1981).

7. *N.J. Civil Serv. Ass’n v. N.J.*, 443 A.2d 1070, 1076 (N.J. 1982).

8. “In but not of” status also applies to various entities such as the Office of the Public Defender (Department of the Treasury) and the New Jersey Commerce and Economic Growth Commission (Department of the Treasury).

9. N.J. CONST. art. V, § 4, ¶ 1.

10. N.J. STAT. ANN. § 52:14F-1 (West 2003).

11. Since the original legislation passed, subsequent governmental reorganizations have moved the OAL to the Department of the Treasury, but its status as “in but not of” has not changed, and the move has had no material effect upon the independence of the OAL from its host agency.

At the very beginning of its existence, the legislature established the OAL's jurisdiction quite broadly. Rather than limiting the OAL's authority to hear contested cases to only a few State agencies, the legislature mandated OAL involvement in the contested cases arising in nearly every State agency. It directed that ALJs conduct all hearings unless the agency head exercised the statutory discretion to personally conduct the hearing.¹² The only significant exceptions to this broad grant of jurisdiction were the State Board of Parole, the Public Employment Relations Commission, the Division of Tax Appeals, and the Division of Workers' Compensation.¹³ In addition, a significant court decision concerning the Division of Unemployment Security resulted in the elimination of numerous cases arising within that agency from the OAL's docket.¹⁴ With few exceptions, all agencies within the OAL's jurisdiction have, from the

12. N.J. STAT.ANN. § 52:14F-8(b) (West 2003). The agency head, whether a single commissioner or a multi-headed agency, may personally hear any contested case.

13. *Id.* § 52:14F-8(a) (West 2003). The Division of Workers' Compensation, an arm of the Department of Labor, has its own staff of workers' compensation judges. In a few central panel states such as Colorado and Minnesota, the workers' compensation and administrative law judges are all housed within the same Office of Administrative Hearings.

14. While the hearing of contested unemployment compensation cases would fall within the ambit of OAL jurisdiction under the statute, the New Jersey Supreme Court, voting 4-2, held in *Unemployed-Employed Council of New Jersey, Inc.*, 428 A.2d at 1312, that under the structure existing for unemployment appeals the major adjudicatory bodies within the Division, the "appellate level" board of review and the intermediate level appeal tribunals, "may be considered an 'agency head' for the purposes of the [OAL] statute." Therefore, hearings before these bodies were lawfully exempted from the OAL's jurisdiction. The Court noted that "with respect to a few firmly established and highly specialized agencies, where perhaps the problem of agency bias was not thought to be patent or excessive or was outweighed by other considerations, the Legislature specifically excluded the conduct of their hearings in contested cases from the coverage of the OAL." *Id.* at 1313. The dissent agreed with the majority that the board of review was the "head of the agency," but disagreed regarding the appeal tribunals, which in practice consisted of many different tribunals actually each consisting of a single examiner. *Id.* at 1315. The dissent concluded that these panels could not be considered agency heads, as their decisions were not actually a "complete adjudication of the contested matters," as, if they were not appealed from within ten days, the decision was then deemed a final decision of the board of review. *Id.* at 1316.

very beginning, chosen to send their contested cases to the OAL for hearing rather than have the agency head hear the cases.¹⁵

By providing for so broad a jurisdiction, the Legislature avoided the need for the piecemeal accretion of jurisdiction over additional agencies that have often been the experience of other central panels. In many instances, these panels were originally established with very circumscribed jurisdiction over the hearings of only a few agencies, and were then required to negotiate jurisdiction with other agencies which, in some instances sought voluntary inclusion within the jurisdiction of the independent agency, or, in other instances, were resistant to attempts to expand the impartial hearing agency's jurisdiction to include their cases. These central panels have sometimes sought executive or legislative assistance in mandating the submission of other initially exempted agencies into the panel's jurisdiction. The results of such attempts have been at best mixed.

The Legislature also determined that the ALJs would be appointed to their positions through essentially the same appointment process as that used for the members of the state's judiciary. Unlike the vast majority of central panels formed before or since, the judges of New Jersey's OAL would not be civil service appointees, nor would the director of the OAL appoint them.¹⁶ Instead, from the

15. Examples of those agencies not employing the OAL to conduct their hearings are the Real Estate Commission and several small professional licensing boards. The Casino Control Commission, a five-member board, utilized the OAL for hundreds of cases between 1979 and 1994. In 1994 it determined, apparently for administrative and budgetary reasons, to utilize its individual board members to conduct contested case hearings, pursuant to the authorization contained at N.J. STAT. ANN. § 52:14F-8(b) (West 2001). The individual commissioner hears the case and then files a report with the full Commission, which issues the final administrative decision. Since 1994, the Commission has asked the OAL to conduct two hearings in which it had concerns about the possible appearance of a conflict if it conducted the hearing itself. One involved an alleged card counter who had filed a federal suit against the Commission; the second was an employee discipline proceeding against the executive director of the Commission, an at-will employee without civil service status.

