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William J. Cowan

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THE NEW YORK ADMINISTRATIVE CORPS PROPOSAL: ANOTHER VIEW

William J. Cowan, Esq. 1/

Introduction

Thank you for the opportunity to present the views of the Department of Public Service on proposed legislation in New York that would create a State Office of Administrative Hearings for the purpose of consolidating in one agency the administrative hearing responsibilities of all state agencies that conduct adjudicatory hearings.

I am the Executive Deputy to Chairman Bradford. Before assuming this position, I served as the Public Service Commission's Chief Administrative Law Judge and Director of its Office of Administrative Hearings from 1980-1987. I am also currently Chairman of the Subcommittee on Administrative Law Judges of the National Association of Regulatory Utility Commissioners.

1/ Statement on behalf of the Department of Public Service to the Assembly Standing Committee on Governmental Operations and the Senate Standing Committee on Commerce, Economic Development and Small Business on proposed legislation to establish an independent State Office of Administrative Hearings, presented by William J. Cowan, Executive Deputy to the Chairman, Public Service Commission, February 2, 1988.

Mr. Cowan is currently serving as Executive Deputy to the Chairman of the New York Public Service Commission. He was the Commission's Chief Administrative Law Judge from 1980 to 1987. He was first appointed an Administrative Law Judge in 1976 by then Chairman Alfred E. Kahn, after serving as Director of the Commission's Office of Opinion and Review. He is a graduate of the School of Law at Northeastern University in Boston. Before undertaking a legal career, he served as an Industry Economist with the then Federal Power Commission and held positions in contract administration and procurement with General Electric's navy and commercial nuclear power divisions.
Some Reasons for Establishing a Central Office

The concept of a state corps of Administrative Law Judges has been adopted in several jurisdictions, most notably in my view, in New Jersey and Minnesota.

The rationales typically advanced for establishment of a statewide panel of Administrative Law Judges seem unexceptionable in principle. The driving force for the concept is an anticipated improvement in the perception and reality of fairness in the conduct of the state's administrative hearings. No one can quarrel with that objective. One only has to look at the transcript of the hearings held to date on the proposed state legislation to realize that this goal is not always achieved in our state's existing hearing process.

One fundamental point deserves emphasis -- a state administrative agency hearing to determine the legal rights, duties or privileges of an individual must be impartial and fair. The hearing officer must be objective and unbiased. He or she should not have, or seem to have, an interest in the outcome of the case, other than that it be decided fairly, with proper regard for due process and in accord with substantive law.

Another basis frequently advanced for establishment of a statewide Office of Administrative Law Judges is an expected improvement in the efficiency of hearings likely to flow from a better allocation of agency staff resources and consequent savings in cost and expenses from centralization. Again, this seems to be a highly laudable goal -- who can argue against improvements in efficiency and cost savings?

Yet another reason offered in support of the centralization concept, and also one which is unassailable, has to do with the quality of administrative decision making. It is thought that improvements in the quality of decision making will flow from centralized control over recruitment, training and the work products of Administrative Law Judges.

What's Wrong with the Existing System

Before concluding that centralization of the hearing function in a new state agency makes ultimate sense, it seems appropriate to ask the question: Why doesn't the state's existing system deliver fair, impartial, efficient and high quality hearings, if indeed it does not? My personal view is that our existing system, while far from perfect, does come very close to meeting the ideals that motivate the sponsors of this legislation. In short, there may be insufficient reason for the sweeping changes called for in this legislation. It
may be that we can move even closer to our common goals with less drastic changes in approach. Moreover, there are strong reasons to prefer a decentralized approach to the conduct of the state's administrative hearings. Let me first discuss the reasons why I believe such hearings should remain under the purview of the individual agencies.

Some Reasons to Prefer a Decentralized Approach

The first requires us to recall why we have administrative agency adjudication at all. Professor Kenneth Culp Davis tells us in his treatise on Administrative Law that the fundamental reasons for the growth of the administrative process include the following:

1. It was more practical to have certain tasks, such as determination of entitlements due to claimants under particular statutes, decided by specialists in that field than by the legislature or the courts. This led to the creation of administrative agencies.

2. Economic regulation of rates required a governmental authority with power not only to adjudicate but to initiate proceedings, investigate, prosecute and issue regulations, all tasks better performed by an administrative agency with special expertise than by the legislature or the courts.

