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UNIFICATION OF THE ADMINISTRATIVE ADJUDICATORY PROCESS: AN EMERGING FRAMEWORK TO INCREASE "JUDICIALIZATION" IN PENNSYLVANIA*

by Gerald E. Ruth **

I. INTRODUCTION

Administrative law judges (ALJs) are the presiding officers in both the adjudicative and rulemaking proceedings for administrative agencies.¹ These judges contribute significantly to administrative law and play a very important role in the administration of justice at both the federal and state levels. As such, the decisions of ALJs "permeate every sphere and almost every activity of our national life [and] have a profound effect upon the direction of our economic growth."²

Despite its positive contributions to administrative law, the administrative judicial system has been heavily criticized. The most common criticism of this system is that it violates the separation of powers doctrine because it allows the legislative, executive, and judicial functions to be housed in one governmental body. Bernard G. Segal, the respected past president of the American Bar Association,

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** Chief Administrative Law Judge, Pennsylvania Liquor Control Board, and President of the Pennsylvania Conference of Administrative Law Judges, B.A., Dickinson College; J.D., Vanderbilt University School of Law.

¹ Some states may call the presiding officer a hearing officer rather than an ALJ. As of the date of publication, 22 states and New York City used a central administrative hearing office or an agency of administrative law judges to conduct administrative hearings. For a listing of these states, see *infra* tables set forth in Appendix A. In addition, as of the date of publication, legislatures in Arizona, Connecticut, Illinois, Indiana, Ohio, New York, and the District of Columbia had introduced legislation providing for a similar administrative hearing system. Chart prepared by Administrative Law Judge Edward J. Schoenbaum, Editor-in-Chief, *Journal of the National Association of Administrative Law Judges*, Springfield, Ill. (Mar. 1996).

² Victor W. Palmer & Edwin S. Bernstein, *Establishing Federal Administrative Law Judges As an Independent Corps: The Heflin Bill*, 6 W. NEW ENG. L. REV. 673, 674 (1984) (alteration in original) (quoting message of President John F. Kennedy, H.R. DOC. NO. 135, 87th Cong., 1st Sess. 1 (1961)).

concisely explained this problem when he stated the following:

Consider, for example, the unavoidable appearance of bias when an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder.³

The appearance of judicial bias is not the only consequence of this separation of powers violation. Individuals attending recent American Bar Association conferences discussed other concerns that they had with the administrative judicial process. These concerns included the following: (1) interference with judicial independence by high-ranking agency figures; (2) an organizational structure that places a nominal value on the role of the Chief ALJ so that no final office management authority is bestowed upon the Chief ALJ; (3) delegation of substantive program responsibility to political appointees who have little or no knowledge of judging; and (4) the handling of personnel matters such as discipline, suspension, or discharge.⁴

Because of these various concerns, there has been a growing movement at both the federal and state levels to detach the ALJ from the agency that is presiding over the litigation.⁵ This movement has bred a new administrative judicial arrangement known as the

³ Bernard G. Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A. J. 1424, 1426 (1976).

⁴ E. Earl Thomas, *Management Hierarchy Can Interfere with Judicial Independence*, A.B.A. JUDGES' J., Winter 1991, at 26.

⁵ See generally Jeffrey S. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 J. AM. JUDICATURE SOC'Y 266, 273 (1981) (advocating a central panel system for federal agencies).

centralized panel. The goal of a centralized panel is to unify the administrative process to ensure that ALJs are completely separate from all internal agency processes. The sole task of the centralized panel judge is to hear cases involving a variety of agencies. No longer will the ALJ be "susceptible to manipulation by agency managers who are responsible for program administration."⁶ No longer will the ALJ be involved in the operational control of compensation, tenure, personnel, equipment, and physical location of the *in loco parentis* agency. No longer will the ALJ appear "attached to an agency."⁷ The centralized system results in a truly independent adjudicatory agency.⁸

In addition to eliminating the lack of impartiality, there are other benefits that can accrue from this new arrangement. These benefits include the following: significant cost savings,⁹ "a more efficient . . .

⁶ Thomas, *supra* note 4, at 26.

⁷ Segal, *supra* note 3, at 1426-28.

⁸ One commentator noted that although "adoption of a central panel system does not guarantee the independence of the ALJ from the agency, the central panel is likely to be accompanied by greater independence." L. Harold Levinson, *The Central Panel System: A Framework that Separates ALJs from Administrative Agencies*, 65 J. AM. JUDICATURE SOC'Y 236, 245 (1981).

⁹ For example, the Minnesota Public Utility Commission saved \$88,670 from the budgeted amount the first year a centralized panel was in place and \$166,000 the second year. See Duane R. Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 J. AM. JUDICATURE SOC'Y 257, 263 (1981). Also, the Minnesota Department of Commerce reduced its hearing costs by 50 percent in one year. *Id.* The costs dropped from \$120,000 to \$60,000. *Id.* In a 1986 Senate Committee Hearing, then-Chief Judge Ronald I. Parker of the New Jersey Office of Administrative Law Judges testified that

the centralization of the hearing function has resulted in demonstrable economics of scale. By comparison, the State cost for the hearing process eight years ago was more than five million dollars. The overall New Jersey State budget at that time was \$4.1 billion. Today, the overall State budget totals \$8.9 billion. OAL's budget for the hearing process is \$6.2 million. In other words, since the creation of OAL, State spending has increased over 100%, while contested case costs have only increased by 24%. This has all been accomplished despite the fact that our caseload has doubled since 1979, while our initial staff size has been reduced.

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[and] effective administrative hearing process,"¹⁰ and the attraction of more experienced and qualified personnel.

Because of these potential advantages, the central panel became popular on the state level during the 1970s and 1980s, and the 1981 Model State Administrative Procedures Act adopted the central panel system.¹¹ In addition, centralization measures have been discussed repeatedly in Congress.¹² The positive effects of this restructuring suggest that centralization of the administrative judicial process should be considered by all fifty states.¹³ To date, however, only twenty-two states actually employ such an arrangement.¹⁴

on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 360 (1986). The 1995 budget was approximately \$9.6 million. Telephone Interview with Michael Boccanfuso, Chief of Budget and Finance, New Jersey Office of Administrative Law (March 19, 1996).

¹⁰ Harves, *supra* note 9, at 265.

¹¹ Levinson, *supra* note 8, at 238. Neither the 1946 nor the 1961 version of the Model State Administrative Procedures Act referred to the central panel concept. MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981) (approved and recommended for enactment in all states at the National Conference of Commissioners on Uniform State Laws Annual Conference in New Orleans, Louisiana, July 31-August 7, 1981). The fact that neither of these versions referred to a central panel system is not surprising given that at that time, only one state used such a system. By 1981, when the Model Act was revised, at least seven states had adopted the central panel system. *Id.* One authority includes Washington as an eighth state. However, Washington's central panel system actually came into existence in 1982. Duane R. Harves, *The 1981 Model State Administrative Procedure Act: The Impact on Central Panel States*, 6 W. NEW ENG. L. REV. 661, 662 (1984).

Judge Harves argued that "[t]he provisions . . . are deficient in two respects. First, while proclaiming its independence, it is proposed [that the Office of Administrative Hearings be included] within an existing executive branch agency." *Id.* Second, another proposal gives the above option to an adopting state, and it grants the agencies the power to designate one or more other persons to preside unless otherwise prohibited by law. Thus, such "state agencies would not be compelled to use the [O]ffice [of Administrative Hearings]." *Id.*

¹² For a discussion of the efforts made by Congress to implement a central panel system, see *infra* notes 97-111 and accompanying text.

¹³ Levinson, *supra* note 8, at 238.

¹⁴ Although the central panel systems vary from state to state, they are more similar than different. The most significant similarity is that the central panels are comprised of independent administrative law judges rather than of personnel

Unfortunately, Pennsylvania is one of the states that has not yet adopted a centralized system—despite recommendations from a study undertaken by the American Bar Association's (ABA) Center for Administrative Justice, made at the request of both academics and the Pennsylvania Department of Justice.¹⁵

The purpose of this Article is to emphasize that the time has come for Pennsylvania to adopt a centralized panel system. To support this proposal, this Article begins with a summary of statements made by authorities in Pennsylvania who have suggested that Pennsylvania adopt a central panel system. In addition, this Article reviews the attempts made at the federal level to adopt such a system. It also reviews various aspects of the central panel systems implemented by the twenty-two central panel states and discusses some of the similarities and differences that exist among the systems, as well as the benefits that these central panel states have reaped. One may reasonably anticipate that, if Pennsylvania adopted a centralized panel system, it would reap many of the same benefits that its sister states, which have already adopted central panel systems, are currently experiencing. Finally, this Article proposes specific recommendations for the Pennsylvania legislature to consider when establishing a central panel system.

supervised by, and accountable to, the state agency. *See infra* Appendix A.

¹⁵ Jeffrey G. Cokin & Jonathan Mallamud, *Hearing Officers in Pennsylvania: Recommendation for an Independent Central Office*, 15 DUQ. L. REV. 605, 605 (1977); *see also id.* at 605 n.3, 606 n.4 (indicating that the final report submitted to the Pennsylvania Department of Justice in 1975 was the basis for the department's draft of the Administrative Hearing Officer Act, promulgated in 1977).

II. THE ACKNOWLEDGMENT OF THE NEED FOR A CENTRALIZED SYSTEM IN PENNSYLVANIA

Pennsylvania is not immune from the due process shortcomings associated with the administrative state. Currently, administrative agencies in Pennsylvania are governed by the Pennsylvania Administrative Agency Law.¹⁶ This legislation, however, is not comprehensive and, unfortunately, merely sets out an individual's right to a hearing,¹⁷ the right to an appeal,¹⁸ and the bare bones of adjudicatory procedure.¹⁹ To compensate for this lack of formal procedures, the Pennsylvania Supreme Court has been forced to "constitutionalize" the process.²⁰ The Pennsylvania Judiciary, however, is not the only group advocating for a change in Pennsylvania. Academics also recommended that Pennsylvania adopt a central panel system to correct the currently existing due process imbalances. The following sections of this Article discuss attempts made by both practitioners and the judiciary to encourage Pennsylvania to adopt a central panel system.

A. Recognition by Academics

Early Pennsylvania cases demonstrated the due process problems inherent in a commingled administrative adjudication system.²¹ These decisions did not, however, directly address the issue of the need for

¹⁶ 2 PA. CONS. STAT. §§ 501-508, 701-704 (1988).

¹⁷ *Id.* § 504.

¹⁸ *Id.* § 702.

¹⁹ 1 PA. CODE § 31.1(c) (1988) (providing by implication that separate state agencies may have their own regulations).

²⁰ *See Lyness v. State Bd. of Medicine*, 605 A.2d 1204 (Pa. 1992) (holding that it must not even appear that the prosecutorial and adjudicative functions have been commingled); *Chester Extended Care Ctr. v. Department of Pub. Welfare*, 586 A.2d 379 (Pa. 1991) (finding that reliance on the action of an agency based upon its silence and misinformation is unconscionable).

²¹ *See Gardner v. Repasky*, 252 A.2d 704 (Pa. 1969); *In re Schlesinger*, 172 A.2d 835 (Pa. 1961); *Wasniewski v. State Civil Serv. Comm'n*, 299 A.2d 676 (Pa. Commw. Ct. 1973); *Donnon v. Civil Serv. Comm'n*, 283 A.2d 92 (Pa. Commw. Ct. 1971).

a centralized system. Arguably, the Pennsylvania Department of Justice first recognized the need to unify the administrative adjudicatory process when it asked the ABA's Center for Administrative Justice to undertake a study of state agency hearings in 1974.²² The ABA's final report recommended the establishment of a central hearing office.²³ Subsequently, the Pennsylvania Department of Justice prepared legislation reflecting these recommendations, however, the legislature failed to enact the proposed legislation.²⁴

In a 1977 article entitled *Hearing Officers in Pennsylvania: Recommendation for an Independent Central Office*, former Deputy Attorney General of Pennsylvania, Jeffrey G. Cokin, and Professor Jonathan Mallamud, from Rutgers University School of Law-Camden, reviewed the factors motivating the ABA to make the proposals that it did.²⁵ First, the authors discussed the prevalence of non-uniform decisions, the judges' lack of qualifications, and the inconsistent supervision policies associated with approximately fifteen state agencies.²⁶ Second, they recognized that if a hearing is to satisfy procedural due process requirements, individuals challenging the actions of an agency must be provided with "an opportunity to know and confront the adverse evidence on which the government will rely."²⁷ Third, the authors noted:

"[T]he most critical function in the prosecution and adjudication of administrative cases is the resolution of disputed facts because the findings of fact which result from administrative proceedings are subject to only limited appellate review. The fact finding process, therefore, must be afforded the broadest dimensions of constitutional

²² Cokin & Mallamud, *supra* note 15, at 605.

²³ *Id.* at 605-06 n.3 (citing JONATHAN MALLAMUD & MILTON M. CARROW, A SYSTEM OF PROVIDING HEARING OFFICERS FOR ADJUDICATORY HEARINGS 113 (1975)).

²⁴ *Id.* at 606 n.4 (citing PENNSYLVANIA DEPARTMENT OF JUSTICE, ADMINISTRATIVE HEARING OFFICER ACT (Blue Draft 1977)).

²⁵ *Id.* at 606.

²⁶ *Id.* at 615, 619.

²⁷ *Id.* at 606 (citing *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 300 (1937)).

protection."²⁸

Fourth, the authors tracked the development of case law involving due process and fairness issues as they related to the administrative adjudicatory process in Pennsylvania.²⁹ Fifth, and possibly the most significant contribution, the authors warned that the Pennsylvania judiciary may soon intervene and mandate that ALJs' adjudicatory and prosecutory functions be strictly separated.³⁰ In so doing, the authors heralded the coming of *Lyness v. State Board of Medicine*,³¹ in which the Pennsylvania Supreme Court replaced the requirement that a party prove actual bias on the part of a representative of an administrative agency with a standard requiring the avoidance of even the appearance of bias in cases involving the commingling of the various functions of administrative agencies.³²

The following year, in another scholarly, case-tracking synopsis, entitled *Commingling of Investigatory, Prosecutory, and Adjudicatory Functions in Administrative Agencies: The Pennsylvania Due Process Standard*, the author addressed

²⁸ *Id.* at 607 (quoting *Human Relations Comm'n v. Thorp, Reed & Armstrong*, 361 A.2d 497, 501 (Pa. Commw. Ct. 1976)).