16. There are several different procedures employed for the appointment of ALJs to central hearing panels. In some states, the director of the agency is appointed by the governor (in North Carolina, by the chief justice of the Supreme Court) and the director then appoints the judges. N.C. GEN. STAT. § 7A-752, 7A-753 (current through 2003). In other states, the judges are selected through a civil service process. In South Carolina the judges are elected by the legislature. S.C.

first, the Governor would appoint the judges with the advice and consent of the Senate.¹⁷ This decision created a corps of judges who were, therefore, clearly political appointees. The statute as initially adopted provided that judges would be appointed for five-year terms.¹⁸ However, the legislation also contained a provision regarding the powers of the director that played a vital role in the establishment of the original corps of judges. The statute granted the director the authority to appoint temporary, or “case-basis,” judges “as may be necessary during emergency or unusual situations for the proper performance of the duties of the office.”¹⁹ These temporary judges were to have the same qualifications for appointment as those required of permanent ALJs.²⁰

Utilizing this provision, Governor Byrne determined to withhold his nomination of judges during the first year of the OAL’s operation. Instead, he authorized the OAL’s first director, Howard Kestin, to appoint the judges under the Director’s authority for one year.²¹ During that year, the judges were carefully evaluated by the Director

CODE ANN. § 1-23-510 (Law. Co-op 1995). In Missouri the governor appoints the three judges, who are referred to as “commissioners.” MO. ANN. STAT. § 621.015, 287.610 (West 2003).

17. N.J. STAT.ANN. § 52:14F-4 (West 2001).

18. *Id.*

19. N.J. STAT.ANN. § 52:14F-5(m) (West 2003).

20. Section 52:14F-5(l) originally required ALJs to be attorneys-at-law of New Jersey or, if not attorneys, to be persons, “in the judgment of the Governor or the director,” “qualified in the field of administrative law, administrative hearings and proceedings in subject matter relating to the hearing functions of a particular agency.” N.J. STAT.ANN. § 52:14F-5(l) (West 2001). The initial corps of judges included several non-attorneys who had previously served in a capacity with either the Department of Education or the Department of Public Welfare in which they were intimately involved in the hearing and dispute resolution process. Several of these non-attorneys obtained law degrees after commencing their service as ALJs and were admitted to the New Jersey Bar. The last sitting non-attorney, an expert in public assistance law who over the years expanded his scope of knowledge to encompass special education, alcoholic beverage and other areas, retired in July 2002. In 1993 the statute was amended to require that all future newly appointed ALJs be members of the Bar in New Jersey for a minimum of five years. *Id.*

21. While the legislation establishing the OAL initially termed its appointed head the “director” subsequent legislation amended the title to “Director of the Office of Administrative Law and Chief Administrative Law Judge.” N.J. STAT.ANN. § 52:14F-3 (West 2001).

and, as the year came to a close, Director Kestin recommended to the Governor those judges whom he found had proven their capability to perform at the high level he demanded. Governor Byrne then offered to the Senate the five-year term nominations for the sitting judges who had proven satisfactory to the Director, and declined to nominate those whom the Director did not believe merited continued service. Governor Byrne's strategy created the opportunity to carefully select the first judges for this new, and still controversial central hearing panel, with a minimum of the political involvement or interference that might have attended such a mass appointment process had he chosen to submit an entire slate of nominees at the very beginning of the OAL's operations. This arrangement afforded the Director the luxury of assuring that this first critical group of appointees would constitute a solid corps of judges who were demonstrably capable of handling the demanding position, while ultimately maintaining the Senate's role in approving the appointments. After the first year, the nominees were reviewed and confirmed by the Senate. Thereafter, the appointment process for subsequent new ALJs was amended, preserving the valuable one-year evaluation opportunity, while simultaneously assuring that, in the future, the Senate would review the prospective new judges immediately, rather than after they had served.²² In 1981, the statute was amended, providing that the new judge would be appointed with the advice and consent of the Senate, to a one-year term. After being evaluated during that one year, the new judge would be appointed for a four-year term, if found to be performing at an acceptable level.²³ Thereafter, additional terms for judges would be five years, again through nomination by the Governor with the Senate's advice and consent.²⁴

This last statement highlights the fact that the Legislature did not grant to ALJs the possibility of achieving tenured status. Each ALJ would therefore face reappointment every five years; although, importantly, the statute did provide that a judge served "until the

22. N.J. STAT.ANN. § 52:14F-4 (West 2001).

23. *Id.*

24. *Id.*

appointment and qualification of the judge's successor."²⁵ This lack of tenure protection remains the case to this day. It is fair to state that tenure has lost favor in the legislature, despite the fact that it is constitutionally mandated for judicial branch judges in New Jersey, as at the federal level, and has been granted to teachers, workers' compensation judges, school custodians, principals and school superintendents, over the years.²⁶ Indeed, the possibility of achieving a tenured status has been eliminated for school administrators.²⁷ In this climate, it seems unlikely that ALJs will have the opportunity to become tenured. The policy considerations militating in favor of, or against allowing tenured status for any government employee or officer, whether a judge or otherwise, are beyond the scope of this article.

The political nature of the appointment process and the absence of any tenure could have caused the position of administrative law judge to be treated as a political prize, with the judges' reappointments contingent upon "political" considerations. Since the adoption of the 1947 Constitution, the reappointment of New Jersey's superior court judges after their initial seven-year term has been almost exclusively a non-political event, with the merit of the candidate as the guiding principle. In the case of ALJs, it must be noted that the process did have an unsettling early episode that could have been a harbinger of things to come. In early 1983, three judges initially appointed in January, 1982 completed their one-year term and were then denied reappointment for the four-year term. The

25. *Id.* This language differed from that governing the terms of judicial branch judges, who serve an initial seven-year term and are then eligible for tenure until age seventy if reappointed. N.J. CONST. art. VI. § 6, par. 3. However, their initial terms last exactly seven years, and if not reappointed by that anniversary date, they are no longer judges. *Id.* While this sometimes causes an emergency session of the Legislature to reappoint a judge whose term is ending, the ALJ language allows ALJs to continue serving until they are either reappointed or replaced. In practice, the lack of urgency in dealing with ALJ reappointments has sometimes resulted in delays in the nomination and/or confirmation of judges. The practical impact of such delay has been to lengthen the service of judges.

