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Monroe I. Katcher II

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NEW YORK'S ELUSIVE
ADMINISTRATIVE LAW JUDGE

Monroe I. Katcher, II*

Nearly forty years ago, it was said that a primary consideration to be kept in mind in the initial step of selecting a hearing officer, was that the hearing officer should approach the hearing with an open mind, without bias and without prejudgment of the issues, this being the primary requisite of fair hearing procedure.¹

Truly impartial hearing officers have been deemed to be those with a substantial measure of independence of the various administrative bodies and agencies for which hearings are conducted.² The experience of the federal administrative agencies has resulted in the creation of administrative law judges whose power, prestige and measure of independence are comparable to trial judges in courts of law.³

An eminent authority on state administrative law has pointed to California as "a shining example of what a state can do in creating a corps of competent hearing officers and giving them appropriate functions and a proper scope of authority."⁴ The California provisions have worked well and deserve careful consideration in other states, stated Frank E. Cooper in 1965.

The predisposition of hearing officers to bias in favor of the administrative bodies and agencies for whom they conduct hearings and by whom they are employed, undermines the process of administrative adjudication. The federal experience teaches that impartiality may be better achieved by creating administrative law judges who are not employed by administrative bodies and agencies for whom they conduct hearings.

New York has been slow in resolving the shortcomings of its system of state administrative law. A State Administrative Procedure Act became a reality in 1975 after "a long and unfortunately unsuccessful

* Past Chairman, Committees on Administrative Law, New York State Bar Association, New York County Lawyers Association, Westchester County Bar Assn.

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¹ Benjamin, Administrative Adjudication in the State of New York, p. 108.

² Cooper, State Administrative Law. Vol. 1, p. 331 et seq.

³ Id.

⁴ Id.

history" during which the original version suffered countless modifications. The watered-down Act was finally approved after 13 years of travail.⁵

Flaws in the machinery of New York judicial review have been identified, but legislative efforts to achieve a more discerning and meaningful review have foundered on the shoals of legislative and executive priorities. Bar association committees on administrative law and procedure have recommended various ways to isolate hearing officers from the constraints imposed by their agency employers, but budgetary considerations have been a major impediment to the creation of an independent pool.

The title of Administrative Law Judge does not exist in the New York State Title and Salary Plan. Positions responsible for conducting administrative law hearings are classified mostly as Hearing Officer, Grade 25. The position of Hearing Officer exists in New York State government in various State departments and agencies in all areas of the State. In early 1981, there were approximately 60 vacancies. The majority of the positions were with the Department of Social Services, in the Albany and New York City Areas. There were also some positions with the Department of Health, in Albany.⁶

The examination announcement of the New York State Department of Civil Service, issued in early 1981, states that:

"Hearing officers conduct quasi-judicial or administrative hearings which are usually both adversary proceedings and investigations instituted by the department involving the resolution of issues of fact, law, and regulatory practice. They are responsible, as the presiding officer, for the conduct of the hearing and the progress of the proceeding to proper disposition. They administer the oath; instruct the parties as to their rights; and rule on the relevancy or admissibility of evidence as provided by law; may issue subpoenas for the attendance of witnesses or the production of necessary books, papers, documents or other evidence; evaluate evidence; make findings of fact and conclusions of law; and render or recommend decisions."

Positions as hearing officers exist, also, in the State Liquor Authority and the Department of Education, Health, and Taxation and Finance. There are, also, positions of Motor Vehicle Referee, Grade 25, and Unemployment Insurance Referee, Grade 25, which conduct

⁵ Katcher, New York's Administrative Procedure Act, 48 NYSBJ 111.

⁶ New York State Department of Civil Service, Letter July 6, 1981.

administrative law hearings for the Department of Motor Vehicles and the Labor Department, respectively.

Irrespective of title, it is not open to question that those who are responsible for the conduct of administrative hearings in New York State exercise powers comparable to trial judges in courts of law; and the highest court of New York has accorded such a status to them, indicating that the subsequent agency determination may be regarded as an appellate administrative decision.⁷ However, when an agency adopts the hearing officer's findings of fact, the elements of impartiality and independence may still remain major desiderata in the process of administrative adjudication.

"The concept of using as a hearing officer someone who is independent of an agency head, is a good one. He can be more objective in that he does not owe his job to the agency head and can remain aloof from the internal politics of the department. While the agency head still make the final determination, the hearing record and the recommendations made to him cannot easily be ignored."⁸

But when agency heads prohibit their hearing officer employees from exercising the function of recommending decisions, the hearing officer's status has been radically diminished, the hearing record has been stripped of a vital element in the administrative judicial process, and the perception of the hearing officer has been obliterated in favor of the bureaucrat. In such instances,⁹ the role of the hearing officer has been reduced to little more than a figure head and the hearing might well have been conducted by an electronic device.

If New York State has found itself too preoccupied with problems holding higher priorities, the City of New York has not only recognized the problem but has taken appropriate steps to cope with it. On July 25, 1979, Mayor Edward I. Koch issued Executive Order No. 12, creating and establishing, in the Department of Personnel, the Office of Administrative Trials and Hearings, to be directed by the Chief Administrative Law Judge. The Executive Order declared the purposes of the Office to be to conduct

⁷ Mtr. of Sorrentino v. State Liq. Auth. (1961) 10 N.Y.2d 143.

⁸ The Chief, a Civil Service Newspaper, Editorial, Feb. 20, 1981.

⁹ While Rule 2, subd. (g) of the Rules of the State Liquor Authority provided that the hearing officer may recommend an adjudicated decision, the Authority has forbidden such recommendations.

administrative trials and hearings at the direction of the Mayor and to conduct such trials upon the written request and delegation of the head of any City agency.

Under the Executive Order, the Chief Administrative Law Judge was to be a lawyer admitted to practice in the State of New York and appointed by the Mayor. In addition to presiding over administrative trials and hearings, the Chief Administrative Law Judge was given the following responsibilities:

"To direct the Office with respect to its organization and management and to appoint its Executive Director;

To appoint to the position of Administrative Law Judge such persons as may be admitted to the practice of the law in the State of New York and otherwise suited by training and experience for such duties;

To establish rules for the conduct of administrative trials and hearings, including charges, specifications, motions, pre-hearing and post-hearing matters;

To collect and publish reports and recommendations of Administrative Law Judges and other hearing officers; and;

To make recommendations to the Mayor concerning the proper conduct of civil service and other administrative trials and hearings."

The Executive Order, which took effect immediately, also provided that Administrative Law Judges established therein should maintain the standards of, and preside over administrative trials and hearings in accordance with the Canons of the Code of Judicial Conduct of the American Bar Association, as promulgated by the State Bar Association.¹⁰

The Office of Administrative Trials and Hearings of the City has been functioning competently since its creation. It has a staff of three Administrative Law Judges, in addition to the Chief Administrative Judge, an Executive Director and a Law Clerk. In the two years of its existence, it has confirmed the evidence of the Federal experience that an independent hearing officer system is the best assurance of a fair hearing procedure, even when the Administrative Law Judge simply recommends the disposition of cases to the agency head.

It is a system which is overdue in New York State-wide.

¹⁰ City of New York, Executive Order No. 12, July 25, 1979.