²⁹ *Id.* at 611-14 (citing *Dussia v. Barger*, 351 A.2d 667 (Pa. 1975); *Horn v. Township of Hilltown*, 337 A.2d 858 (Pa. 1975); *Department of Ins. v. American Bankers Ins. Co.*, 363 A.2d 874 (Pa. Commw. Ct. 1976), *aff'd*, 387 A.2d 449 (Pa. 1978)); *see also* Bernard J. Donohue, Comment, *Commingling of Investigatory, Prosecutory, and Adjudicatory Functions in Administrative Agencies: The Pennsylvania Due Process Standard*, 82 DICK. L. REV. 693 (1978) (providing a thorough case-tracking synopsis and categorization of commingling).

³⁰ In support of this contention, the authors cited *Department of Insurance v. American Bankers Insurance Co.*, 363 A.2d 874 (Pa. Commw. Ct. 1976), *aff'd*, 387 A.2d 449 (Pa. 1977), which reversed the decision of the insurance commissioner "because the hearing officer . . . was the direct supervisor of the associate general counsel who presented the Department's case." Cokin & Mallamud, *supra* note 15, at 612 (citing *American Bankers*, 363 A.2d at 875). The authors reiterated Judge Blatt's warning "that the Supreme Court of Pennsylvania is applying a more stringent standard to prevent a commingling of the judicial and the prosecutorial functions." *Id.* at 614 (quoting *English v. North E. Bd. of Educ.*, 348 A.2d 494, 496 (Pa. Commw. Ct. 1975)).

³¹ 605 A.2d 1204 (Pa. 1992).

³² *Id.* at 1211. For a discussion of the *Lyness* decision, see *infra* notes 40-48 and accompanying text.

Pennsylvania's struggle to correct the due process impropriety that resulted from the commingling of judicial functions in administrative agencies.³³ This 1978 piece recognized that "[t]he commonwealth court [was] . . . unwilling to apply prior supreme court precedent to general commingling situations. The court fear[ed] that *requiring anything less than a showing of actual bias* would significantly impair the ability of the state's administrative bodies to punish violations of the law."³⁴ Thus the court's fear possibly stunted the creation of a central panel system.

Since the release of the ABA report and these law review articles, very little has been published regarding the need for a central panel system in Pennsylvania. Quite possibly, this is because the commonwealth court required that actual bias be shown in cases involving general commingling of functions within an agency, but that a showing of the appearance of bias is adequate in cases where one individual performed the commingled functions.³⁵ Whatever the reason for this dormancy, recent activity by the Pennsylvania judiciary has again brought the issue to the forefront.

B. Judicial Intervention Comes True

In January 1991, the commonwealth court in *Georgia-Pacific Corp. v. City of Reading*³⁶ reiterated the need to prove the existence of actual prejudice. The court stated:

The basic due process requirement that there be a fair trial before an impartial tribunal is applicable to administrative [hearings] as well as to courts. Potential dangers exist when there is a commingling of the investigative, prosecutorial and adjudicative functions. We have recognized that the due process requirement of a fair trial is violated when these functions are commingled in a single individual and that due

³³ Donohue, *supra* note 29, at 693.

³⁴ *Id.* at 703 (emphasis added); see *Bruteyn v. State Dental Council & Examining Bd.*, 380 A.2d 497 (Pa. Commw. Ct. 1977).

³⁵ Donohue, *supra* note 29, at 700-10.

³⁶ 585 A.2d 1166 (Pa. Commw. Ct. 1991).

process may be violated when these functions are performed by different individuals within the same administrative entity. The test in the latter situation is whether the functions performed are adequately separate so that there is no *actual* prejudice.³⁷

The commonwealth court held that bias tainted the decision-making process, and acknowledged that evidence of a "symbiotic" relationship can be sufficient to show the lack of proper separateness.³⁸ The court also noted that "[t]he role of the prosecutor is to fashion as strong a case against the accused as the evidence will allow . . . [which] is manifestly at odds with the impartiality required of the adjudicator."³⁹

The Pennsylvania Supreme Court finally addressed the commingling issue in *Lyness v. State Board of Medicine*⁴⁰ and mandated a change in the structure of administrative agencies in

³⁷ *Id.* at 1169 (citations omitted). The court also provided guidelines to help determine whether actual bias existed:

[In order t]o ascertain bias when the prosecutorial and adjudicative functions are performed by different individuals within the same administrative agency, we examine two factors: first, does anything of record indicate improper commingling of the functions performed by the involved individuals; and second, has one such individual concerned himself with the other's activities.

Id. (citing *Board of Pensions and Retirement v. Schwartz*, 510 A.2d 835 (Pa. Commw. Ct. 1986), *appeal granted*, 520 A.2d 1387 (Pa. 1987)). In this case, there existed evidence "of cooperation between the Council, an advocacy group whose role is prosecutorial in nature, and the Commission." *Id.*

³⁸ *Id.* at 1170.

³⁹ *Id.* (quoting *Bruteyn v. State Dental Council & Examining Bd.*, 380 A.2d 497, 501 (Pa. Commw. Ct. 1977)). The court cited cases from several agencies in arriving at its decision: *FR & S, Inc. v. Department of Environmental Resources*, 537 A.2d 957 (Pa. Commw. Ct. 1988), *aff'd*, 560 A.2d 1392 (Pa. 1989); *Horsley v. Philadelphia Board of Pensions and Retirement*, 510 A.2d 841 (Pa. Commw. Ct. 1986), *aff'd*, 546 A.2d 1115 (Pa. 1987); *Bruteyn*, 380 A.2d 497; and *Human Relations Commission v. Thorp, Reed & Armstrong*, 361 A.2d 497 (Pa. Commw. Ct. 1977).

⁴⁰ 605 A.2d 1204 (Pa. 1992); see Daniel B. Vukmer, Note, *Lyness v. State Board of Medicine: Commingling of Prosecutorial and Adjudicative Functions*, 2 WIDENER J. PUB. L. 283 (1992).

Pennsylvania. The supreme court, recognizing the well-established principle that "due process is fully applicable to adjudicative hearings,"⁴¹ stated what it thought was a "clear path when it [came] to commingling prosecutorial and adjudicatory functions."⁴² The supreme court overruled the *Georgia-Pacific* decree necessitating proof of actual bias. Referring to prior cases, the supreme court reasoned:

Due process is not swept under the carpet simply because it is transgressed by a group of people, rather than a single individual. Indeed, the due process guaranty of the Pennsylvania Constitution is primarily directed at governmental (i.e. state) action, which generally presumes action of a municipal, administrative, or state governmental body, rather than a single individual.

. . . .

Thus, a mere possibility of bias under Pennsylvania law is sufficient to raise the red flag of protection offered by the procedural guaranty of due process. . . . [T]he mere *appearance* of bias must be avoided⁴³

Following the lead of the supreme court, one month after *Lyness*, the commonwealth court acknowledged that to avoid the "appearance of impropriety" the administrative adjudicatory function must be distinct from the prosecutorial function.⁴⁴

On January 14, 1993, the Pennsylvania Commonwealth Court again had the occasion to apply the *Lyness* rationale when it decided

⁴¹ *Lyness*, 605 A.2d at 1207 (quoting *Soja v. Pennsylvania State Police*, 455 A.2d 613, 615 (Pa. 1982)).

⁴² *Id.*

⁴³ *Id.* at 1208 (citing *Dussia v. Barger*, 351 A.2d 667 (Pa. 1975); *Gardner v. Repasky*, 252 A.2d 704 (Pa. 1969)).

⁴⁴ *Copeland v. Township of Newtown*, 608 A.2d 601, 602 (Pa. Commw. Ct. 1992) (holding that the board which suspended a police officer could not then sit as an impartial jurist on appeal); *see also Giffin v. Chronister*, 616 A.2d 1070 (Pa. Commw. Ct. 1992) (involving a complaint in equity brought against the insurance commissioner alleging an unconstitutional commingling of prosecutorial and adjudicative functions).

Bunch v. State Board of Auctioneer Examiners.⁴⁵ In *Bunch*, the board of examiners revoked an auctioneer's license. On appeal, the appellant argued that there was a "commingling of the prosecutorial and adjudicatory functions,"⁴⁶ and the commonwealth court agreed. The court reversed and remanded the license revocation order. In so doing, the court referred to the language in the *Lyness* decision that "even an *appearance* of bias and partiality must be viewed with deep skepticism."⁴⁷ The court further noted that *Lyness* instructed that when commingling occurs:

"The accused is forced to face the same body which heard allegations and formed prosecutorial judgments concerning probable cause (some of it perhaps inadmissible as formal evidence), now dressed in the robe of an impartial jurist. Such a schizophrenic face of justice, poses subtle dangers which threaten complete objectivity and is not permissible under the due process guaranty of the Pennsylvania Constitution, as interpreted by this Court for over three decades."⁴⁸

Thus it seems clear that by 1993 in Pennsylvania the mere appearance of the commingling of prosecutorial and adjudicatory functions within administrative agencies was enough to constitute a due process violation, and that proof of actual bias was no longer a necessary prerequisite.

C. *Post-Lyness & Bunch*

The *Lyness* mandate thus requires that two questions be answered. First, how does the current administrative system in Pennsylvania comply with this new mandate? Second, how will the system function in the twenty-first century? One would think that the best way to answer these questions would be to ask those in the system how they perceive the present law and how they intend to

⁴⁵ 620 A.2d 578 (Pa. Commw. Ct. 1993).

⁴⁶ *Id.* at 581.

⁴⁷ *Id.* (quoting *Lyness*, 605 A.2d at 1207) (emphasis in original).

⁴⁸ *Id.* at 582 (quoting *Lyness*, 605 A.2d at 1211).

comply with the strictures of *Lyness*. Unfortunately, because there is not a uniform system of administrative adjudications in Pennsylvania it is difficult to obtain a straight answer to either question. What can be said with certainty, however, is that little has changed, at least with respect to the structure of the administrative system in Pennsylvania, since *Lyness* and *Bunch*. One year after *Bunch*, the commonwealth court acknowledged that the Unfair Insurance Practices Act⁴⁹ contained language authorizing commingling of an insurance commissioner's duties.⁵⁰ However, in a six-to-one decision, the commonwealth court held that within the agency there existed sufficient "walls of division" separating the prosecutorial and adjudicatory functions.⁵¹

The tone of most of the commonwealth court opinions has been to mute the original *Lyness* mandate by limiting its application. The court stamped due process approval on less than full board and less than quorum adjudications, even when the commingled prosecutorial-adjudicatory brush tainted certain board members.⁵² It

⁴⁹ 40 PA. CONS. STAT. ANN. §§ 1171.1-.15 (1992).

⁵⁰ *Stone & Edwards Ins. Agency, Inc. v. Department of Ins.*, 636 A.2d 293, 298 (Pa. Commw. Ct.) (en banc) (requiring actual environment of commingled functions), *aff'd*, 648 A.2d 304 (Pa. 1994); *see also* *George Clay Steam Fire Engine & Hose Co. v. Pennsylvania Human Relations Comm'n*, 639 A.2d 893, 904 (Pa. Commw. Ct. 1994) (concluding that there was no commingling when 11 Pennsylvania Human Relations Commission members made final adjudications in cases in which commission staff members made findings of probable cause); *Cooper v. State Bd. of Medicine*, 623 A.2d 433, 436 (Pa. Commw. Ct. 1993) (holding that members of the State Board of Medicine may render a final adjudication as long as they were not involved in making the prosecution recommendations).

⁵¹ *Stone & Edwards Ins. Agency*, 636 A.2d at 300; *see also Lyness*, 605 A.2d at 1209 (providing that "[w]hat our Constitution requires . . . is that if more than one function is reposed in a single administrative entity, *walls of division* be constructed which eliminate the threat or appearance of bias" (emphasis added)).

⁵² *See Jabbour v. State Bd. of Medicine*, 638 A.2d 406 (Pa. Commw. Ct. 1994); *Merchant v. State Bd. of Medicine*, 638 A.2d 484 (Pa. Commw. Ct. 1994); *Batoff v. State Bd. of Psychology*, 631 A.2d 781 (Pa. Commw. Ct. 1993); *Cooper v. State Bd. of Medicine*, 623 A.2d 433 (Pa. Commw. Ct.), *appeal denied*, 636 A.2d 635 (Pa. 1993).

However, in *Marich v. Pennsylvania Game Comm.*, 639 A.2d 1345 (Pa.

also required raising the due process issue at the board level; otherwise, it considered the issue to be waived.⁵³

It is a shame that little has changed regarding the commingling of the prosecutorial and adjudicatory functions, especially considering that Pennsylvania possesses a rather disjunctive and non-uniform administrative adjudicatory process with various "fabricated" walls of division.⁵⁴ The most prominent example of this disjunctive system can be seen in the variety of agency decision making and hearing officer arrangements.⁵⁵ These arrangements cover

Commw. Ct. 1994), *rev'd*, 666 A.2d 253 (Pa. 1995), the commonwealth court held that the Pennsylvania Game Commission violated the petitioner's due process rights. *Id.* at 1347. The court based its holding on the fact that the hearing officer, a member of the Bureau of Law Enforcement of the Pennsylvania Game Commission, and the only Commonwealth employee present, "presented the Commonwealth's evidence; questioned the parties; and made recommended findings of fact and conclusions of law" which were adopted by the commission *in toto*. *Id.* at 1346. The commonwealth court held that this "appearance of bias" constituted an improper commingling of the prosecutorial and adjudicatory functions. *Id.* at 1347. The Pennsylvania Supreme Court reversed the decision of the commonwealth court, holding that the denial of due process for a hunting license is not constitutionally protected because it is not a deprivation of a person's life, liberty, or property interest. *Pennsylvania Game Comm'n v. Marich*, 666 A.2d 253, 257 (Pa. 1995).

⁵³ See *Singer v. State Board of Psychology*, 633 A.2d 246 (Pa. Commw. Ct. 1993).

⁵⁴ As early as 1977, the authors of *Hearing Officers in Pennsylvania: Recommendation for an Independent Central Office* verified this disjunctiveness when they stated that "[a]t present, Pennsylvania does not have a uniform system for making examiners available." Cokin & Mallamud, *supra* note 15, at 615.

⁵⁵ Cokin and Mallamud described the disjunctive nature of the administrative process in Pennsylvania in the following manner:

Both the Pennsylvania Human Relations Act and the Pennsylvania Securities Act of 1972 forbid the delegation of the hearing function; hearings in those agencies are conducted by the agency head or panels of members of [that particular] agency. Similarly, hearings concerning the fixing of milk prices must be heard before one or more members of the Milk Marketing Board. Initial hearings are also held before members of such boards and commissions as the Commission on Charitable Organizations, the Industrial Board, and several of the licensing boards within the Bureau of Professional and Occupational Affairs.