26. Workers' compensation judges originally received tenure upon appointment, but legislation passed in 1991 provided that they serve an initial three-year term and then, if reappointed, they receive tenure. N.J. STAT. ANN. § 34:15-49 (West 2001).

27 *Id.* § 18A:17-20.5 (West 2001).

reasons behind their lack of reappointment, while never officially stated, were commonly suspected of being simply political. Since that time, for nearly twenty years and through dozens of reappointments of judges of both political parties and by governors of both parties, the process has been untainted by politics. For example, the recent reappointment of eight registered Republicans, appointed by the previous Republican governor, by the present Democratic governor, is in keeping with the non-political process that has seemingly been accepted as the OAL has matured and become a recognized and respected element of the state government.²⁸

The director's selection of the first group of judges was not completed without some controversy. Rather than limit his selections to the existing hearing officers employed full or part time by administrative agencies, Director Kestin, acting after receiving an opinion from the Attorney General, drew the judge applicants from the private and public sector. The applicant pool included: hearing officers, deputies attorney generals, attorneys employed by the State in executive agency management, solo practitioners, and partners and associates in private practice. Some of the existing hearing officers who were not selected sued, contending that they had entitlement to an appointment under the terms of the act creating the OAL. In an opinion that can be rightly seen as confirming the legislative intent to liberate the administrative adjudication process and the new OAL from the shackles of the former system, the Supreme Court of New Jersey held that the provisions of the statute did not grant existing hearing officers any "grandfather" status.²⁹ The Governor was therefore, free to appoint whomever he saw fit, so long as the prospective judge met the statutory criteria of admission to the bar or possessed a "particular expertise."³⁰

In a state where judicial branch judges are all appointed and none are elected, the decision to make ALJs gubernatorial appointees served to enhance their status from the start. Combined with the broad grant of jurisdiction, the gubernatorial appointment of the judges created a strong political base upon which the OAL could

28. In practice, the reappointment process begins with a confidential recommendation from the director and chief administrative law judge to the Governor's counsel.

29. *New Jersey Civil Serv. Ass'n.*, 443 A.2d at 1075.

30. *Id.*

build its place in government. It invested the Legislature with an interest in the success of the agency. Of course, the political nature of the appointments could, in its worst sense, have led to the OAL serving as an office in which to place political “cronies” and “hacks” as a favor to persons who would not normally achieve such a position on their own merit. Fortunately, in the nearly twenty-five years it has been in operation, the selection process has led to the appointment of a dedicated and extremely talented group of judges. It is true that, in most instances, the ability to become an ALJ is limited by a person’s ability to be noticed and actively considered by a local senator. However, as with the vast majority of the judicial branch appointees in this state, the political process has served the people admirably.

The one apparent negative consequence of the political nature of the appointment process has been the delay that often occurs in filling vacancies. Appointments to ALJ positions are very often determined in conjunction with the selection of appointees to the judiciary. As a result, the time for the Governor to settle on names for ALJ nomination submissions has occasionally been quite protracted. This delay often leaves the OAL shorthanded and, along with periodic budgetary constraints, has often caused the OAL to operate with thirty-five to forty judges, compared to its original complement of forty-five judges. As the agency’s docket has evolved, the shortage of judges has resulted in lengthier delays in processing cases, and a need to concentrate on cases with time priorities established by state or federal mandates, at the expense of other, perhaps equally important matters with no such mandated priority.³¹

While the director’s authority to appoint temporary judges has been utilized to allow retired ALJs to continue to work on limited dockets, the directors have generally refrained from appointing private sector attorneys to temporarily supplement the efforts of the

31. For instance, legislation requires that lemon law cases be resolved within twenty days of submission to the OAL; teacher tenure cases must be expedited, with rigid discovery schedules and mandated starting dates; and federal mandates require that public assistance and special education cases be expedited. Other cases, such as disability pension appeals and employee disciplinary termination appeals, have no specific time mandates.

permanently appointed judges.³² This reluctance has stemmed from a belief that the use of part-time attorney judges who otherwise practice law, or have other employment would be a retreat to the previous system of part-time hearing officers. Additionally, it would be a regression from the desire to avoid the potential conflicts and appearances of conflicts that can arise when attorneys, and their law firms, appear as litigators at the OAL in one case, and then shift into the role of temporary judges for other cases. In other state systems, the director would have the ability to appoint judges to permanently fill all funded positions, presumably without the delay caused by the political appointment process.