3. Legislative and judicial processes, the principal alternatives to the administrative process, fell short of providing what was needed. Legislatures are ill suited for handling masses of detail and courts rather obviously cannot furnish the accounting, engineering and other technical skills required to fix rates or grant licenses in complicated economic circumstances.

4. The public demanded a speedy, inexpensive and simple procedure -- and one which keeps the roles of lawyers to a minimum. ²

The common denominator in all of the above is the fundamental understanding that the tasks of an administrative agency can best be accomplished by a staff of professionals trained in the expertise of the particular agency -- so that claims can be adjudicated more swiftly, licenses granted or denied by agency staff skilled in the particular field and rates set in accord with statutes and

²/ Davis, Administrative Law Treatise, Section 1.05.

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principles understood by the agency. Thus, special expertise was an important consideration in the formation of the administrative agencies themselves.

The testimony of senior representatives of several state agencies at these hearings demonstrates the importance of having hearing officers knowledgeable about the laws and regulations of the agency and familiar with complicated facts likely to come into the record in that agency's proceedings. This *raison d'être* for administrative agencies will lose a lot of its force if an agency's hearings become the responsibility of a central panel of Administrative Law Judges without the special expertise of the agency itself. We might as well turn over agency adjudication to the courts. Indeed, we might even prefer to think in terms of specialized courts to handle these types of adjudications rather than go in a direction inconsistent with the underlying principles of administrative agency adjudication.

There are other reasons to prefer in-house control over agency administrative hearings. A central panel necessarily involves establishment of a new bureaucracy with concomitant increased expense. It is by no means certain that cost savings of individual agencies from a centralized panel structure will be enough to offset the costs of the new bureaucracy. From which I have read and discussed with others, I think the jury is still out on the cost issue.

Centralization also brings with it an increased emphasis on judicialization of administrative agency hearings. Professor Davis noted that the public was looking for a speedy, cheap and simple procedure, a procedure which keeps the role of lawyers to a minimum. Agency Administrative Law Judges are familiar with the types of claimants and other individuals appearing before them. They are also very familiar with the agency's rules and the statutes which they are administering. An Administrative Law Judge from a central panel, on the other hand, is more likely to resort to a more formal structure and process that could intimidate individual claimants and other parties appearing before the agency. That atmosphere may cause parties to feel a need for legal counsel to represent them in hearings.

The increased formality of hearings also runs counter to the growing movement in our society toward alternative dispute resolution techniques, such as case settlement through mediation, negotiation and arbitration.

Centralization is also likely to lead to less informed decision making at the administrative agency level if the hearing officer's recommended decision or report is prepared by an individual lacking in the technical expertise of the agency. I would note, parenthetically, that, at the Public Service Commission, it is the Administrative Law Judge's responsibility to assure that the record is
complete on all issues. In a centralized system, that responsibility would fall to agency staff, because of the Administrative Law Judge's likely lack of expertise. The agency would also lose control over the timing of cases and policy direction, to the extent that the latter is deemed desirable. The most important point, of course, is that Administrative Law Judges do not come with fungible experience. An individual trained in the application of motor vehicle statutes and regulations would simply not be able to handle the type of proceeding that the Public Service Commission routinely conducts into rates and the practices of large complex public utilities. And to the answer frequently heard that Judges do not need to have technical knowledge to decide cases, I will repeat my earlier comment that we have administrative agencies precisely because we don't want Judges operating in these highly technical areas without subject matter knowledge.

Some Alternatives to Centralization

So that I don't leave you with the impression that I think any movement toward centralized control over the administrative hearing process is the devil incarnate, there may be modifications that we can make to the state's existing practices and procedures to move closer toward a realization of the objectives of a centralized office, without the attendant problems. The first that occurs to me, and the most desirable in my view, is the establishment of a semi-autonomous Office of Administrative Hearings within each state administrative agency that conducts adjudicatory and rule-making hearings under the State Administrative Procedure Act. This is exactly the kind of organization we have at the New York Public Service Commission. I understand that the Department of State and other agencies have similar structures. Other agencies would do well to consider following this lead. Indeed, it might even be desirable to amend the State Administrative Procedure Act to require each administrative agency to establish a semi-autonomous office of administrative hearings. Each agency would then have a group of professional hearing officers in an independent office. There would be no loss of subject matter expertise under this system. While the Administrative Law Judges would continue to be employees of the agencies, their independence would be somewhat more assured than it is currently. This, in turn, would improve the perception that Administrative Law Judges are independent and able to conduct fair and impartial hearings.