. . . [I]n workmen's compensation and unemployment compensation

a wide range of procedures, including processes in which "the administrative head conducts the hearing and renders a decision, to the use of part-time hearing officers either hired from outside the government on a contract basis or drawn from the existing legal staff of the agency."⁵⁶ In addition, the use of nonlawyers as hearing

cases, hearings are conducted by full-time employees who are subject to the state's civil service law. [Conversely, for licensing matters, t]he Liquor Control Board [(LCB)], employs on an annual salary basis, part-time hearing officers who are permitted to maintain their own law practices. [For enforcement hearings, however, the LCB retains full-time, independent ALJs.] In the Department of Agriculture, hearing officers are hired pursuant to a service contract and are paid on a per diem basis. Many other agencies, including the Department of Education and the Department of Labor and Industry, use an assistant attorney general or the agency's chief counsel to conduct hearings. Usually the hearing function is only one of a wide variety of duties these individuals perform. [By comparison, i]n the Department of Health, hearing officers are hired on an ad hoc basis in cases regarding new health care facilities.

Id. at 615-16 (footnotes omitted).

⁵⁶ *Id.* at 615. Although remaining, for the most part, in a relatively unaltered state, "[t]he hearing officer arrangement has . . . been changed in at least two agencies." *Id.* at 616. For example:

[i]n the Department of Public Welfare, a . . . "Hearing and Appeals Unit" was created [circa 1975] in response to a consent decree issued by a federal district court. And, [because] many aspects of the hearing system previously used by the Public Utility Commission [(PUC)] did not meet the due process requirements of the United States and Pennsylvania Constitutions, legislation [was passed in 1976] to improve the PUC's hearing system [by providing for] administrative law judges [to] hear cases and write recommended decisions.

Id. at 616-17 (footnotes omitted).

In addition, one commentator pointed out that, although the improvement in the hearing system at the PUC was a "positive step," perhaps it did not go far enough. He noted that

[t]he Senate Consumer Affairs Committee's Report, upon which the legislation was based, made some additional recommendations affecting commingling within the PUC. Before the new Act, the hearing officer simply presided at the hearing to control the admission of evidence. The Committee proposed, and its proposal was eventually accepted, that the office of administrative law judge, patterned after the federal model, be created. When he acts in place of the Commissioners, the

officers is not an uncommon practice.⁵⁷ To complicate matters further, some heads of agencies delegate hearing functions to full- or part-time employees or to their own personnel.⁵⁸ These delegated adjudicatory powers range from ruling on the admissibility of evidence to making recommendations, binding and non-binding findings, automatically reviewable decisions, and final decisions unless appealed.⁵⁹

Cokin and Mallamud⁶⁰ and Donohue⁶¹ confirmed the existence of this administrative morass. These authors, however, also presented scholarly reviews of alternative systems.⁶² These alternatives included creating partial central office systems,⁶³ implementing separate internal systems within the agency,⁶⁴ maintaining the existing system

presiding officer is now entitled to make a tentative decision and submit it to the Commission. Both the Committee and the legislature could have gone further, however, and provided that the administrative law judge's findings of fact be conclusive. If the hearing is truly to serve as a "trial court," the judge should have been given greater independence. It serves not only to separate functions within the agency, but also to further other agency purposes. Current procedures also allow the Commission to hear a case de novo on appeal.

Donohue, *supra* note 29, at 715 (footnotes omitted).

⁵⁷ For instance, the Pennsylvania "Labor Relations Board . . . utilizes some nonlawyers as hearing officers." Cokin & Mallamud, *supra* note 15, at 617. Similarly, "[t]he Board of Probation and Parole and the Bureau of Traffic Safety of the Department of Transportation also utilize nonlawyers to conduct hearings." *Id.* (footnote omitted).

⁵⁸ *Id.* at 615.

⁵⁹ See, e.g., 47 PA. CONS. STAT. § 4-402 (Supp. 1995) (providing that the LCB may delegate to hearing officers who will make recommendations on license requests).

⁶⁰ Cokin & Mallamud, *supra* note 15.

⁶¹ Donohue, *supra* note 29.

⁶² Cokin & Mallamud, *supra* note 15, at 622-26; Donohue, *supra* note 29, at 716-18.

⁶³ Cokin & Mallamud, *supra* note 15, at 623. Partial central office systems include a completely centralized office and an office that has a few ALJs to service only a few of the agencies. *Id.*

⁶⁴ Donohue, *supra* note 29, at 717-18.

with statutory restrictions,⁶⁵ prohibiting commingling of functions,⁶⁶ requiring minimum qualifications or civil service testing,⁶⁷ limiting part-time employment,⁶⁸ and requiring the filing of informational statistical reports.⁶⁹

One commentator suggested that "[t]he best solution would be a formal internal separation within the agency."⁷⁰ The goal of this compromise would be to maintain a consistent agency policy and to provide for protection against the commingling of prosecutory and adjudicatory functions.⁷¹ This solution, however, does not address the fact that there cannot be a truly autonomous and independent adjudicatory body within an agency when: (1) the offices are in the same building; (2) the agency seals are the same; (3) the assignment of the adjudicator is made by the same agency; (4) the staff and personnel are hired, promoted, disciplined, and paid by the same agency; and (5) the same agency approves or disapproves the purchase of the equipment, furniture, paper, bills, utilities, travel, education, and the like.⁷²

A general statute placing restrictions on the commingling of functions and requiring minimum qualifications would also be an improvement, "but would not render certain a fundamentally fair hearing with the appearance of impartiality [required by *Lyness*,] while maintaining the necessary administrative efficiency."⁷³ Finally,

⁶⁵ Cokin & Mallamud, *supra* note 15, at 622. The statute, as an example, would forbid a person who is the decision-maker from obtaining legal advice from the prosecutor. *Id.*

⁶⁶ Donohue, *supra* note 29, at 694-95.

⁶⁷ Cokin & Mallamud, *supra* note 15, at 622. An alternative to civil service testing is a requirement that all hearing officers have a law degree. *Id.*

⁶⁸ *Id.* at 623 (suggesting that limiting part-time employees should be combined with mandating minimum training requirements).

⁶⁹ *Id.* The reports should include "the number of cases heard [by the hearing officer], time of disposition, appeals taken, and other relevant [information]." *Id.*

⁷⁰ Donohue, *supra* note 29, at 717.

⁷¹ *Id.*

⁷² UNITED STATES CIVIL SERVICE COMMISSION, REPORT OF THE COMMISSION ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES 46 (1974) [hereinafter CIVIL SERVICE COMMISSION REPORT].

⁷³ Cokin & Mallamud, *supra* note 15, at 623.

although a partially centralized adjudicatory system would be a step in the right direction, states that started with a partially centralized office are now expanding and have determined that a completely centralized system is far more advantageous.⁷⁴ The ultimate conclusion, therefore, is that a partially centralized adjudicatory system would be an improvement, but that "a *totally* centralized system seems far more advantageous for providing fundamentally fair hearings."⁷⁵

The mandate of the supreme court to remove even the appearance of bias remains a great impediment to the administrative scheme in Pennsylvania. The solution is quite simple: follow the lead of our sister states and create a central panel system.⁷⁶ As will be discussed

⁷⁴ OFFICE OF THE AUDITOR, STUDY OF ADMINISTRATIVE ADJUDICATION IN HAWAII 11 (1991) [hereinafter HAWAII STUDY].

⁷⁵ Cokin & Mallamud, *supra* note 15, at 626 (emphasis added).

⁷⁶ This solution seems all the more reasonable considering the vast number of agencies that exist in Pennsylvania. The 1974 Mallamud and Carrow Study listed 27 different agencies. MALLAMUD & CARROW, *supra* note 23, at 6-73. In 1977 Cokin and Mallamud referred to 47 separate Pennsylvania agencies enumerated in PA. STAT. ANN. tit. 71, §§ 1710.1-.51 (1962 & Supp. 1977-78) (repealed 1978). Cokin & Mallamud, *supra* note 15, at 607 n.12.

Section five of the Judiciary Act Repealer Act, Act of April 28, 1978, No. 53, 1978 Pa. Laws 202, replaced the Administrative Agency Law, PA. STAT. ANN. tit. 71, §§ 1710.1-.51. The scope of the new Administrative Agency Law is set forth in subsection 501(a) of Title 2, which includes *all* Commonwealth agencies (without listing) but excepts from the provisions in subsection 501(b) proceedings before the following: Department of Revenue, Auditor General, or Board of Finance and Revenue regarding taxes and interest; proceedings before the Secretary of the Commonwealth under the Election Code; proceedings before the Department of Transportation relating to appeals from government agencies; and proceedings before the State System of Higher Education involving student discipline. 2 PA. CONS. STAT. § 501(a), (b) (1995).

As of the date of publication, there are 27 Commonwealth departments and commissions. They are the (1) Department of Aging; (2) Department of Agriculture; (3) Department of the Auditor General; (4) Department of Banking; (5) Department of Commerce; (6) Department of Community Affairs; (7) Department of Conservation and Natural Resources; (8) Department of Corrections; (9) Department of Education; (10) Department of Environmental Protection; (11) Fish and Boat Commission; (12) Game Commission (13) Department of General Services; (14) Department of Health; (15) Department of

later in this Article, Pennsylvania's sister states have already proven that such a system works and can provide a variety of benefits.⁷⁷

III. EFFORTS TO CENTRALIZE AT THE FEDERAL LEVEL

Presently, the federal government has 1374 ALJs serving approximately thirty agencies.⁷⁸ By sheer number, the efforts to centralize federal ALJs involves a bigger task than those efforts initiated on the state level. Yet, despite this immensity, past and present federal authorities have continued to push for a centralized system.

A. Past and Present Efforts

The earliest use of authorities similar to ALJs began in 1789.⁷⁹ Of course, no one proclaimed violations of due process during this initial use of administrative authority because the due process protection

Highways; (16) Historical and Museum Commission; (17) Human Relations Commission; (18) Department of Insurance; (19) Department of Labor and Industry; (20) Department of Military Affairs; (21) Public Utility Commission; (22) Department of Public Welfare; (23) Department of Welfare; (24) Securities Commission; (25) Department of State; (26) Department of Transportation; and (27) Department of Treasury.

In addition, there are numerous boards and commissions that are statutorily designated within the 27 departments and commissions. *See* PA. STAT. ANN. tit. 71, §§ 11-13 (1990).

⁷⁷ For a discussion of state efforts to centralize, see *infra* notes 112-18 and accompanying text.

⁷⁸ Telephone Interview with Joyce Harrell, Federal Administrative Law Judges Division (Feb. 28, 1996); *see* Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1343 n.6 (1992) (indicating that on October 1, 1991, according to the Office of Personnel Management, there were 1184 federal ALJs); Lubbers, *supra* note 5, at 276 (indicating that as of June 1981, there were 1119 federal ALJs).

⁷⁹ For example, the military appointed officers to determine which "soldiers were 'disabled during the late war,' . . . [and] customs officers who . . . were authorized to 'estimate the duties payable' on imports." 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.11 (2d ed. 1980) (alteration in original). These early appointments evidence that the federal government relied on individuals with expertise in certain areas to provide just decisions.

was in its infancy stage. It was not until the 1920s that the United States Supreme Court examined the commingling of the prosecutorial, investigative, and adjudicative functions within one governmental body. Subsequently, the Court held it to be inappropriate under the Due Process Clause of the Fifth Amendment.⁸⁰ As a result, legislators introduced several bills in Congress to create an administrative court. Unfortunately, World War II delayed these attempts.⁸¹

President Franklin D. Roosevelt initiated comprehensive studies in an attempt to eliminate the commingling of these three functions.⁸² In 1941 the Attorney General's Committee on Administrative Procedure submitted a report in which a majority of the committee expressed concern that the use of a separate body to handle administrative adjudication would result in decisions that are inconsistent with agencies' mandates and policies.⁸³ In addition, the committee was also concerned that such a system could either lead to a breakdown of responsibility between an agency and the adjudicatory body, or it could discourage negotiations and settlements.⁸⁴ Consequently, the majority's report rejected a unified administrative court.

A three-member minority, however, favored placing the adjudicatory function either in one independent body or in several specialized Article I courts.⁸⁵ The minority members concluded that [h]earing and deciding officers cannot be wholly independent so long as their appointments, assignments, personnel records, and reputations are subject to control by an authority which is also engaged in investigating and prosecuting. Of course, this dependence may be diminished

⁸⁰ *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (holding that the mayor violated due process of law when he acted as the chief executive in charge of the investigation and as the presiding judge).

⁸¹ KENNETH C. DAVIS, *ADMINISTRATIVE LAW TEXT* § 1.04 (1959).

⁸² EARL THOMAS, *ADMINISTRATIVE LAW JUDGES: THE CORPS ISSUE 19-21* (1987).

⁸³ *Id.*

⁸⁴ *See id.* at 20-21.

⁸⁵ *Id.* at 21.

by various devices, as the Committee has very rightly attempted. We think it clear, however, that such dependents [sic] cannot be eliminated by measures short of complete segregation into independent agencies.⁸⁶

Congress ultimately incorporated the majority's recommendations into the Federal Administrative Procedure Act in 1946.⁸⁷ However, had the minority's report prevailed, a system similar to what Congress is considering today might be in place.⁸⁸

Despite this initial rejection, authorities in the field have continuously supported a unified corps of ALJs appointed and employed by an authority separate from agencies. The Hoover Commission Report proposed a unified corps in 1955,⁸⁹ and in 1974 a federal advisory committee proposed a study of the corps idea.⁹⁰ Furthermore, former ABA President Bernard G. Segal⁹¹ and President Gerald Ford's Solicitor General, Robert H. Bork,⁹² advocated the unified corps in 1976 and 1977, respectively. In 1981, two renowned political science experts, Ronald Marquardt and Edward M. Wheat, argued for a unified corps.⁹³ From 1983 to 1989, Senator Arlen Specter supported the Heflin Bill.⁹⁴ In 1993, a new Heflin Bill was

⁸⁶ ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 209 (1941).

⁸⁷ Administrative Procedure Act of 1946, ch. 324, Pub. L. No. 46-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

⁸⁸ THOMAS, *supra* note 82, at 20-21. For a discussion of the Heflin Bill and the Gekas Bill, see *infra* notes 97-111 and accompanying text.

⁸⁹ COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT REPORT, H. DOC. NO. 128, 84th Cong., 1st Sess. 63-64 (1955).

⁹⁰ Palmer & Bernstein, *supra* note 3, at 679.

⁹¹ Segal, *supra* note 3, at 1426.

⁹² President Ford directed Solicitor General Robert H. Bork to head a committee to study the needs of the federal judiciary system. *State of the Judiciary and Access to Justice Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on Judiciary*, 95th Cong., 1st Sess. 243-44 (1977).

⁹³ Ronald Marquardt & Edward M. Wheat, *The Developing Concept of an Administrative Court*, 33 ADMIN. L. REV. 301, 317-21 (1981).