A perpetual concern of central panel directors and their judges has been the salary structures and limits which have, in the estimation of many directors, hindered their ability to attract many good candidates for ALJ positions. Fortunately, ALJs in New Jersey have been reasonably well compensated. While the level of salary and the system for determining the salaries of individual judges has varied over the years in 1999, the Legislature, acting upon the recommendations of a distinguished committee appointed to recommend salaries for senior executive and judicial positions enacted a new salary provision.³³ For the first time, ALJ salaries were tied to those of the judicial branch. In so doing, the legislature also equalized the salary levels of ALJs vis-à-vis those of workers' compensation judges.³⁴ In the end, the salaries achieved reasonably reflected both the economic reality of a northeastern state and, importantly, the significant work performed by the judges and the

32. In addition to retired ALJs, the OAL has long relied on the services of two temporary judges, one a retired attorney and the other an attorney who did not otherwise practice, each of whom possessed substantial experience in the complex field of public utility ratemaking. These appointments reflected a very specific need to supplement the available expertise of the corps of judges to manage a somewhat arcane docket. While the retired attorney continues to assist the office, the other attorney is now a federal ALJ.

33. Positions considered included: the Governor, cabinet officers, judicial branch judges, workers' compensation judges and administrative law judges, and Casino Control commissioners.

34. Legislation enacted in late 1991 had established a salary scale for workers' compensation judges tied to set percentages of the salaries provided for trial judges of the superior court.

high level of responsibility inherent in the position.³⁵ Compensation provided to judges serving other central panels has not always reflected this recognition. It is impossible to determine with any certainty how this issue would be resolved were the judges not political appointees. However, I believe that the fact that both ALJs and workers' compensation judges are drawn from the pool of those within the scope of consideration for appointment to the judiciary has helped them secure salaries that are, in fact, fairly representative of their significant level of responsibility for matters which are often of great public concern.³⁶

While appointment to the judiciary will, for most, be preferable to appointment to an executive branch "judicial" position, due to the higher salary, better pension and the undoubted prestige attached to a judiciary appointment, over time the appointment to an ALJ position has developed into a highly acceptable alternative for those who for want of enough open seats in a vicinage cannot yet secure an appointment to the superior court. In addition, an ALJ position has become a much sought after position for others whose interest in a judgeship is not necessarily so tied to an interest in a judicial branch position. Also, ALJ appointees have, in increasing frequency, been tapped within a few years of their appointment for positions within the judiciary. At this time a former director and chief ALJ sits on the New Jersey Supreme Court. Both a former director and chief ALJ and a former deputy director sit on the Appellate Division of Superior Court and two former ALJs serve as assignment judges,

35. At present, all ALJs start at \$105,750, which is 75% of the salary of a superior court trial judge, and then progress through two additional steps to a salary of \$119,850, or 81% of a trial judge's salary. The assignment judges and the deputy director each receive an additional \$2,500; the director and chief ALJ receive \$125,490, 89% of a trial judge's salary.

36. As a result of legislation passed in December 2001, one remaining difference between the benefits received by workers' compensation judges and administrative law judges is that retiring workers' compensation judges are eligible to receive as much as 75% of their salary in pension benefits if they have served twenty years and reached the age of sixty. The percentage is the same as that received by Superior Court and Supreme Court judges, who receive higher salaries. An industry assessment pays for the costs of the workers' compensation system, including the judges' pensions. While there appears to be a clear recognition that similar legislation is merited for ALJs, the enactment of such legislation has been understandably sidetracked by the current budget difficulties affecting New Jersey.

each in charge of the judiciary in a vicinage. Two other former ALJs have served on the Federal Bankruptcy Court. The presence of well over a dozen former ALJs at various levels of the judiciary has provided the State, and indeed the federal judicial branch, with a better understanding and acceptance of the work of ALJs and of the administrative process itself.

On balance, while improvements might be made to the process for selecting all judges in this state, I believe that the public has been substantially well served by the selection process as it currently exists in New Jersey.

In order to assure a high level of competence in ALJ performance, and to provide public input concerning the judges' performance, a 1981 amendment mandated that the director develop and implement a program of judicial evaluation to aid the director in the performance of his duties and assist in the making of reappointments.³⁷ The mandate directed that judicial evaluation focus upon competence, productivity and demeanor.³⁸ It required that as a part of the evaluation process, comments be obtained from selected litigants and attorneys who appeared before the judge. The statute specifically provides that "[t]he methods used by the judge but not the result arrived at by the judge in any case may be used in evaluating a judge."³⁹ This mandate, which was one of the earliest statutory provisions requiring a comprehensive evaluation system for ALJs, (or for that matter any judges) had been anticipated by the OAL's earlier initiation of an extensive system of randomized questionnaires soliciting the comments of randomly selected litigants, attorneys and agencies regarding many characteristics of a judge's performance. The anonymous nature of the process encourages candor, and overall, the system has been quite successful. The evaluation process allows the director to monitor and address performance problems, while passing on suggestions for improvement to judges, without violating confidences. Productivity information is coupled with the questionnaires. Importantly, random review of ALJ opinions is conducted by the director and deputy director. Again, these reviews do not consider the outcome of the

37. N.J. STAT. ANN. § 52:14F-5(s) (West 2001).

38. *Id.*

39. *Id.*

cases, but instead, the means through which the judge presents and explains the case and his or her determination of the matter. The information obtained through the evaluation process is used both as an educational tool for improving performance and, as the statute provides, to assist the director in respect to reappointment recommendations that are presented to the Governor in advance of the completion of a judge's term.⁴⁰