I can attest from personal experience for the past seven years as the Chief Administrative Law Judge of an agency much in the public view that the concept of a semi-autonomous entity within the organizational structure of the agency itself is one that works fairly well. This is not to suggest that this type of organizational structure is free from problems. One can always distrust the motives of the agency head and you may not always have agency commissioners 114
willing to tolerate the existence within the agency of an independent partly autonomous office. It is human nature that the desire to control the decision-making process of the Administrative Law Judges will always exist to some degree. But one has to place some trust in the executive appointment system. In my experience, the individuals occupying the seat of Chairman at the PSC have always recognized the benefits of having an independent corps of trained professional Administrative Law Judges, even if they sometimes disagreed with their recommendations.

Yet another possible way of achieving some of the benefits of the current system with minor modification would be to maintain a central register of Administrative Law Judges at the State Office of Employee Relations for compensation, promotion and training functions, while keeping the Administrative Law Judges resident in their individual agencies. This is akin to the existing federal system. One advantage of this arrangement is that it would make Administrative Law Judges independent of agency politics and free from agency influence. Moreover, it would improve the perception of Administrative Law Judge independence. The centralized control over personnel actions also would permit recognition of different levels of Administrative Law Judges depending upon experience and other pertinent factors. Centralization of training and quality control would likely enhance individual agency initial decisions. Of course, this type of arrangement would maintain the subject matter expertise of Administrative Law Judges within the agencies, preserving this important benefit of the current system.

Some Comments on the Bill's Applicability to the Public Service Commission

I would like to briefly outline some of the specific problems that I see with the proposed legislation vis-a-vis the Public Service Commission. First, we strongly believe that parties who participate in Public Service Commission hearings receive fair and impartial treatment and that due process protections are extended equally to all parties. We take some solace that the current draft of the bill would not make its provisions applicable to most of the Commission's proceedings, because they are more often than not considered rule makings under SAPA. We are concerned, however, because, although the bill is currently limited to adjudicatory hearings, it could at some later date be broadened to include rate-making and other types of rule-making proceedings conducted by the Public Service Commission. We believe this would be highly undesirable. Even in its present form the bill causes our agency difficulties. Cases arising under Section 68 of the Public Service Law involving the exercise of gas and electric franchises and Article VII and VIII proceedings involving the siting of major electric generating and transmission
facilities are adjudicatory and would fall under the provisions of this statute. These types of cases are among the most technical and complex that we handle. It would be extremely problematical for our agency if these cases were bound to be heard before Administrative Law Judges that do not have technical expertise in our field.

We are also troubled by the provision of the legislation that would require each Administrative Law Judge be admitted to practice law in New York for five years. Our agency historically and currently has utilized non-attorneys successfully as Administrative Law Judges. At a minimum, those individuals currently serving as Administrative Law Judges should be grandfathered into their positions and accorded full Administrative Law Judge status under the law. Moreover, the idea that one must be an attorney to serve competently as a hearing officer is simply wrong in my experience, particularly where the matters at issue are technical and complex and the overriding concern is the public interest rather than the rights of individuals. In many highly technical cases we assign Administrative Law Judges who have a background in engineering or other sciences because they are better able to ensure the development of a comprehensive record through questioning of witnesses and rulings that require the parties to address certain issues. Additionally, these Judges may be more proficient in analyzing complex, technical issues and this advantage can often be observed in the quality of their recommended decisions.

It would be a serious disadvantage to preclude from service as Administrative Law Judges individuals who have the requisite technical expertise and who through experience have learned the administrative process. The legislation would also make recruitment of Administrative Law Judges from outside of New York very difficult. The Public Service Commission has historically recruited nationally for its Administrative Law Judges, and we have been able to attract highly qualified candidates throughout the country to positions in New York.

In conclusion, I would like to reemphasize three basic points. First, the proposed legislation seems to be trying to fix something that may not be broken. To the extent that it is broken, there is a good chance that the system can be repaired -- it does not need to be replaced. Second, there is a very good reason why Administrative Law Judges now reside within the individual agencies and that is to take advantage of their experience with the statutes they administer and their knowledge of the particular jurisdictional field of the agency. This is one of the principal rationales for the existence of administrative agencies themselves and ought not to be discarded without careful consideration of alternatives. And third, an alternative that has worked well for the Public Service Commission, and I think would work well in many other agencies, is the creation of
semi-autonomous office of administrative hearings within each state administrative agency. This type of organization will go a long way toward resolving some of the perceived problems with the existing structure while preserving all of its inherent advantages.