⁹⁴ S. 826, 102d Cong., 1st Sess. (1991) (sponsored by Senator Howell Heflin, former Chief Judge of Alabama).

introduced and approved by the Senate on November 19, 1993.⁹⁵ Despite years of action, the federal unified corps concept was in limbo until June 8, 1995, when Congressman George Gekas introduced House Bill 1802, a bill almost identical to the Heflin Bill, calling for the centralization of federal administrative law judges.⁹⁶

B. A History of the Heflin Bill

The previous Heflin Bill and the new Gekas Bill have two primary purposes: first, to remove ALJs from the supervision and control of the agencies that employ them and, second, to establish an independent, unified corps of ALJs.⁹⁷ To achieve these goals, the initial 1983 version of the Heflin Bill⁹⁸ devised an organizational

⁹⁵ S. 486, 103d Cong., 1st Sess. (1993).

⁹⁶ H.R. 1802, 104th Cong., 1st Sess. (1995). Congress reviewed other recommendations. The Joint Congressional Committee of the Congress, at the request of the Joint Office of Personnel Management,

agreed to do a study of what is referred to as "The Changing Role of Administrative Law Judges in Federal Agency Adjudication." The agreement was entered into March 1, 1991, [for completion by June, 1992] Significantly, the agreement . . . provides for a study of the increasing tendency of federal agencies to depart from the Administrative Procedures Act . . . , by using [ALJs] less and by relying on the use of nonadministrative law judge employees of the agency to hear adjudications more and more.

Charles N. Bono, *Another Study of Federal ALJs: The Never-Ending Story*, A.B.A. JUDGES' J., Winter 1992, at 23. A draft report was issued May 26, 1992, and a final report with recommendations was submitted on December 10-11, 1992. COMMITTEE ON ADJUDICATION, PROPOSED RECOMMENDATION: THE FEDERAL ADMINISTRATIVE JUDICIARY 1 (Dec. 10-11, 1992). There are some recommendations and suggestions to repeal existing protective provisions of the APA that insulate ALJs from improper agency pressure. *Id.* at 13. Additionally, agencies would be given authority to evaluate and rank ALJs' performances, and to grant awards, commendations, and bonuses to those ALJs who please the agency. *Id.* at 15. Also, an agency would be given a large list of new, minimally qualified ALJs from which it could select those individuals that the agency most wanted to be its independent adjudicator. *Id.* at 14.

⁹⁷ See 129 CONG. REC. S6609-10 (daily ed. May 12, 1983) (statement of Senator Heflin).

⁹⁸ S. 1275, 98th Cong., 1st Sess. (1983).

structure that called for "not more than ten but not less than four divisions" of "corps," and specifically divided the "corps" into "seven divisions reflecting areas of specialization."⁹⁹ These divisions included the following: "(1) Division of Communications, Public Utility and Transportation Regulation; (2) Division of Health, Safety and Environmental Regulation; (3) Division of Labor; (4) Division of Labor Relations; (5) Division of Benefits Programs; (6) Division of Securities, Commodities and Trade Regulation; [and] (7) Division of General Programs and Grants."¹⁰⁰

In response to the savings and loan crisis, the 1991 version of the Heflin Bill¹⁰¹ added one more division, the Division of Financial Services Institutions.¹⁰² The new Gekas Bill of June 5, 1995, is almost identical to the 1991 and 1993 Heflin Bills and provides the following: (1) each division would have a chief judge but no longer requires that the judge have a minimum of five years of experience as the Heflin Bills required;¹⁰³ (2) the chief judge of the corps and those of the respective divisions would be appointed by the President with the "advice and consent of the Senate" for a five-year term;¹⁰⁴ except five of the first division chief judges who shall have shorter initial terms;¹⁰⁵ (3) the chief judges would comprise the policy-making body of the corps known as the council of the corps;¹⁰⁶ (4) the council would have authority to appoint,¹⁰⁷ assign, reassign, or transfer other judges;¹⁰⁸ to prescribe rules and procedures;¹⁰⁹ and generally to

⁹⁹ Michel Levant, *A Unified Corps of Administrative Law Judges—The Transition from a Concept to an Eventual Reality*, W. NEW ENG. L. REV. 705, 707 (1984) (citing S. 1275, 98th Cong., 1st Sess. § 2 (1989)).

¹⁰⁰ *Id.*

¹⁰¹ S. 826, 102d Cong., 1st Sess. (1991).

¹⁰² *Id.* § 598(b)8.

¹⁰³ H.R. 1802, 104th Cong., 1st Sess. § 599(a) (1995); see S. 486, 103d Cong., 1st Sess. § 598(c)(2) (1993); S. 826, 102d Cong., 1st Sess. § 598(c)(2) (1991).

¹⁰⁴ H.R. 1802 § 599(a), 599a(c)(1); see S. 486 § 597(a); S. 826 § 597(a).

¹⁰⁵ H.R. 1802 § 599a(c)(2); see S. 486 § 598(c)(3); S. 826 § 598(c)(3).

¹⁰⁶ H.R. 1802 § 599b(a); see S. 486 § 599(a); S. 826 § 599(a).

¹⁰⁷ H.R. 1802 § 599b(d)(2); see S. 486 § 599(d)(2); S. 826 § 599(d)(2).

¹⁰⁸ H.R. 1802 § 599b(d)(1); see S. 486 § 599(d)(1); S. 826 § 599(d)(1).

¹⁰⁹ H.R. 1802 § 599b(d)(4); see S. 486 § 599(d)(4); S. 826 § 599(d)(4).

govern the corps' affairs and operations as a collegial council.¹¹⁰

Congress is still debating over the exact structure to be implemented, but as can be seen by the renewed interest, a federal central panel system appears to be forthcoming. The scheduling of a debate on the Gekas Bill before the Judiciary Committee of both Houses is imminent.¹¹¹

IV. EFFORTS TO CENTRALIZE ON THE STATE LEVEL

Many of the sister states of Pennsylvania have had tremendous success in developing central panel systems.¹¹² These states have proven that the overall effect on individual state agencies has been one of efficiency, effectiveness, and improved quality.

Pennsylvania is in the fortunate position to be able to review the structure and results achieved by these central panel states. The variety of items addressed by each state, such as the number of hearing officers, the average annual caseload, the locations throughout the state, funding sources, rules of procedure, and qualifications and salaries of hearing officers, are set forth in Appendix A to assist the Pennsylvania General Assembly. The empirical data summarized in Appendix A reveals that a central panel system can achieve tremendous results. In addition to these empirical results, the states now enjoy other benefits, all of which are attainable if Pennsylvania adopts a central panel system.

¹¹⁰ H.R. 1802 § 599b(d)(5)-(13); *see* S. 486 § 599(d)(5)-(13); S. 826 § 599(d)(5)-(13).

¹¹¹ Telephone Interview with Congressman George Gekas, United States House of Representatives (Aug. 15, 1995). The Author reconfirmed this point with a member of Congressman Gekas' staff on January 31, 1996. Furthermore, it should be noted that the American Bar Association supported the adoption of the Heflin Bill. Letter from Diane Livingston, Staff Director, ABA, to Joanie Work, Administrative Officer (Aug. 31, 1989) (on file with author) (confirming endorsement by the ABA House of Delegates).

¹¹² For example, Maryland increased the number of cases that the ALJs hear to 77,000, while reducing the number of ALJs. In addition to the states, New York City also centralized its administrative adjudication. New York's centralization increased efficiency by computerizing case tracking, electronically recording hearings, and computerizing case scheduling. *See infra* Appendix A.

Once established, a centralized panel structure will provide the Commonwealth with six very important benefits. First, a centralized system will guarantee, and be perceived by the public as guaranteeing, the impartiality of ALJs as fact-finders.¹¹³ Second, this system will improve the quality of hearings and decisions.¹¹⁴ Third, such a scheme will place the management and training of all ALJs in the hands of experienced officials whose understanding and appreciation of the duties and responsibilities of the office come from their actual performance of such duties and responsibilities.¹¹⁵ Fourth, many in-house staff and part-time outside personnel will no longer be required.¹¹⁶ Fifth, a reduction of overall costs will be realized.¹¹⁷ Sixth, an experienced, government-wide, politically insulated, career service would attract quality individuals.¹¹⁸

A. Guaranteeing Impartiality

A fundamental goal of those developing state central panel systems has been to give ALJs a certain amount of independence from the agencies over whose proceedings they preside.¹¹⁹ As of 1981, seven state central panel systems set out to achieve the basic goal of separating ALJs from the agencies that they served.¹²⁰ Each state, however, did so in a different way, adapting to unique political and economic considerations.¹²¹ These seven states included California (1945), Colorado (1976), Florida (1974), Massachusetts (1974), Minnesota (1976), New Jersey (1979), and Tennessee (1974).¹²²

¹¹³ Cokin & Mallamud, *supra* note 15, at 626.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 626-27.

¹¹⁷ *Id.* at 641.

¹¹⁸ *Id.* at 627.

¹¹⁹ Malcolm Rich, *Adapting the Central Panel System: A Study of Seven States*, 65 J. AM. JUDICATURE SOC'Y 246, 246 (1981).

¹²⁰ *Id.* at 247.

¹²¹ *Id.* at 248.

¹²² *Id.* at 249.

One impetus for creating a central "pool" of hearing officers, at least in Florida, Massachusetts, and Minnesota, "was displeasure among [the] legislatures with agency 'rule-making by fiat.'"¹²³ It should be noted that after surveying the ALJs in these states regarding independence, more than half supported separation from their respective agencies.¹²⁴

The other states, summarized in Appendix A, also had to consider the problem of impartiality. Each state had to decide how to separate the adjudicatory and prosecutory functions effectively. For example, the Minnesota Office of Administrative Hearings (OAH), in its report on its first decade, 1975 to 1985, stated that the central hearing office served as an independent and impartial buffer for the administrative process.¹²⁵ This buffer also eliminated the conflict of administrators trying to be impartial adjudicators while maintaining a close relationship with members of the regulated industry in an attempt to keep abreast of current events within the industry.

In 1988 the *Final Report of the Governor's Task Force on Administrative Hearing Officers*, recommending a central panel system for Maryland, provided as follows:

Having Hearing Officers assigned to a Central Panel would better indicate to the citizens and business community of Maryland that they would in fact receive an impartial and unbiased adjudication of their appeal. The Administrative Law Judges would not be dependent upon the agency-party for continued employment, salary, promotions, benefits, office space, parking permits, etc., and would not be subject to retribution or 'control' via a diminution of those items.¹²⁶

In 1990 the Hawaii Legislature began its own foray into mapping

¹²³ *Id.* (quoting Telephone Interview with Duane R. Harves, Chief Administrative Law Judge in Minnesota (September 1980)).

¹²⁴ *Id.* at 250.

¹²⁵ DUANE R. HARVES, THE STATE OF MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS 1975-1985: A REPORT ON THE FIRST DECADE 57 (1986).

¹²⁶ FINAL REPORT OF THE GOVERNOR'S TASK FORCE ON ADMINISTRATIVE HEARING OFFICERS 18 (June 28, 1988) [hereinafter GOVERNOR'S TASK FORCE]. For the text of the report, see *infra* Appendix B.

out a central panel system. Initially, it requested that the Auditor of Hawaii study the extent of administrative adjudication in the state.¹²⁷ In particular, it asked whether placing all hearing officers into a separate state office would promote efficiency and the appearance of impartiality in decision-making.¹²⁸ The auditor summarized the study as follows:

We explored the issue of whether separating hearing officers from their agencies and organizing them into a "central panel" would increase their independence, improve efficiency and make the process appear more fair. . . .

We believe that a central panel will enhance the appearance of fairness and lead to more confidence in government.¹²⁹

The auditor also surveyed the administrators of central panels in other states and reported that "[a]ll states cited improvements in impartiality and fairness. The comments ranged from Colorado's 'tremendous' to Florida's 'improved.' Tennessee said that the increased perception of impartiality and fairness by the public and the bar has been one of the most prominent and satisfying benefits."¹³⁰ The auditor's report recommended that Hawaii conduct a pilot test of suitable agencies to test the concept of a central panel and to evaluate the results.¹³¹ By January 1992, the Governor of Hawaii designated the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, to be the Pilot Central Panel for the State of Hawaii.¹³²

¹²⁷ HAWAII STUDY, *supra* note 74, at 1.

¹²⁸ *Id.* (citing S. Con. Res. 169, S.D. 1 (1990) (enacted)).

¹²⁹ *Id.* at i.

¹³⁰ *Id.* at 11.

¹³¹ *Id.* at 22.

¹³² Rodney A. Maile, *State of the States: Hawaii*, CENT. PANEL (Newsletter of the Central Panel States, Lutherville, Md.), Spring 1993, at 2. Five years ago, the Auditor of the State of Hawaii completed a legislative study on the administrative adjudication process, with particular attention paid to the desirability of creating a central panel of hearing adjudicators. The report, released in February 1991, recommended the legislature ask the governor to establish a task force with the responsibility of initiating, planning, implementing, and evaluating the pilot test of the central panel concept. HAWAII STUDY, *supra* note 74, at 31.

Similarly, Pennsylvania initially recognized a need for impartiality. The 1974 study of adjudicatory hearings in Pennsylvania, completed by Jonathan Mallamud and Milton M. Carrow, concluded that Pennsylvania needed fair and impartial hearings.¹³³ The committee recommended that a central office be established to provide hearing officers for administrative agency adjudications.¹³⁴ Such a central office would "offer the best opportunity for creating an independent group of hearing officers who could conduct fair hearings and, thereby, help to increase substantially public confidence in government."¹³⁵ Finally, the study also brought to light the need for independent hearing officers to appear fair.¹³⁶

¹³³ MALLAMUD & CARROW, *supra* note 23, at 91-92.

¹³⁴ *Id.* at 113.

¹³⁵ *Id.* This study further provided as follows:

The complete central office would have the best chance of creating an attractive career service capable of obtaining highly qualified people to become professional hearing officers. At the same time the central office would be able to assist such people to become experts in various substantive areas without sacrificing their independence. In my opinion, formed after considering the alternatives, a central office would have the best opportunity to increase the quality of administrative hearings on a continuing basis, while insuring that those conducting the hearings develop a sufficient understanding of the various substantive areas to insure a fair application of agency policy as well as a fair determination of the facts of each case with sufficient independence to protect the rights of private parties.

Id. at 113-14.