The Legislature also granted the OAL's director substantial authority to create a uniform system for administrative adjudication throughout State government. The director was authorized to "[d]evelop uniform standards, rules of evidence, and procedures, including but not limited to standards for determining whether a summary or plenary hearing should be held to regulate the conduct of contested cases and the rendering of administrative adjudications";⁴¹ to "[p]romulgate and enforce such rules for the prompt implementation and coordinated administration of the 'Administrative Procedure Act' . . . as may be required or appropriate";⁴² and to "administer and supervise the procedures relating to the conduct of contested cases and the making of administrative adjudications."⁴³ This broad grant of authority formed the basis for the adoption in 1980 of the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1-1 et seq.*⁴⁴ These rules established the procedural framework for administrative adjudication for all OAL hearings. Even more broadly, the rules govern the procedures applicable for hearings conducted by the agency head, and contested

40. At one time the judges' salaries were tied directly to the evaluation process. The system involved a complex and detailed analysis of written decisions, which were rated by a panel of peers on a numerical scale. The judges generally believed that the system was geared to monetary concerns, and was not primarily used as a means of education and training. A committee of judges studied the process and issued a report to the director urging significant changes and a reorientation of evaluation. These recommendations were generally accepted, and evaluation then became a process for self-improvement and the monitoring of any significant concerns with a judge's performance, rather than a factor in salary determination. Of course, as noted above, the evaluations are a significant factor in the reappointment process.

41. N.J. STAT. ANN. § 52:14F-5(e) (West 2003).

42. *Id.* § 52:14F-5(f).

43. *Id.* § 52:14F-5(g).

44. N.J. ADMIN. CODE tit. 1 §. 1:1-1.1(a) (2003).

hearings held by the exempt agencies.⁴⁵ The Uniform Rules have, over time, been supplemented by a series of Special Rules, created to deal with the unique needs of particular types of cases.⁴⁶ These Special Rules are formulated by both the OAL and the requesting agency, and are promulgated in Title 1 of the Administrative Code, rather than in the requesting agency's own title. To date, the OAL has never sought to dictate the forms of pleadings applicable to the vast variety of agency disputes that come before it, instead, deferring to the agency's own rules. The OAL's control over the details of the hearing process has regularized and standardized the practice of administrative law for the agencies, the Bar and the general public. The decision to authorize the OAL to adopt uniform rules has avoided the common difficulty reported by other central panels of procedural patterns varying from agency to agency. At the same time, the Special Rules have allowed for necessary variations without undoing the goal of uniformity and consistency.

A significant aspect of the Uniform Rules is the creation of a uniform system for discovery in contested cases.⁴⁷ While the rules provide for all of the usual forms of discovery common to judicial branch litigation, the use of depositions is restricted to those situations where the parties voluntarily agree to depose witnesses or where the party seeking to conduct a deposition over the opposition of the other party is able to convince a judge that "good cause" exists for the deposition.⁴⁸ Clearly, the intent here was to strictly limit the use of depositions, and thus, reduce costs of the discovery process. In practice, depositions have historically not played a substantial part in the discovery process in OAL proceedings. "Good cause" has generally been interpreted narrowly, and it must be something more

45. *Id.*

46. Examples of the types of cases for which some Special Rules have been adopted include Council on Affordable Housing, Special Education, School Ethics, Family Development, Insurance and Unemployment Benefit and State Temporary Disability cases. The number of such Special Rules varies by case type. Generally, the "special" rules relate to unique discovery limitations or time frames applicable to the cases, definitional matters, unusual time frames for decisions and exceptions, or hearing and evidence matters that are unusual due to the nature of the case, statute or regulation.

47. N.J. ADMIN. CODE tit. 1 §. 1-10.1-6.

48. *Id.* §. 1-10.2(c).

than the natural desire of litigators to find out what potential witnesses for the adversary might say at a hearing. In most instances, depositions have been allowed when witnesses may not be available at the hearing, when experts are involved (and even then sparingly), or when a case is very old or involves a particularly complex fact pattern.

Over the years, the OAL has experienced a significant increase in the volume of motions filed. At first, motions of any sort were relatively rare, but through the years motions concerning discovery issues and, most importantly, motions for summary decision, have become a greater feature of OAL practice.⁴⁹ While the number of motions does not approach that seen in the judiciary, there is a need to manage the time necessary to allow judges to consider and write orders, particularly those for summary decision. These motions have complicated the judges' already crowded schedule of hearings and initial decision writing.

The nature of the caseload has also changed. At first, the docket was heavy with public assistance, civil service, Casino Control Commission and motor vehicle cases (the latter including implied consent.) However, over time, the complexity of the cases presented to the OAL has significantly increased. The number of public assistance cases has decreased substantially as a result of welfare reform and economic conditions.⁵⁰ Breathalyzer refusal cases were moved to the state's municipal courts to be tried along with the driving-under-the-influence cases already within those courts' jurisdictions. The Casino Control Commission, a multi-person agency head, determined to hold its hearings in-house, with its individual commissioners presiding.⁵¹ As these cases were being subtracted from the agency's docket, other trends developed. A massive increase in special education filings occurred in the 1990s, introducing a class of often exceptionally complex and hard-fought cases. Unlike other cases within the OAL's jurisdiction, the ALJs issue the final administrative ruling in special education cases. These

49. *Id.* §. 1-12.1-12.7.

50. See e.g. New Jersey Administrative Law Decisions available at: <http://lawlibrary.rutgers.edu/oal/search.shtml> (last modified May 3, 2002).