¹³⁶ *Id.* at 94-95. The authors also made the point that the hearing officer should be independent enough to be able to make a fair evaluation of past agency policy in an effort to achieve a fair decision without feeling the need to decide all open questions in favor of the agency. In considering the question of independence it is also necessary to remember that not only must the decision be fair in fact, but that the appearance of fairness may be crucial. One purpose of affording parties fair hearings is to achieve fair results; another purpose is to instill confidence in the fairness of the decision-making process. Both are important and although a decision may be fair, if it appears that an agency exercises control over a particular decision of

the hearing offices, outside of the on-the-record proceedings, the parties will not

B. Improving the Quality of the Hearing Process

The various central panel system states also recognized the need to increase the management, training, and quality of their hearing officials. The programs implemented by these states demonstrate the diverse ways in which the hearing process can be improved. For example, Minnesota implemented "a formal training program which include[d] training in areas of substantive law such as workers' compensation, discrimination law, [and] public utilities regulation."¹³⁷ As a result, the number of cases received for disposition increased from 4,620 cases in 1989 to 10,783 cases in 1995.¹³⁸

Both California and Colorado embraced the concept of total quality management. In particular, Colorado developed a computerized case-tracking system that significantly reduces delays in scheduled hearings from 264 days to 82 days.¹³⁹ The Colorado Legislative Audit Committee praised the division involved for doing more with less.¹⁴⁰ In addition, California consulted with officials in Colorado in its attempt to accomplish total quality management control.¹⁴¹

In response to a state budget crisis in 1991, the North Carolina

feel that the decision is fair. The basic idea is to make hearing officers sufficiently independent to make factual determinations uninfluenced by outcome-oriented institutional pressures, and to resolve open policy questions fairly, in harmony with previous agency determinations but also taking into account the arguments of the parties so that they can feel that they received a fair hearing. This goal applies both where hearing officers make decisions subject to appeal and where hearing officers merely make findings and recommendations for the determination of the agency head.

Id. at 95 (citation omitted).

¹³⁷ See HARVES, *supra* note 125, at 58.

¹³⁸ Telephone Interview with Sandy Haven, Assistant to the Honorable Kevin Johnson, Chief Administrative Law Judge in Minnesota (Feb. 14, 1996).

¹³⁹ Edwin L. Felter, Jr., *State of the States: Colorado*, CENT. PANEL (Newsletter of the Central Panel States, Lutherville, Md.), Spring 1993, at 1-2.

¹⁴⁰ *Id.* at 1.

¹⁴¹ Karl S. Engeman, *State of the States: California*, CENT. PANEL (Newsletter of the Central Panel States, Lutherville, Md.), Spring 1993, at 2.

Legislature created the Government Performance Audit Committee.¹⁴² The purpose of the committee was to check for poor management, waste, and inefficiency in executive branch agencies. The Speaker of the House and the President Pro Tempore of the Senate, along with influential legislators and other public officials, made up the committee.¹⁴³ The audit staff found that, at times, some agencies arbitrarily rejected an ALJ's recommended decision when doing so served the interests of the agencies.¹⁴⁴ Because of efficiency and the quality of the decisions, the committee recommended that the ALJ's decisions be final.¹⁴⁵

C. Improving Management and Training Programs

Maryland, on the other hand, focused on improving its ALJs by implementing a comprehensive training program. The Maryland Office of Administrative Hearings (OAH) established a training program to prepare each ALJ for certification in various areas of administrative law.¹⁴⁶ The plan was structured to train all ALJs in OAH priority areas and to train a select few ALJs in other subject areas.¹⁴⁷ A quality assurance director monitors the training plan for each ALJ, targeting training to OAH priorities and ALJs' interests.¹⁴⁸ The evaluation of an ALJ's performance is based in part on his progress during the training process. Initial training programs provide an overview of selected subjects, and less experienced ALJs are required to observe cases as they are heard by experienced ALJs.¹⁴⁹

¹⁴² Julian Mann, III, *State of the States: North Carolina*, CENT. PANEL (Newsletter of the Central Panel States, Lutherville, Md.), Spring 1993, at 5. The six states referred to above experienced the type of favorable results that central panel states enjoyed. *See also* Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75 (1994) (discussing the central panel systems in Maryland, North Dakota, and Texas).

¹⁴³ Mann, *supra* note 142, at 5.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ GOVERNOR'S TASK FORCE, *supra* note 126, at 19.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

The ALJs are certified by the OAH upon completion of their course work. Mock trials, videotaping, written course work, and subject matter courses, such as rules of evidence, are offered to ensure continuing education. This is similar to the "training programs provided by other central panel states."¹⁵⁰

To ensure the completeness of this training program, the Chief ALJ of Maryland does the following: develops a code of professional responsibility for ALJs, monitors the quality of administrative hearings, and submits an annual report on the activities of the office.¹⁵¹ The Chief ALJ receives assistance from a state advisory council and is responsible for making policy and evaluating performances.¹⁵² In fact, Maryland was the first state to implement an advisory council in order to provide a critique of its central panel system. In January 1992, an audit by the Maryland Department of Budget and Fiscal Planning pointed out that performance evaluations of ALJs are separated from the agencies by a ten-member Judicial Performance and Evaluation Committee.¹⁵³ This committee consisted of two five-member panels that utilized standardized protocols and rating forms which focused on an ALJ's abilities to preside, write, and progress in training.¹⁵⁴

Maryland recognized several benefits from the reorganization of its ALJs and the ALJ training program. To begin, while reducing costs due to a budget cut, the OAH experienced a ten percent increase in its case load to over 74,000 cases with about 59,000 hearings.¹⁵⁵ Furthermore, the office heard more complex cases arising from a greater number of agencies than it was originally structured to hear.¹⁵⁶ At the same time, the office did not experience an increase in the

¹⁵⁰ STATE OF MARYLAND: DEPARTMENT OF BUDGET & FISCAL PLANNING, MANAGEMENT REVIEW OF THE OFFICE OF ADMINISTRATIVE HEARINGS 9 (1992) [hereinafter MANAGEMENT REVIEW].

¹⁵¹ MD. CODE ANN., STATE GOV'T § 9-1604 (1993).

¹⁵² *Id.* § 9-1610 (1993). North Dakota replicated this approach with respect to visibility and accountability. See N.D. CENT. CODE § 54-57-08 (1991).

¹⁵³ MANAGEMENT REVIEW, *supra* note 150, at 12-13.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 27.

¹⁵⁶ *Id.* at 13.

average backlog of cases.¹⁵⁷

D. Reducing Staff

States adopting a central panel system experienced a huge reduction of staff. In North Dakota, for example, "[a]pproximately one year after the establishment of the Administrative Hearing Officer Division, only a few state agencies continued to maintain full-time and part-time hearing officers."¹⁵⁸ Therefore, "[t]he remainder of the state's agencies, boards, and commissions almost exclusively used the services of the Administrative Hearing Officer Division."¹⁵⁹

Tennessee enjoyed similar success. The legislature originally created the Tennessee Administrative Procedures Division "to provide hearing officers only for regulatory boards, [such as those in] the Department of Health and the Department of Commerce and Insurance."¹⁶⁰ However, because of the division's success and good reputation over the years, many more agencies voluntarily elected to do the same.¹⁶¹

Maryland also experienced a reduction from ninety ALJs prior to adopting a central system to seventy-seven in 1990. By 1995 there were only fifty-nine full-time and three part-time ALJs.¹⁶² In addition, from 1990 to 1992, there was a corresponding reduction of staff from 135 to 115 individuals.¹⁶³ Colorado also demonstrated a similar reduction in staff after implementing a total quality management

¹⁵⁷ John W. Hardwicke, *State of the States: Maryland*, CENT. PANEL (Newsletter of the Central Panel States, Lutherville, Md.), Spring 1993, at 3.

¹⁵⁸ Hoberg, *supra* note 142, at 84.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 78.

¹⁶¹ *Id.*

¹⁶² Telephone Interview with Bernice Verner, Assistant to the Honorable John W. Hardwicke, Chief Administrative Law Judge in Maryland (February 7, 1996).

¹⁶³ John W. Hardwicke, *State of the States: Maryland*, CENT. PANEL (Newsletter of the Central Panel States, Lutherville, Md.), Spring 1993, at 3.

program.¹⁶⁴ In 1988 the central panel system in New Jersey employed only forty-three full-time ALJs with 2.5 support staff members per judge, as compared to the previous 136 hearing examiners.¹⁶⁵ The Minnesota Department of Commerce reduced its total staff by forty percent with the number of hearing officers reduced by twenty-seven percent.¹⁶⁶

E. Reducing Costs

Other cost-saving measures can be realized in addition to the savings associated with a reduction in staff. Many of the central panel states, such as Maryland, Missouri, New Jersey, Tennessee, and Wisconsin, became more efficient and realized economic benefits as a consequence of central computerization.¹⁶⁷ Since the inception of its central panel system in 1979, New Jersey experienced a continuous and dramatic reduction of costs.¹⁶⁸

¹⁶⁴ See Karl S. Engeman, *State of the States: Colorado*, CENT. PANEL (Newsletter of the Central Panel States, Lutherville, Md.), Summer 1992, at 2-3.

¹⁶⁵ GOVERNOR'S TASK FORCE, *supra* note 126, at 23. In addition, the Chief ALJ of New Jersey estimated that had the old system remained in place, the cost to New Jersey would have been \$20 million compared to the then cost of \$7.5 million. *Id.*

¹⁶⁶ *Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcomm. on Administrative Practice of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 9-10 n.11 (1983) [hereinafter *ALJ Corps Act Hearings*] (statement of the Honorable Howard Kestin, Chief Administrative Law Judge for the State of New Jersey).

¹⁶⁷ See *State of the States*, CENT. PANEL (Newsletter of the Central Panel States, Lutherville, Md.), Summer 1993, at 1-4, 6-7.

The California central panel of ALJs, noted and widely respected for fairness and skill, did not have one decision rejected in the past year, despite the fact that each agency head had the authority to reject any ALJ decision and substitute a new one. These changes are estimated to have saved California \$800,000 in costs and \$2 million "in party litigation costs." Letter from Professor Michael Asimow, Professor of Law, School of Law at the University of California, Los Angeles, to Neil R. Eisner, Chairman of the Outstanding Government Service Award Committee (Apr. 8, 1993), in NEIL EISNER ET AL., REPORT OF THE OUTSTANDING GOVERNMENT SERVICE AWARD COMMITTEE (1993) (on file with the Author).

¹⁶⁸ *ALJ Corps Act Hearings*, *supra* note 166, at 9-10.

According to Chief Judge Duane R. Harves, the creation of the centralized Minnesota Office of Administrative Hearings dramatically decreased hearing costs and turnaround time in issuing decisions, while at the same time increasing efficiency.¹⁶⁹ Chief Judge Harves' statistics revealed a reduction of hearing costs for the Minnesota Public Utilities Commission from \$400,000 in fiscal year 1976 to \$311,330 in fiscal year 1977, and to \$184,219 for fiscal year 1982.¹⁷⁰ Other agencies experienced similar savings, such as the Minnesota Department of Commerce, which reduced its hearing costs from \$120,000 to \$60,000 in fiscal year 1982.¹⁷¹ Similarly, in late 1994 the Texas State Office of Administrative Hearings reported a 70% reduction in the cost of its hearing proceedings.¹⁷²

*F. Attracting Experienced and Politically Insulated
Career Professionals*

Jonathan Mallamud and Milton Carrow, in a 1975 study and report to the Pennsylvania Department of Justice, indicated that a central office would increase the potential for career development.¹⁷³ As the system works now, hearing officers conduct hearings in only a single agency. According to the study, more individuals would pursue a career as an ALJ in a centralized system because they would have the opportunity to work in a variety of agencies throughout the state.¹⁷⁴ This variety would combat the boredom that judges who continuously preside over the same issues face, thus having "the

¹⁶⁹ Duane R. Harves, *The Minnesota Experience*, MD. BAR J., Dec. 1986, at 18.

¹⁷⁰ *Id.* at 11.

¹⁷¹ Harves, *supra* note 9, at 263. Maryland also experienced cost savings associated with its central panel system. In 1993, that state reduced its budget from \$7.7 million to \$6.7 million—achieving a reduction in money spent while increasing the number and complexity of cases, and decreasing the backlog of cases. John W. Hardwicke, *State of the States: Maryland*, CENT. PANEL (Newsletter of the Central Panel States, Lutherville, Md.), Spring 1993, at 3.

¹⁷² *Texas: Developments in the States*, THE ADMINISTRATIVE JUDICIARY NEWS AND JOURNAL, Winter 1994, at 1, 7.

¹⁷³ MALLAMUD & CARROW, *supra* note 23, at 110.

¹⁷⁴ *Id.* at 121-22.

added benefit of attracting more members of the bar to pursue the career of administrative law judge."¹⁷⁵

Mallamud and Carrow discussed other benefits associated with the implementation of a central panel system. Their study indicated the following:

If the career were viewed as a career in fair decision-making, a quasi-judicial career, it would very likely attract people with very high qualifications who would not work as a hearing officer now, except perhaps on a part-time basis. At the same time, the creation of an administrative hearing service might lead to the development of a group of independent decision-makers within the administrative structure who would have the type of independence and respect now associated only with the judiciary.¹⁷⁶

The authors then argued that if the previous assertion was true, the public would have more confidence in the government "and it might enable the government, through the use of fair hearings, to carry out its policies in sensitive areas more easily than it can now."¹⁷⁷

The Maryland Office of Administrative Hearings may have the broadest jurisdiction and largest caseload of administrative hearings of any central panel agency in any state. It has been referred to as the "vanguard" in the central panel system.¹⁷⁸ In fact, after only eighteen months of operation, the Maryland Department of Budget and Fiscal Planning commended the Maryland OAH "for successfully consolidating a large number of disparate hearing units into a professional, well managed new agency. Management systems for quality assurance, case docketing, hearing scheduling and training for Administrative Law Judges . . . are either in place or in planning. The agency clearly has the potential for achieving excellence."¹⁷⁹

The prior discussion of these six factors demonstrates that the

¹⁷⁵ THOMAS, *supra* note 82, at 15-16.

¹⁷⁶ MALLAMUD & CARROW, *supra* note 23, at 121.

¹⁷⁷ *Id.*

¹⁷⁸ Hoberg, *supra* note 142, at 83; *see also* Appendix A (providing a list of these figures for the central panel states in Table 1).

¹⁷⁹ MANAGEMENT REVIEW, *supra* note 150, at i.

central panel states experienced problems, similar to those that Pennsylvania is currently experiencing, with their respective adjudicatory processes, and that these states chose to implement various types of central panel systems to rectify these problems. Most importantly, not one state that adopted a central panel system has reverted back to its previous fragmented hearing process. Additionally, most of these state panel systems experienced increased acceptance, expansion in use, uniformity of rules, improved efficiency, and overall cost reduction.

V. PENNSYLVANIA SHOULD ADOPT A UNIFIED ADJUDICATORY ADMINISTRATIVE PROCESS

Pennsylvania can and should adopt a central panel system to effectively carry out the administrative adjudicatory function. So long as accountability is retained within the respective administrative agencies, a central panel system has the potential to increase the overall effectiveness of the administrative adjudicatory process in Pennsylvania.