51. *Supra* note 15.

rulings are appealable only to the state or federal judiciary.⁵² Civil rights, educational funding, public utility ratemaking, environmental, and professional board proceedings have also become more complex.⁵³ The result of these trends has been to reduce the number of short proceedings and increase the number of multi-day cases.

With the exception of special education decisions and arbitration decisions in Spill Fund matters, all decisions of ALJs are initial decisions that are subject to review by the agency head of the transmitting agency.⁵⁴ Nearly all interlocutory orders are similarly

52. N.J. ADMIN. CODE tit. 1 §. 1-18.1 (2002). The number of these cases transmitted to the OAL after initial intake at the Office of Special Education Programs (OSEP) rose from 250 in 1995 to 640 in 2001. Many additional matters are resolved by mediation or by informal discussion at the OSEP without the need to involve the OAL. The impact of the increase in special education cases has been dramatic. The federal mandates regarding the disposition of these cases and the limited ability to manage the cases prior to the onset of the hearings each have added to the difficulty of scheduling these cases within the judges' otherwise crowded dockets. In addition, although not mandated by federal or state law, the OAL has accepted the challenge of offering emergency relief to parties where warranted. N.J. ADMIN. CODE tit. 1 §. 6A-12.1 (2003). This opportunity to seek such relief in the administrative realm, as opposed to seeking it in the judicial branch, has been utilized by hundreds of parties in the past ten years. While there is no doubt that the need to manage this unpredictable docket of emergency matters has complicated the OAL's ability to function, it does provide a substantial service to litigants and avoids funneling these education-related controversies to the judiciary.

53. The New Jersey Supreme Court has on several occasions directed that the OAL conduct hearings in a special class of cases that involve education funding for poor urban school districts found unable to provide students with the constitutionally mandated "thorough and efficient education." These cases are known as "*Abbott cases*" after the series of landmark New Jersey Supreme Court decisions beginning with *Abbott v. Burke*, 495 A.2d 376, 390 (N.J. 1985). These cases have involved issues dealing with hundreds of millions of dollars relating to educational and related programs affecting both preschool children and K-12 students. *Id.* at 381. Recently, the OAL has also held extensive hearings in a case in which rural and suburban districts sought to prove that they also qualify for the financial assistance previously ordered for the urban districts. In addition to these matters, the OAL also conducts hearings for the Board of Public Utilities in quasi-legislative public utility electric, gas, telephone, cable television and water rate areas.

54. Initial attempts by the OAL to differentiate between substantive and procedural decisions, and limit the right of transmitting agency heads to review so-called "procedural" decisions, were rejected by the New Jersey Supreme Court in *In re Uniform Administrative Procedure Rules*, 447 A.2d 151 (N.J. 1982).

susceptible to agency head review, either at the time the interlocutory decision is rendered or, in the agency head's discretion, at the time of review of the initial decision.⁵⁵ ALJs generally must decide cases within forty-five days of the close of the record, unless state or federal mandates require a shorter time for decision.⁵⁶ Agency heads are, likewise, required make final decisions accept, reject, or modify the ALJ's decision within forty-five days.⁵⁷ If the agency heads fail to do so, the ALJ decision becomes the final decision of the agency.⁵⁸ However, as case loads have increased, case complexity has grown. Budgetary limits have reduced the number of agency review personnel, and the number of ALJs has remained depressed. The number of cases in which either the judge, or the agency, or both have found it necessary to request an extension of the time for issuing a decision has grown. Extensions for an additional forty-five days in which to issue a final decision are allowable for "good cause shown."⁵⁹ Second, or any subsequent forty-five day extensions are allowable upon a showing of "extraordinary circumstances."⁶⁰ Such extensions require the signature of the agency head and the director of the OAL. In addition, a recent Appellate Division decision stated that "any extension . . . shall be under the supervision of the Director of the OAL."⁶¹ In practice, such extensions are readily granted, although the OAL director has, at times, advised an agency head that no further requests for an extension would be issued in a given case when a reasonable number of extensions have already been obtained.

However, the Court did agree that a small class of decisions on matters directly affecting and vital to the management of the hearing process itself was properly reserved for review by the director of the OAL and not for the transmitting agency head. *Id.* at 160. These include issues involving the disqualification of an attorney or non-attorney representative, the recusal of a judge, disputes over hearing locations, sanctions for costs, expenses or fines, and *pro hac vice* admission. *Id.*

55. See *In re Unif. Admin. Procedure Rules*, 447 A.2d 151, 160 (N.J. 1982); N.J. STAT. ANN. § 52:14B-10(c) (West 2001).

56. *Cf.*, *supra* note 25.

57. N.J. STAT. ANN. § 52:14B-10(c) (West 2001).

58. *Id.*

59. N.J. ADMIN. CODE tit. 1 § 1-18.8 (2003).

60. *Id.*

61. N.J. STAT. ANN. § 52:14B-10(c) (West 2001); N.J. ADMIN. CODE tit. 1 § 1-18.8(f) (2003); *Capone v. N.J. Racing Comm'n* and *Silverman v. N.J. Racing Comm'n*, 817 A.2d 995, 1003 (N.J. Supr. Ct. App. Div. 2003).

Similar limitations are used in connection with judges' requests. In only one instance has the OAL director refused to sign an agency extension request, a refusal later upheld upon court challenge.⁶²

The statutory law concerning the authority of an agency head to modify or reject the initial decision of an ALJ has recently been changed to reflect what had, for years, been the appellate case law standard. Case law has long recognized that the person who actually hears witness testimony has a distinct advantage in determining credibility over one who simply reviews a cold record.⁶³ Thus, substantial deference is accorded to the trial judge's determinations as to the credibility of witnesses.⁶⁴ In codifying this deferential standard in the Administrative Procedure Act, the Legislature instructed agency heads that they may not reject the ALJ's findings of fact concerning the credibility of lay witnesses, unless it is determined from a review of the record that the ALJ's findings are either unsupported by sufficient, competent, and credible evidence, or the findings are arbitrary, capricious and unreasonable.⁶⁵ In practice, many factual determinations regarding the events and circumstances relevant to the outcome of a contested case are determined upon the credibility of the witnesses. This standard greatly limits the situations in which an agency head can overturn the factual findings of the ALJ concerning both credibility and the material facts of the case. In contrast, no deference is accorded by

62. *Newman v. Ramapo Coll. of N.J.*, 793 A.2d 120, 125 (N.J. Super.Ct. App. Div. 2002). While the specific facts in *Newman* supported the refusal of an extension, the willingness of the OAL to acquiesce in agency requests for extensions is in part a practical recognition of the need for ALJs themselves to obtain extensions and in part a bow to the expressed reluctance of the appellate courts to see an agency "deprived" of the opportunity to decide a contested case. *See King v. N.J. Racing Comm'n*, 511 A.2d 615 (N.J. 1986).

63. *Clowes v. Terminix Intern., Inc.*, 538 A.2d 794 (1988).

64. *Id.*

65. N.J. STAT. ANN. § 52:14B-10(c) (West 2003). The original bill containing the limitation upon agency review of credibility determinations also limited the agencies' ability to review the judge's determinations of fact. However, the legislation as passed did not retain this restriction. For a discussion of legislative provisions limiting agency review of specific aspects of ALJ decisions, see James F. Flanagan, *Redefining the Role of the State Administrative Law Judges: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1376-1382, 1411-1415 (Fall 2002).

case law or statute to the credibility determinations of the ALJ regarding the testimony of expert witnesses, or the findings and conclusions concerning the meaning and interpretation or the application of statutes and regulations.⁶⁶ However, whenever the agency head determines to either reject or modify the ALJ's findings of fact, conclusions of law or interpretations of agency policy, the statute requires that the agency head "state clearly the reasons for doing so."⁶⁷

At present, with the notable exception of special education decisions and arbitration awards made under the Spill Fund, no orders or decisions issued by ALJs are final, whether they be interlocutory or initial decisions.⁶⁸ The legislature has neither provided for mandatory final administrative decision by an ALJ for the agency's contested cases, nor, as exists in some states, for advance, voluntarily waiver of an agency's right to review ALJ decisions in a single case, or in a class of cases.⁶⁹ This article will not explore the issue of "final decision authority."⁷⁰

66. Flannagan, *supra* note 65, at 1367-69, 1397.

67. N.J. STAT. ANN. § 52:14B-10(c) (West 2003). "Inexcusable neglect" and "gross indifference" to an agency's statutory responsibilities resulting in an agency's failure to produce a timely decision explaining in detail its findings and conclusions may lead to the ALJ's decision being "deemed adopted," even when the agency did issue a timely notification that it rejected the ALJ's initial decision. *Capone*, 817 A.2d at 1003.

68. *In re Kallen*, 455 A.2d 460 (N.J. 1983).

69. An agency may choose not to affirmatively act upon an ALJ's decision and thereby allow it to become the agency's final decision. N.J. STAT. ANN. § 52:14B-10(c) (West 2003). This "inaction" has always occurred after the judge has issued the decision and not as a result of any agency's pre-announced intention to let the ALJ's decision be its final decision. In some other central panel states, legislative action has allowed for finality of some, or, indeed, all ALJ decisions. In the most sweeping provision, the decisions of Louisiana's central panel are all final administrative determinations and the agency is even forbidden to appeal a decision. LA. REV. STAT. ANN. § 49:992(B)(2),(3) (West 2003). In Maryland, the governing statute provides that an agency may delegate to the Office of Administrative Hearings the authority to issue proposed or final findings of fact, proposed or final conclusions of law, proposed or final findings of fact and conclusions of law, or the final administrative decision of an agency in a contested case. MD. CODE ANN., STATE GOV'T. § 10-205(b) (2002 Supp.). Many agencies have utilized this discretionary authority and authorized the Office of Administrative Hearings to issue final decisions, some on a case-by-case basis and others by regulation in the Code of Maryland Agency Regulations. In Minnesota,

Another significant statutory provision, enacted in 1993, provides that the OAL may promulgate and enforce rules for reasonable sanctions, including assessments of costs and attorney's fees which may be imposed on a party, attorney or other representative of a party "who, without just excuse, fails to comply with any procedural order or with any standard or rule applying to a contested case."⁷¹ While the Uniform Administrative Procedure Rules had long provided for case-related sanctions for failure to comply with such orders and rules,⁷² the signal element of the 1993 enactment was the additional provision that allowed the agency to promulgate and enforce rules that permitted the imposition of a "fine not to exceed \$1,000.00 for misconduct which obstructs or tends to obstruct the conduct of contested cases."⁷³ This provision, while not granting to ALJs the contempt authority that New Jersey has been determined to be a power exclusive to the judiciary⁷⁴ has provided the OAL and its judges with a necessary option in rare cases where an attorney or

by statute the Office of Administrative Hearings issues final decisions in matters arising by complaints filed with the state's human rights agency, MINN. STAT. ANN. § 363.071 (West 2003); in employee discipline appeals; in municipal boundary disputes; and in revenue recapture cases. In other instances the legislature has allowed agency heads to delegate final decision authority to ALJs.