As with any other proposed reform, the centralized or unified system is not without its adversaries. The following concerns exist regarding the creation of an independent, centralized-adjudicatory agency: (1) the judges' experience with, and the necessary understanding of the policies of the agency; (2) the format of the central adjudicatory agency, including its scope and authority; and (3) the finality of agency decisions.¹⁸⁰ Although each of these concerns is valid, they do not outweigh the benefits associated with a central adjudicatory system. The consensus of a majority of those individuals within the legal community utilizing a unified system is that such a system is efficient and increases the quality of hearings and decisions.¹⁸¹

¹⁸⁰ See HARVES, *supra* note 125, at 57; Cokin & Mallamud, *supra* note 15, at 618-22; Palmer & Bernstein, *supra* note 3, at 693-703.

¹⁸¹ HARVES, *supra* note 125, at 57; Cokin & Mallamud, *supra* note 15, at 606; Edwin L. Felter, Jr., *Colorado's Central Panel of ALJs: The Hidden Executive Branch Judiciary*, COLO. LAW., July 1990, at 1308; Allen L. Tapley,

A centralized adjudicatory agency with a sufficient number of ALJs would provide all administrative agencies with the necessary resources to properly adjudicate matters within their jurisdiction. Such consolidation would afford economies of scale in terms of eliminating duplication of hearing facilities, law libraries, and support staffs, and would secure maximum benefits from computerized docketing and scheduling systems. Regarding the concern that experience and insight are needed to effectively adjudicate agency matters, the following will assist the hearing officer. First, a central system will attract more highly qualified individuals than does the present system. Second, by utilizing a specialized training program and assigning cases to experienced hearing officers, it is reasonable to expect that the high degree of skill necessary to adequately address the varied and complex matters that often arise will be achieved. Third, to assist them in their adjudicative functions, the centralized ALJs would be able to rely on law clerks' research and the litigants' briefs, just as the Pennsylvania judiciary does in its adjudications. All of this will be accomplished while maintaining the degree of impartiality necessary to increase overall judicialization of the administrative process.

Critics of the central panel system are also concerned with funding for this type of system. The central panel states use two mechanisms to finance the central office of hearing officers: (1) appropriations of general funds; and (2) the imposition of user fees.¹⁸² In Pennsylvania the central office could receive its own budget from the General Appropriations Fund. This method of appropriation would eliminate the detailed process of assessing appropriations for the various state agencies. The expenses could be borne entirely by the agencies using the central office services on a charge back system.

In 1977 the Pennsylvania Department of Justice estimated that state agencies expended approximately ten million dollars on the hearing process in Pennsylvania.¹⁸³ As noted earlier in this Article,

Letters: The Success of Unification, 65 J. AM. JUDICATURE SOC'Y 232, 232, 278 (1981).

¹⁸² See *infra* Appendix A.

¹⁸³ Cokin & Mallamud, *supra* note 15, at 640-41 n.138.

many states have experienced a decrease in costs as a result of their use of a centralized panel system.¹⁸⁴ Even if the use of a central office resulted in only minimal cost decreases, or perhaps even increased costs, these costs would be offset by the increases in the quality and fairness of the total administrative agency hearing process.

The centralized panel system is an attractive and necessary step. Once established, a centralized panel structure will reduce partiality, costs, and staff; attract experienced hearing officers; and improve the quality of the hearing process.

VI. CONCLUSION

The present system for applying administrative law in an adjudicatory hearing in Pennsylvania is fragmented and often fails to provide the basic appearance of fairness and impartiality. There is a nationwide movement to increase the "judicialization" of the administrative adjudicatory process and to make changes that increase the economic benefit to government. To date, twenty-two states have implemented some form of a centralized panel system, and the results have been extremely favorable.¹⁸⁵ Therefore, it should be abundantly clear that the governor of Pennsylvania or the Pennsylvania Legislature should appoint a task force to study this movement, as did the governor of Maryland in 1988¹⁸⁶

Convinced that significant dissatisfaction existed regarding the administrative hearing process in Maryland, the governor appointed a task force to examine the system. He specifically charged the task force to determine the following:

1. Is there a need to create a centralized system of

¹⁸⁴ For a discussion of reduced state costs, see *supra* notes 167-73 and accompanying text.

¹⁸⁵ For a table of the states that use the central panel system, see *infra* Appendix A.

¹⁸⁶ Analyzing the impact that unification would have on each agency would be a multifarious project. In order to have a complete and comprehensive evaluation regarding each state agency, it will be necessary to have a study performed with input obtained from members of the Legislative Budget and Finance Committee, and the Joint State Government Commission.

administrative hearing officers, as has been done in a number of States? If so, how should the centralized system be structured and financed? 2. If a centralized system of administrative hearing officers is not needed, what specific changes should be made to Maryland's current system of selecting and using administrative hearing officers? 3. What qualifications and training should be required of administrative hearing officers? 4. What procedures should be instituted to insure that the most qualified people are hired and retained as administrative hearing officers? 5. How should the performance of the administrative hearing officers and the overall process of administrative hearings be evaluated? 6. What specific procedures should be adopted to insure that the administrative hearing process is consistent throughout the State?¹⁸⁷

The final report of the Maryland task force has been included as

¹⁸⁷ GOVERNOR'S TASK FORCE, *supra* note 126, at 24-28 (responses omitted). The task force overwhelmingly concluded the following: First, it was "necessary to create a centralized system of Administrative Law Judges . . . organized into one independent office within the Executive Department," with a Chief Judge, appropriate assistants, and financed as the existing units within Maryland; second, "given the breadth of the problems noted," the task force "strongly [believed] that the better course of action would be to adopt the central panel concept" over other alternative changes to the existing system; third, as the minimum requirements for professional adjudicators, the administrative law judges must have membership in the Bar, with preference for experience in administrative hearings; fourth, "the administrative law judge cadre [should] be hired in unclassified service," dismissed only for cause, and have assurance of job tenure; fifth, "[t]he Chief [ALJ] should be . . . responsible for ensuring the efficient and effective performance" and processing of hearings subject to occasional legislative audit; sixth, all hearing units should be merged into one independent office headed by the Chief ALJ; and seventh, the task force further recommended the development of "one set of procedural regulations that would uniformly apply to the hearing of contested cases throughout all of the executive agencies." *Id.*; see *infra* Appendix B.

As a result of the favorable report of the task force, Maryland established a central "Office of Administrative Hearings" with ALJs as of January 1, 1990. MD. CODE ANN., STATE GOV'T § 9-1602 (1995); Exec. Order No. 01.01.1989.21.

Appendix B. The Pennsylvania legislature can draw from it during any deliberations that may arise if Pennsylvania pursues a study of a central panel system.

It is my hope that the data accumulated, set forth, and discussed in this Article will serve as a source of guidance and inspiration to encourage Pennsylvania to adopt a central panel system. At a time when the Commonwealth is attempting to limit costs while improving services, there has never been a more opportune time to investigate and propose a central panel system. By implementing a central panel system, Pennsylvania has everything to gain and nothing to lose.

APPENDIX A¹⁸⁸

CENTRAL PANEL STATES SURVEY 1992: TABLE 1

STATE	PLACE IN GOVERNMENT	LOCATION	NUMBER OF HEARING OFFICERS	AVERAGE ANNUAL CASELOAD
CAL.	Executive Branch	Regional Offices	39 Full Time	6,000
COLO.	Executive Branch	Regional Offices	10 Full Time 7 Part Time	13,100
FLA.	Executive Branch	Central Office	30 Full Time	5,000
MD.	Executive Branch	Central Office	Chief/Deputy ALJs Plus 56 Full Time	77,000
MASS.	Executive Branch	Central Office	8 Full Time	1,300
MINN.	Executive Branch	Central Office	11 Full Time 25 Part Time 27 Workers' Comp.	10,500
MO.	Executive Branch	Central Office	2 Full Time 1 Vacancy	2,000
N.J.	Executive Branch	Regional Offices	45 Full Time	11,000

¹⁸⁸ *Central Panel System Survey*, SUMMARY OF CENTRAL PANEL STATES' ACTIVITIES FOR THE 1992 CENTRAL PANEL CONFERENCE, October 1992, at tables 1, 2. As of 1992, 15 states and New York City had established a central panel hearing system. Iowa was one of the 15 central panel state in existence in 1992, however, Iowa is not included in this chart because it did not participate in the study conducted by those attending the 1992 Central Panel Conference. In addition, as of 1992, Hawaii had undertaken a two-year pilot program and was considering permanently implementing a central panel system. As of the date of publication, seven additional states had established a central panel hearing system. Schoenbaum, *supra* note 1. These states included: Texas, Wyoming, South Carolina, South Dakota, Georgia, Kentucky, and Louisiana. See table 4, Appendix A. In addition, as of the date of publication, six states and the District of Columbia had introduced legislation providing for the establishment of a central panel system. Schoenbaum, *supra* note 1.

N.Y. CITY	Executive	Central Office	7 Full Time 4 Vacancies	1,000
STATE	PLACE IN GOVERNMENT	LOCATION	NUMBER OF HEARING OFFICERS	AVERAGE ANNUAL CASELOAD
N.C.	Executive Branch	Central Office	Chief ALJ Plus 8 Full Time	1,400
N.D.	Executive Branch	Central Office	Director Plus 3 Full Time	600
TENN.	Secretary of State	Central Office	Chief ALJ Plus 8 Full Time	1068
WASH.	Executive Branch	Regional Offices	59 Full Time 1 Part Time	42,000
WIS.	Department of Administration	Central Office with Satellites	12 Full Time	3,600
WYO.	Independent Agency in Executive Branch	Regional Offices	3 Full Time 8 Part Time	5,500

CENTRAL PANEL STATES SURVEY 1992: TABLE 2

STATE	FUNDING SOURCES	ANNUAL BUDGET	RULES OF PROCEDURE	CODE OF ETHICS	TYPE OF DECISION
CAL.	User Fees	\$ 9 Million	APA	Canons of Ethics for Attorneys	Recommended & Final
COLO.	User Fees	\$ 1.3 Million	Own	Judicial Code of Ethics	Recommended
FLA.	User Fees	\$ 4.9 Million	APA	Judicial Code of Ethics & Attorney's Code of Ethics	Recommended & Final
MD.	General & Reimbursable Funds	\$ 6.7 Million (FY 1993)	APA	Own	Recommended & Final
MASS.	General Fund	\$ 473,000 (FY 1992)	APA	Canons of Ethics for Attorneys	Recommended & Final
MINN.	User Fees & Workers' Compensation Appropriation	\$ 5 Million	Own	Own	Recommended & Final
MO.	General Fund & User Fees	\$ 650,000	APA	Attorneys' Canons of Ethics	Final
N.J.	General Fund & User Fees	\$ 5.7 Million	APA & Own	Own & Judicial Code of Ethics	Recommended
N.Y. CITY	Budget Appropriation	\$ 1.7 Million	CAPA & Own	Code of Judicial Conduct & City Conflicts of Interest Law	Recommended & Final
N.C.	General Fund	\$ 2.13 Million	APA	Attorneys' Code of Ethics	Recommended & Final
N.D.	General Fund & User Fees	\$ 604,000	APA & Own	Attorneys' Code of Ethics	Recommended & Final
TENN.	General Fund & User Fees	\$ 622,574	APA & Own	Canons of Judicial Ethics	Recommended
WASH.	User Fees	\$ 6 Million	APA	Own	Recommended & Final

STATE	FUNDING SOURCES	ANNUAL BUDGET	RULES OF PROCEDURE	CODE OF ETHICS	TYPE OF DECISION
Wis.	General Funds	\$ 1.425 Million	APA & Own	Canons of Ethics for Attorneys & State Employees	Final
Wyo.	General & Highway Funds	\$ 600,000	In Process	Not Yet	Final

CENTRAL PANEL STATES SURVEY 1992: TABLE 3

STATE	QUALIFICATIONS OF HEARING OFFICERS	STATUS OF HEARING OFFICERS	SALARIES OF HEARING OFFICERS	APPOINTMENT OF CHIEF ALJ	TERM LENGTH OF CHIEF ALJ
CAL.	Experienced Attorneys	Civil Service	\$ 65,472 - 83,088	Appointed by Governor	Open-ended
COLO.	Experienced Attorneys	Civil Service	\$ 43,632 - 58,464	Civil Service Position	No Time Limit
FLA.	Experienced Attorneys	Civil Service	\$ 65,000	Appointed by Governor & Cabinet	Open-ended
MD.	Members of the State Bar	Exempt	\$ 33,000 - 62,000	Appointed by Governor	6 Years
MASS.	Experienced Attorneys	Exempt	\$ 36,000 - 46,000	Appointed by Sect. of Admin. with Governor's Approval	Open-ended
MINN.	Experienced Attorneys	Civil Service	\$ 59,000 - 65,000	Appointed by Governor	6 Years
MO.	Experienced Attorneys	Exempt	\$ 65,000	No Chief - All ALJs Appointed by Governor	6 Years
N.J.	Attorneys or Experience in Admin. Law	Exempt	\$ 66,150 - 81,900	Appointed by Governor	6 Years
N.Y. CITY	Attorneys Admitted in New York for Five Years Min.	Non-competitive	\$ 61,103 - 67,273	Appointed by Mayor	None
N.C.	Experienced Attorneys	Civil Service	\$ 44,000 - 72,000	Appointed by Chief Justice of State S. Ct.	4 Years
N.D.	Attorneys or Experience in Admin. Law	Civil Service	\$ 23,484 - 46,092	Appointed by Governor with Consent of Senate	6 Years
TENN.	Experienced Attorneys	Exempt	\$ 32,616 - 38,004	Appointed by Sec. of State	Open-ended
WASH.	Experience in Admin. Law	Exempt	\$ 40,668 - 52,056	Appointed by Governor	5 Years
WIS.	Experienced Attorneys	Civil Service	\$ 27,500 - 63,715	Civil Service Position	No Time Limit
WYO.	Experienced Attorneys: Five Years Private Practice Min.	Exempt	\$ 40,944 - 69,588	Appointed by Governor	Expires with Governor's Term

CENTRAL PANEL STATES SURVEY 1995: TABLE 4

STATE	YEAR CREATED	NAME	APPOINTING AUTHORITY, ALJ TERM	ALJs
CAL.	1945	Dep't of General Services, Office of Admin. Hearings	Governor, 4 years coterminous	38
COLO.	1976	Dep't of Admin., Div. of Admin. Hearings	Director of Administration	25
FLA.	1974	Dep't of Admin., Div. of Admin. Hearings	Governor & Cabinet	32
GA.	1994	Office of State Admin. Hearings	Governor	33
HAW.	1990	Office of Admin. Hearings	Governor	4
IOWA	1986	Dep't of Inspections & Appeals, Appeals & Fair Hearings Div.	Governor, 4 years	16
KY.	1994	Office of Attorney General, Div. of Admin. Hearings	Attorney General	4
LA.	1995	Dep't of State Civil Serv., Div. of Admin. Hearings	Governor	42
MD.	1989	Office of Admin. Hearings	Governor, 6 years	55
MASS.	1974	Admin. Law Appeals Div.	Secretary of Administration & Finance	8
MINN.	1976	Office of Admin. Hearings	Governor, 6 years	67
MO.	1978	Admin. Hearings Comm'n	Governor, 6 years	2
N.J.	1978-79	Office of Admin. Law	Governor, 6 years	45
N.C.	1988	Office of Admin. Hearings	Chief Justice, 4 years	9
N.D.	1991	Office of Admin. Hearings	Governor, 6 years	4
S.C.	1993-94	Office of Admin. Hearings	Legislature	6

STATE	YEAR CREATED	NAME	APPOINTING AUTHORITY, ALJ TERM	ALJs
TENN.	1974	Admin. Procedures Div.	Secretary of State	10
TEX.	1991	Office of Admin. Hearings	Governor, 2 years	70
WASH.	1981-82	Office of Admin. Hearings	Governor, 5 years	64
Wis.	1983	Dep't of Admin., Div. of Hearings & Appeals	Governor	15
WYO.	1992	Office of Admin. Hearings	Governor, 4 years coterminous	11

APPENDIX B

FINAL REPORT OF THE GOVERNOR'S TASK FORCE ON ADMINISTRATIVE HEARING OFFICERS

June 28, 1988

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I. EXECUTIVE SUMMARY

In response to important issues raised during the deliberations on House Joint Resolution 51 during the 1987 legislative session, Governor Schaefer appointed a Task Force on Administrative Hearing Officers by letter dated December 24, 1987. A copy of that letter is attached as Appendix A.