70. Although early in the history of New Jersey's OAL the concept of final decision authority was the subject of an unsuccessful legislative proposal (which never was voted upon) that generated opposing articles written respectively by the then Deputy Director of the OAL and the state's Attorney General, there has been no serious, in-depth consideration of the issue since the early 1980s. Given the subsequent action of some legislatures in both central panel and non-central panel states that has provided for some degree of finality in at least some instances, perhaps it is time for the issue to be explored anew in New Jersey. There are interesting arguments on both sides of the question, which will not be detailed here. For early commentary on the question see Steven L. Lefelt, *A Search for Agency Expertise in New Jersey*, 110 NEW JERSEY LAW JOURNAL 525 (1982) (affirmative); and Irwin I. Kimmelman, *The Appropriate Role of the Office of Administrative Law*, 111 NEW JERSEY LAW JOURNAL 157 (1983) (negative). A recent controversial analysis of trends can be found in James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355 (Fall 2002).

71. N.J. STAT. ANN. § 52:14F-5(t) (West 2003).

72. N.J. ADMIN. CODE tit. 1 § 1-14.4.

73. N.J. STAT. ANN. § 52:14F-5(t) (West 2003).

74. *Hayes v. Gulli*, 418 A.2d 295 (N.J. Super. Ct. Ch. Div. 1980).

party simply refuses to control himself or herself and materially delays or obstructs the course of a hearing.⁷⁵

Throughout its history, the OAL has sought to assure that it operated pursuant to the highest standards of ethics and judicial responsibility. From its earliest days, the OAL directed its judges to look to the New Jersey Code of Judicial Conduct for guidance on matters of propriety.⁷⁶ However, in 1992 the agency codified its own Code of Judicial Conduct for Administrative Law Judges, based upon the Model Code of Judicial Conduct as adopted by the ABA on August 7, 1990, and the aforementioned New Jersey Code.⁷⁷ A primary feature of the Code is the absolute ban on any political activity by an ALJ.⁷⁸ Judges, who serve full time, are also barred from the practice of law.⁷⁹ The Rules also provide for a process for disciplining ALJs, including preliminary review of matters involving potentially serious discipline such as suspension or removal by a panel of judges followed by a hearing process. While the ultimate authority to impose discipline short of removal lies with the director and chief ALJ, whose decision is presumably subject to judicial review as the final decision of an administrative agency, removal of a judge can only occur if the Governor so determines, following receipt of a recommendation for removal from the director.⁸⁰ Non-judicial employees of the Office must comply with a Code of Ethics as well.

CONCLUSION

New Jersey's Office of Administrative Law has developed a stellar reputation for independent, fair and comprehensive

75. This provision has been invoked against attorneys on two occasions. As one attorney did not bother to pay the sanction, the matter was referred to the Attorney General, who filed an action in Superior Court to enforce the OAL order as a final agency action. The court upheld the sanction and ordered the attorney to pay.

76. RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, APP. TO PART I (2001).

77. N.J. ADMIN. CODE tit. 1 § 1, APP. A (2003).

78. RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, CANON 5 (2001).

79. *Id.* at Canon 4F.

80. N.J. ADMIN. CODE tit. 1 §§ 31-3.1 *et seq.* (2003).

adjudication of a vast array of administrative disputes involving the State, its agencies, local governmental and educational entities, and the regulated public. Despite initial misgivings, I believe it has convinced executive branch agencies that it is not a threat to their ability to carry out their legislative mandates, while at the same time assuring that they and the public “cut square corners.” The appellate courts have long recognized that the records arising from OAL litigation are generally of superior quality, and the Supreme Court has found that the OAL can be trusted to contribute to its management of significant matters of great public concern.

The choices made in each state regarding the manner in which that state’s central panel has been formed, have been substantially the product of the particular legal and political culture existing in that jurisdiction. To a great extent the OAL’s success is directly traceable to the wise choices made by the legislature and Governor of New Jersey, who gave it its start. The establishment of a truly independent agency without ties to a “host” agency with supervisory powers over the OAL and its director, the broad jurisdiction granted to the OAL from the very beginning, the agency’s statutory mandate to produce binding rules of procedure, the decision that its judges should be appointed much as the judges of the state’s highly respected judiciary are, and the significant early support of the Supreme Court to assure that the new agency was protected against any potentially negative “grandfather” influence, were all crucial aspects of building the institution. Each, in its own way, has contributed to an organizational structure and position that has been recognized nationally as perhaps the most well-established and “judicial” central panel in the country. The New Jersey model is not one that has been adopted in whole in any other state. Yet, there is little doubt that others have looked to New Jersey to see how and why its OAL has been so successful. As the OAL approaches a quarter century of service to the citizens of New Jersey, it will strive to continue its mission to effectively, efficiently and independently serve the state and its citizens.