In his letter, the Governor indicated that there is a significant dissatisfaction among members of the Bar, the business community, and the public, in regard to the existing system of selecting and using administrative Hearing Officers. In the various offices within the Executive Branch, administrative appeals are heard by persons who are employed by that particular agency. (Types of hearings presently conducted are shown in Appendix G.) As such, these Hearing Officers are subject to the control and supervision of the agency which has rendered a decision or taken some action that is the subject of the appeal heard by the Hearing Officer. Naturally, the business, licensee or citizen who has contested the agency's action is concerned that they may not receive a fair hearing before this Hearing Officer. By contrast, a "Central Panel" of Hearing Officers, as employed by other states, combines the Hearing

Officers in a single independent unit, which provides hearing examiner services to a wide variety of State agencies.

In addition, other criticisms of the present system are that Hearing Officers often receive no training in conducting hearings or writing the resulting opinions, and that the Hearing Officers are not well supervised. Critics have also pointed out that the procedures and standards for the conduct of administrative hearings vary from State agency to State agency, and that the administrative hearing process is poorly operated. Furthermore, it is alleged that written opinions issued by Hearing Officers frequently do not withstand judicial scrutiny.

Because more people are affected by administrative decisions rendered by State agencies than by decisions of the judiciary, agency decisions have a pervasive influence in our society, and it is important that the citizenry of Maryland perceive the administrative appeal process as being fair and impartial. In his letter, the Governor indicated that it is important to improve upon the existing administrative hearing process, and to ensure fair and efficient administrative justice.

The Governor charged the 15 members of the Task Force (membership is attached as Appendix B) to examine the current system of selecting and using administrative Hearing Officers and to recommend needed changes to improve the system. The Task Force was specifically charged with answering the following questions, and a summary of our recommendations follows each individual question.

1. Is there a need to create a centralized system of administrative hearing officers, as has been done in a number of states? If so, how should the centralized system be structured and financed?

The Task Force overwhelmingly recognizes the need for and recommends the creation by statute of a centralized system of Administrative Law Judges in Maryland. The system should be financed as are the current units within State government, i.e. through the normal budgetary processes and allocations. Because the new system would be much more efficient than the present one, whatever additional

funds are needed to create it, would be offset by savings in the long run.

2. If a centralized system of administrative hearing officers is not needed, what specific changes should be made to Maryland's current system of selecting and using administrative hearing officers?

The Task Force believes that the better course of action lies with creation of a centralized system of Administrative Law Judges, as this approach would be more efficient than trying to correct, in a piecemeal fashion, the existing problems. The centralized system would not sacrifice agency expertise or eliminate ultimate agency responsibility for final decisions, but would ensure that facts are determined and proposed decisions rendered in an unbiased manner.

3. What qualifications and training should be required of administrative hearing officers?

The Task Force recommends that the Administrative Law Judges be individuals admitted to the Bar, that relevant experience be required for employment, and that ongoing training be instituted. However, existing non-lawyer hearing officers would be retained, and these positions would be upgraded through attrition.

4. What procedures should be instituted to insure that the most qualified people are hired and retained as administrative hearing officers?

The Task Force recommends that the Administrative Law Judge cadre be hired as unclassified employees, but that their dismissal be only "for cause." These judges should be better paid, and compensated in a more uniform fashion.

5. How should the performance of the administrative hearing officers and the overall process of administrative hearings be evaluated?

A Chief Administrative Law Judge should be made

responsible for ensuring an effective and efficient hearing process. Legislative audits or an advisory board could provide oversight.

6. What specific procedures should be adopted to insure that the administrative hearing process is consistent throughout the State?

With the consolidation of hearing functions within one office under one Chief Administrative Law Judge, consistency should follow institutionally as a matter of course. Additionally, it should be possible to adopt one set of procedures for governing the contested case hearing process throughout all State agencies involved.

More expansive replies to the above six inquiries are contained in part IV, below.

II. MATERIAL REVIEWED AND TESTIMONY RECEIVED

Pursuant to the Governor's charge letter, the Interim Report of this Task Force was issued on January 29, 1988, and a copy of that document is attached as Appendix C. As noted in the Interim Report, the Task Force members received their notice of appointment during the week of January 11, 1988. The first meeting of the Task Force took place during the evening of January 13, and 10 subsequent evening meetings took place, the last of which was on May 18, 1988. The Task Force members heard testimony on the deficiencies of the present system for hearing officers in Maryland. We also reviewed background material on the "central panel" concept that is used to a variety of degrees in approximately 13 other States around the country. In addition, the Task Force received in-person testimony, and was able to hear from and ask questions of the Chief Administrative Law Judge of the State of Minnesota, where the central panel concept was initiated many years ago, as well as from the Chief Administrative Law Judge for the State of New Jersey, which state also has a central panel. Other background material was distributed to each Task Force member, a partial list of which is listed in Appendix H.

In addition to these and other written materials, the Task Force heard from a variety of persons in Maryland who were interested in the subject matter before the Task Force. These persons are listed in Appendix D.

Also, the public was notified of our meetings and invited to attend, by way of advertisements published of at least some of our meetings, in the *Daily Record*, and in the Department of Legislative Reference's weekly publication on legislative committee and task force meetings.

Testimony delivered to the Task Force during its deliberations reflect the following problems in the existing system:

1. Presently, Hearing Examiners in the State are employed by, and under the control of, the agency where the contested case or other disputed action arises. Quite naturally, this gives the appearance of an inherent unfairness or bias against the appellant. Since the Hearing Examiners work for the agency which is a party to the dispute, citizens, businesses and some attorneys believe they will not receive impartial adjudication of their appeal, as the agency can hire and fire the Hearing Examiners, decide on their promotional opportunities and salary adjustments, their office accommodations, location of their work site, parking privileges, support staff, budget, and other managerial prerogatives, all of which impact in a major way upon the livelihood and working environment of the Hearing Examiners. We note, however, that while the appearance of inherent unfairness is alleged, no proof of actual bias was shown to this Task Force.
2. The Merit System selection process weeds out the people low salaries tend to attract, i.e. young people, because hiring preferences are mandated to be given to veterans, and which practice tends to exclude most women, since they are usually not veterans of the military. Consequently, the Merit System selection process often prevents consideration of a large percentage of the labor pool. The low salaries which are paid Hearing Examiners also serves to discourage the more competent and well-qualified individuals from applying, as they

cannot afford their normal standard of living on the State salaries which are offered. Better candidates are generally found outside of the Merit System, i.e. through hiring contractually or by obtaining individuals on a temporary (TP) basis.

3. Burnout exists to one degree or another among the Hearing Examiners in the different agencies, particularly in those agencies which only conduct one or two types of hearings. Some examiners spend years and years hearing and deciding the same type of case.
4. Smaller agencies may not have any Hearing Examiners on its staff. As a result, contractual Hearing Examiners are employed, requiring the agency to advertise for such services on bid, with bids being received by local members of the Bar. While this provides the independence that is sought, it is difficult for that individual to build up any expertise, or for the agency to be assured of expertise of the Hearing Examiner, since only limited experience is gained in that fashion. Some other agencies have only one Hearing Examiner, which allows for some ongoing experience to be accumulated by that individual; however, there is no peer consultation available, and an excessive amount of time is spent in researching issues, finding solutions, and in "recreating the wheel". Sole Hearing Examiners feel isolated without access to other more experienced Examiners, and they have no backup coverage in times of illness, or other absences such as maternity leave, vacation periods, and during times of excessive workload.
5. There are no Statewide consistent minimum qualifications for State employees hearing cases. Some Hearing Examiners have no law school training whatsoever, others are not members of the Bar, yet the typical Hearing Examiner is required to rule on procedural and evidentiary problems which are presented for the parties during the course of the hearing by licensed attorneys. The resulting rulings if erroneous can result in a disappointed or aggrieved citizen or business. This engenders a disrespect for the process, and a disenchantment with the justice which is supposed to be forthcoming from the Executive

Branch of State government. A basic problem is that Bar membership is not a minimum requirement to be a Hearing Examiner within Maryland State service. While not guaranteeing proficiency in the legal arena, having passed the Maryland Bar is an indication that the individual is adept at the proper application of legal principles and the rules of evidence. Hearing Examiners who have not mastered this knowledge in law school as confirmed by admission to the Bar are not going to master it through on-the-job training during a six month probation period upon being hired in the State Merit System.

In other States and in the Federal government, Bar membership is required as a minimum qualification for the administrative law judge position. Some agencies of Maryland State government which employ contractual Hearing Examiners require those individuals to be members of the Bar: for example, the Department of Education; the Department of Agriculture; the Nursing Home Appeal Board; the Retirement and Pension Systems; and the Health Claims Arbitration Office.

While some Hearing Examiner classifications allow for the substitution of Bar membership for the required number of years of experience, the low salary which is set for Hearing Examiner positions precludes most Bar members from even applying for the positions and, consequently, members of the Bar seldom appear on the eligible list for possible selection to Hearing Examiner classifications.

6. Hearing Examiners who are assigned to a particular agency cannot absorb a sudden influx of new cases as occurs from time to time, and they are not able to pick up heavier caseloads caused by long term illnesses or other absences of their co-workers. Similarly, an excess number of Hearing Examiners in one agency, caused by a drop in caseload, cannot easily be deployed to other agencies which may need help in their hearing offices. In some agencies, there may occur a cyclical influx of cases, as with Unemployment Insurance, or with the Tax Refund Intercept Program. As a result, individual offices may be extremely burdened during one time of the year, and then relatively inactive during other periods of the year.

7. The status of Hearing Examiners is perceived to be very low. There is a lack of prestige in holding such an office, and there is perceived to be a lack of respect of the private Bar for some of the Hearing Examiners. Recruitment for these positions when vacancies arise is difficult, since these are not sought-after positions by bright law school graduates. The low salaries and the often routine sameness of the cases serves to discourage many energetic and competent individuals from applying for these important positions, contributing to a self-perpetuating decline of quality of staff.
8. Training for hearing examiners is necessary. However, in the fragmented system as now exists, development of a training program is not practical, since it requires a great deal of time, effort and expertise. Although the hearing process is very similar among State agencies, the scattering of separate hearing offices results in each individual unit being too small to warrant the necessary agency resources to be devoted to training Hearing Examiners.

Currently, the training of Hearing Examiners is sporadic or non-existent, or if it exists, expensive. There is no one source of expertise or schooling on how to be an effective and competent hearing examiner, other than the National Judicial College in Reno, Nevada. Attendance there would approximate \$2,000 per individual. Presiding examiners need to be expert in handling objections, motions, intervenors, expert witnesses, and a full range of procedural and evidentiary problems which are attendant to many of the contested cases heard by the State's Hearing Examiners. There is no ongoing continuing education which is presently provided to the State's Hearing Examiners. Related to this, it has been pointed out that there is a need for an increased level of professionalism among these individuals.

The quality of the decision-writing of the hearing examiners has been challenged. Some hearing examiners are not familiar with the rules of evidence which should be applied in these proceedings, and are either overly inclusive or overly exclusive of testimony and documentary evidence. It has been said that written administrative decisions do not stand up to judicial

scrutiny on review. Hearing Examiners in several agencies are perceived to take too long to issue decisions, and backlogs in caseloads are not infrequent.

9. Some Hearing Examiners are seen by individuals who appear before them to exhibit a bias against one of the parties, either against the citizen/business or against the agency. Some Hearing Examiners exhibit boredom and disinterest in presiding over their hearings.
10. An effective review of the Hearing Examiners' written work product or conduct of the hearing is generally not made. It is perceived that supervisors only check for the correctness of the decision, i.e. its "bottom line" result.
11. Some Hearing Examiners are merely "doing time" until retirement. Some Hearing Examiners are not of judicial temperament. Under the Merit System, there is no existing way to select individuals based on such legitimate personality factors.
12. Some Hearing Examiners fail to develop the record and pursue questions where the appellant is not represented by legal counsel. If their decision consequently goes against the appellant, and if an appeal to court is filed, this can result in a time-consuming, expensive, and detrimental process to the citizens/businesses.
13. The current fragmented hearing offices do not allow for the pooling of resources. There is no central library of administrative law decisions. Administrative decisions of an agency may be overturned in court, and other agencies may not learn of the court's decision, with the result that similar unlawful or improper practices may be continued at these other agencies.
14. In many of the cases heard by boards and commissions throughout the State, an Assistant Attorney General presents evidence to the board or commission, and another Assistant Attorney General advises that board or commission on how to rule on legal motions and evidentiary rulings, and guides the boards and commissions on the content and form of the resultant decision. The perception of the appellants before the

board and commissions, again, is that the administrative agency has stacked the deck against them.

15. The myriad regulations which apply to hearings conducted by the wide variety of State agencies may discourage the private Bar from providing free or low cost legal representation to the poor of the State, since attorneys are required to spend additional time in familiarizing themselves with the procedural regulations of the several agencies. This presents an obstacle to the effective and fair presentation of cases before administrative agencies on behalf of individuals who cannot afford to pay for private legal counsel, but who nevertheless do need effective legal representation to obtain such benefits as unemployment insurance and welfare benefits.
16. The fragmented administrative hearing process presently in existence mitigates against any concerted effort being given to modernize the State's Administrative Procedure Act. With a number of concerned offices spread throughout the State agencies, there is no opportunity to share opinions and discuss problems within the existing system, as the individual State agencies are too myopic or weak to propose the necessary changes.
17. In those agencies where a cadre of Hearing Examiners do exist, some legal counsel for the agency do not fully present their points and authorities, or do not fully develop their facts and arguments in support of the agency's position, possibly because they perceive that the "captive" hearing examiner is already inclined to rule in favor of the agency.
18. The current Hearing Examiners who are not attorneys are not subject to the Code of Professional Responsibility nor to the Judicial Code of Ethics, both of which are mechanisms which would serve to heighten and professionalize the quality of hearings conducted in the administrative arena.
19. Separate agencies, by sending their respective Hearing Examiners to the same area of the State on the same or adjacent days to do only a few hearings, cause a loss of efficiency, and a waste of taxpayers' money. Cumulative travel time under the existing system is excessive.

20. Hearing Examiners employed by an agency are required to obtain their legal advice and guidance from their assigned Assistant Attorney General who, in most cases, is the same individual who, or from the same office, which appears before the Hearing Examiner in presenting the agency's case for adjudication. This results in the appearance of an unhealthy symbiotic relationship developing between the adjudicatory Hearing Examiner and the partisan Assistant Attorney General.
21. Salaries must be at a level to recruit and retain excellent staff, and a career ladder must exist to encourage competent adjudicators to remain in State government service. The pay scales for entry level Hearing Examiners, who are required in some cases to have a J.D. degree and two years of experience, are approximately the same as paid to school teachers who are newly graduated from college with a Bachelor's degree, and who work a ten-month year, and the salaries are about the same as is paid to registered nurses who do not have a Bachelor's degree.

Contractual court reporter services are paid approximately twice as much per hour as the Hearing Examiner who is presiding over the hearing, and that Hearing Examiner also receives a lower salary than the Assistant Attorney General or the Assistant Public Defender who appear before him. The national data show that Maryland Hearing Examiners earn less than half of the average salary nationwide for comparable positions. Paralegals and legal secretaries in the Baltimore area receive equivalent or higher salaries. Within State government, there is presently a great variety in the range of salaries paid to contractual Hearing Examiners, and so too even among Merit System Hearing Examiners who are employed by the various Departments in State Government. For example, contractual Hearing Examiners employed by the Department of Education, Nursing Home Appeal Board, and Retirement and Pension Systems are paid between \$47 per hour and \$70 per hour. Hearing Examiners with the Motor Vehicle Administration earn approximately \$14 per hour. The chief adjudicative position in the Department of Personnel has a salary fixed approximately

\$5,000 higher than the comparable position in the Department of Health and Mental Hygiene.

Many of the problems existing with the State's existing administrative hearing process can be related to the low levels of salaries paid for this work.

III. FINDINGS SUPPORTING A CENTRAL PANEL

As more information was gathered from the speakers and from the written material presented, the ultimate vote of the Task Force was overwhelmingly in favor of the central panel concept. During the course of our deliberations, we have identified a number of arguments which favor the recommendation of the central panel concept.

1. Having Hearing Officers assigned to a Central Panel would better indicate to the citizens and business community of Maryland that they would in fact receive an impartial and unbiased adjudication of their appeal. The Administrative Law Judges would not be dependent upon the agency-party for continued employment, salary, promotions, benefits, office space, parking permits, etc., and would not be subject to retribution or "control" via a diminution of those items.
2. Establishment of a Central Panel would facilitate a comprehensive and meaningful restructuring of pay scales and minimum qualifications, which would lead to a more professional and more capable corps of adjudicators who could render better decisions, faster. The current system has a chaotic pay and job classification fabric. Combining all hearings could result in multi-tier job classifications or designations, with salaries reflecting the type of hearing, and providing staff with an incentive to perform well.
3. A properly constituted Central Panel would preserve the expertise presently existing with current Hearing Examiners, who would continue to be used, at least initially, to hear cases from their former agency. However, cross-training would occur, and these Administrative Law Judges would become proficient in more than one subject, thereby increasing their job

satisfaction, as well as their value to the State.

4. Establishment of a Central Panel would allow for peer consultation, with the more experienced ALJs providing guidance and the benefit of their experiences to junior ALJs.
5. Back-up coverage necessary due to illnesses or other absences would be available. Larger number of cross-trained ALJs would allow a sudden influx of cases to be handled expeditiously. Since caseloads are not predictable or within an agency's control, the number of ALJs in agencies under the present system may be too high or too low, and the Central Panel would even out the workload.
6. Serving with a Central Panel ALJ corps would enhance the prestige and self-worth of the adjudicator, and a Central Panel would serve as magnet to which bright and capable attorneys would be drawn to government service. It would become an agency to which the better law school graduates would seek to apply, due to its prestige, the variety of cases, and the opportunities for intellectual stimulation and service to the public. It could employ law clerks and student interns, who could gain insight into the burgeoning practice of Administrative Law, and who could serve as ALJs upon passage of the Bar exam and upon gaining professional legal experience.
7. A Central Panel, due to its larger size, could develop a training program for ALJs to ensure that decisions are well-written, and that they could withstand scrutiny on appeal. A Central Panel would allow for better supervision of ALJs, and improvement through better supervision could be gained in demeanor and temperament. A Central Panel would facilitate the establishment of performance evaluation standards. A code of ethics for Administrative Law Judges could be developed and implemented by the Chief Administrative Law Judge.
8. A Central Panel would allow for the pooling of law books, journals, and support staff, and it would be economical to subscribe to electronic data research systems, such as WESTLAW or LEXIS. Duplicate subscriptions to the Annotated Code and to COMAR and other materials could be

eliminated, with savings realized thereby. Non-productive travel time could be cut drastically by assigning one ALJ to hear a variety of agencies' appeals in a given region of the State, since several Hearing Examiners, each from a different agency, travel there now. This would also increase the speed and efficiency of rendering decisions.

9. Establishment of a Central Panel would allow for a uniform or standardized format for decision writing. Decisions could be published, indexed and cross-indexed for the benefit of the ALJs, the practicing Bar, State administrators, and the public. A body of administrative law would thereby be developed to guide participants in resolving future problems, without having to resort to the expense of an adjudicatory hearing.
10. Having a Central Panel would facilitate the establishment of a single legal advisor to assist ALJs, someone who is well-versed in administrative law, and who does not appear before the Hearing Examiner to argue in contested cases.
11. A Central Panel would be a focal point from which would emanate suggested changes to pertinent statutes, such as the Administrative Procedure Act. The current fragmentation of hearing offices results in isolated, myopic, and disorganized approaches to bettering the State's APA.
12. A Central Panel would function more as an independent fact finding tribunal and proposer of decisions without sacrificing the ultimate agency responsibility for final decision-making. Attorneys on both sides would respect the process more, and would be more vigorous and exacting in their presentations, which would serve the ends of justice better, not only for the agency, but also for the citizenry/business concerns as well.
13. If ALJs were not attached to agencies, there would be a greater likelihood that agencies would be required to articulate their regulations more clearly, for the benefit of the regulated public/industry.

As noted above, the Task Force has voted overwhelmingly in favor of the Central Panel concept. We believe that the benefits of consolidating most of the Hearing Officer functions presently interspersed throughout the executive department into one office,

with one Director, outweighs any of the perceived or anticipated drawbacks. As noted earlier, there are approximately 13 states which presently have consolidated their hearing functions into one independent office. While some start-up difficulties would ensue, all of the states which have embraced this concept have been satisfied with the results, and have viewed the Central Panel model as a vast improvement over their previous fragmented and disorganized non-system, such as now exists in Maryland.

Evidence from these other States reflects that, by centralizing these functions, tremendous economies of scale have resulted, and taxpayers' money expended in the administration of this quasi-judicial hearing function has been diminished greatly. For example, in New Jersey, approximately 136 Hearing Examiners in 50 agencies were consolidated into a Central Panel. That office, as a result of this consolidation of functions and consequent increased efficiencies, now employs only 43 full-time administrative law judges, with a 2 1/2 to 1 ratio of support staff to sitting ALJ. The Chief Administrative Law Judge for New Jersey estimated for this Task Force that if the old system had remained in place, the total expenditures by the State for this service would now be approximately 20 million dollars, yet under the central panel, the State's cost is only 7.5 million dollars.

IV. TASK FORCE RECOMMENDATIONS

As a result of our inquiry and study, and in regard to the specific questions the Governor requested the Task Force to address, our responses are as follows:

1. Is there a need to create a centralized system of administrative hearing officers, as has been done in a number of States? If so, how should the centralized system be structured and financed?

After due consideration and deliberation, the Task Force overwhelmingly believes it is necessary to create a centralized system of Administrative Law Judges in Maryland. We believe that all presently existing hearing examiners, with the exception of highly unique agencies such as the Workmen's

Compensation Commission, the Public Service Commission, and the Inmate Grievance Hearing Examiners within the Division of Corrections of DPSC, should be organized into one independent office within the Executive Department. We believe the centralized system should be structured with a Chief Administrative Law Judge, an appropriate number of Deputies or Assistants, and utilize the existing hearing personnel who are now scattered throughout and employed by the various State agencies. The system should be financed as are the current units within State government, i.e. through the normal budgetary processes and allocations. Some other states having a Central Panel finance these operations by charging user agencies on a "fee for service" basis. However, we feel that Maryland's budgeting process can easily accommodate a centralized system, and anticipated savings with the new system should readily become apparent. The fiscal note for HB 1374, a bill introduced in the 1988 Session which has many of the characteristics we are recommending here, indicated that the cost of establishing such a new office could range from \$190,000 to \$727,000. The Task Force believes that this upper estimate may be too high, and that the initial expenditures could possibly be diminished by phasing in the transfer of hearing officers or staggering over time their move to a central location.

2. If a centralized system of administrative hearing officers is not needed, what specific changes should be made to Maryland's current system of selecting and using administrative hearing officers?

The Task Force has looked at the possibility of refraining from recommending a centralized system of Administrative Law Judges, and suggesting changes to the existing system; however, given the breadth of the problems noted, we strongly feel that

the better course of action would be to adopt the Central Panel concept, as its benefits greatly outweigh any perceived defects.

3. What qualifications and training should be required of administrative hearing officers?

It is the considered opinion of the Task Force members that membership in the Bar should be the minimum requirement for persons employed by the Central Panel as professional adjudicators. However, so as not to unduly work a hardship upon existing State employees who do not have this qualification, we would propose that such individuals be grandfathered into the new system with no diminution [sic] in pay, but that new hires be members of the Bar. Preferred qualifications would include past experience in presiding over administrative hearings or court hearings, or participation as counsel in evidentiary hearings under the APA, or in court.

4. What procedures should be instituted to insure that the most qualified people are hired and retained as administrative hearing officers?

Due to the critical importance of the decisions made by these positions, and since the experience of the existing hearing offices [sic] has been less than satisfactory in regard to their ability under Merit System procedures to hire the best qualified individuals, we recommend that the Administrative Law Judge cadre be hired in the unclassified service, but that the dismissal of Administrative Law Judges be only "for cause". Such a hybrid employment system between the classified and unclassified services would ensure that persons selected to fill these positions would possess the necessary personality, temperament and judicial qualities, in addition to formal education and training, to perform effectively as Administrative Law Judges. In

addition, since dismissal could only be "for cause," these Administrative Law Judges would not be subject to being dismissed upon the whim of an agency head or other high government official who is displeased with a particular decision rendered by that individual. Assurance of a reasonable job tenure is necessary to insure that an Administrative Law Judge renders a decision based on the facts and evidence, and not on account of improper or adverse influence being brought by the individual or individuals who are on the losing end of the case.

Current Hearing Examiners should retain their Merit System status, as should the support personnel who also would be moved to the new unit.

5. How should the performance of the administrative hearing officers and the overall process of administrative hearings be evaluated?

The Chief Administrative Law Judge should be made responsible for ensuring the efficient and effective performance of the administrative hearing officers assigned to this office, and should be required to ensure that the overall process of conducting administrative hearings is operating satisfactorily. The Chief Administrative Law Judge should consult with the Hearing Examiners of the various units within State government and work with them in setting appropriate standards to insure that hearings are processed promptly throughout the system. In addition, the Legislative Auditor could monitor the processes of the Central Panel office. Another alternative would be to establish an advisory committee or policy committee, the members of which would be appointed by the Governor, to ensure effective oversight of this office.

6. What specific procedures should be adopted to insure that the administrative hearing process is consistent throughout the State?

With the merger of all hearing units into one independent office, headed by a Chief Administrative Law Judge, it should be possible to develop one set of procedural regulations which would uniformly apply to the hearing of contested cases throughout all of the executive agencies. Any required variation in procedure should be able to be kept to an absolute minimum.

V. CONCLUDING SUMMARY

In summary, we would note that the members of the Task Force believe that the Central Panel concept, as outlined here, should be instituted in Maryland by appropriate legislation, with the particulars of a bill to be finalized by the Executive. We note that there is a real dissatisfaction among the citizens and businesses within Maryland with the existing administrative hearing process, as evidenced by recent events involving the Parole Commission, the Commission on Medical Discipline, and the Commission on Human Relations. The present fragmented system mitigates against the efficient disposition of appeals, primarily because of the inadequacy of the personnel and employment process. Since the minimum requirement for many of these positions is graduation from law school, it is apparent that the salaries are unattractive to individuals who have had to pay tuition and related expenses for college and law school. A Hearing Examiner in the nearby Washington, D.C. city government begins at approximately \$40,000 per year, and those in New Jersey begin at \$52,000 per year. The Task Force believes that much of the dissatisfaction with the current system insofar as it pertains to the demeanor, expertise, and productivity of the Hearing Examiners can be traced to the salary levels which are offered. We believe, however, that with the mandated requirement that these individuals be members of the Bar, salary levels will be set appropriately so that qualified and competent individuals will be attracted to this very important service within Maryland State government.

Finally, we emphasize that with the establishment of a Central Panel of Administrative Law Judges, the individual agency heads

will retain the ultimate decision-making authority which the law mandates be theirs. Therefore, while the initial hearing, with the testimony of witnesses and the presentation of documentary evidence, will be conducted by a Central Panel ALJ, the final agency decision rests with the executive head of the governmental unit which is involved. As Justice Frankfurter noted more than 35 years ago, an impartial and disinterested adjudicator preserves both the appearance and reality of fairness "generating the feeling, so important to popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162 (1951). By having a Central Panel Administrative Law Judge render the initial decision, the critical legal requirement of providing administrative due process is enhanced for Maryland's citizens and businesses.