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Striving for Efficiency in Administrative Litigation: North Carolina’s Office of Administrative Hearings

Julian Mann, III*

Due process of law\(^1\) is the driving force behind the need for efficiency in administrative litigation. The old adage, "Justice delayed is justice denied," describes in modern terms an inefficient hearings' system that cannot deliver justice.\(^2\) By contrast, an efficient hearings' system, one designed to move cases swiftly to trial, can deliver both justice and due process by avoiding unnecessary delay.\(^3\)

How is efficiency measured in a modern hearings' system? Although distinctions have been drawn between measuring "delay" and "pace" of litigation\(^4\), most authorities agree that an accurate gauge of

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\(^1\) "Law in its regular course of administration through courts of justice." BLACK'S LAW DICTIONARY 449 (5th ed. 1979).

\(^2\) See Anthony F. Vollack, Keeping A abreast of the Flood: How Judges Can Control Caseflow, 5 State Court Journal 8, 9 (1981); see Chief Justice Thomas O. Marshall, Workshop on Reducing Trial Court Delay (Dec. 10, 1986), reprinted in 2 PLANNING AND CONDUCTING A WORKSHOP ON REDUCING DELAY IN FELONY CASES (INSTITUTE FOR COURT MANAGEMENT OF THE NATIONAL CENTER FOR STATE COURTS) Tab 16 (1991); see also KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT § 8.06 (3rd ed. 1972) ("Delay may be the equivalent of denial of relief so that immediate judicial review becomes appropriate.").

\(^3\) "The time has come for the courts to reduce delay and to make efficiency a high priority of the judicial system." The North Carolina Courts Commission, Case Management (A Report by the Subcommittee on Structure of the Courts to the North Carolina Courts Commission) 5 (Jan. 1995) (on file with the North Carolina Courts Commission); see also William E. Hewitt, Courts that Succeed: A Tour of Six Successful Courts, THE CT. MANAGER, Spring 1993, at 4 (asserting that delay has a negative effect on the quality of justice).

\(^4\) Pace of litigation refers to the "time it takes a case to proceed from the filing of a complaint to the issuance of a verdict or judgment." Delay pertains to a particular case and refers to the "time beyond that which is reasonable for obtaining a just resolution of the case." JOHN A. GOERDT ET AL., REEXAMINING THE PACE OF LITIGATION IN 39 URBAN TRIAL COURTS 36 (1991).
efficiency is determined by monitoring the median time between the filing and resolution of court cases in a judicial system.  

Some of the variables which affect this efficiency measure are: (a) degree of intervention by the court in asserting control over dockets; (b) existence of Differentiated Case Management (DCM); (c) use of a computerized system to track cases; (d) time limits for discovery and motions; (e) case load per judge; (e) availability of Alternative Dispute Resolution (ADR); and (g) adoption by the court of a firm continuance policy. A system which is too focused on efficiency measures may unnecessarily rush due process. However, 

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5 American Bar Association, Standards Relating to Trial Courts § 2.52 (1985) (hereinafter "ABA Time Standards"). The ABA Time Standards call for disposition of 90% of general civil cases within twelve months of filing, 98% within eighteen months, and 100% within twenty-four months. See infra text p. 184.  
7 See Thomas A. Henderson, et al., Differentiated Case Management File Report 2 (July 1990) (on file with the National Center For State Courts) ("DCM [Differentiated Case Management] is a sophisticated means of early case categorization to facilitate individual case management and to move the cases in each category to conclusion with the procedures, information support, speed and resource appropriate for the particular category."); see Caroline S. Cooper et al., Differentiated Case Management: What is it? How Effective has it Been?, Judges J., Winter 1994, at 2.  
10 See Goerd, supra note 4, at 54; see also Chief Justice Burley B. Mitchell, Jr., Address to a Joint Session of the North Carolina General Assembly 5 (Mar. 21, 1995) (on file with the Clerk of the North Carolina Supreme Court).  
13 See George E. (Ted) Allen, Another View of the Rocket Docket, Trial, Apr. 1993, at 48 ("Disposition rates and speed, although important, should be balanced with other considerations. Concern for timeliness should not be allowed to elevate procedure over substance.").
more often than not, unnecessary delay occurs when courts ignore these variables.\textsuperscript{14}

\textbf{PERICULUM IN MORA}

(DELAY BREEDS DANGER)

Trial delay and its relationship to injustice compels judges, lawyers, and administrators to address the need for efficiency. In short, delay reduction is as much a matter of judicial and professional ethics as it is a question of judicial administration.\textsuperscript{15} To do nothing to resolve the problem of court delay is to acquiesce in a system which fails to consistently produce due process.\textsuperscript{16} The scales of justice cannot weigh accurately unless they are calibrated.

The need for efficiency exists in all courts from trials in the magistrate court to complex appeals in the supreme court. Administrative tribunals are no different. Trials in administrative forums assume

\textsuperscript{14} See BARRY MAHONEY et al., CHANGING TIMES IN TRIAL COURTS 194 (1988).

\textsuperscript{15} "A Judge Should Perform the Duties of His Office Impartially and Diligently. . . . (5) A judge should dispose promptly of the business of the court." N.C. Code of Judicial Conduct, Canon 3, § A(5) (1994). "A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials." \textit{Id.} at § B(1); \textit{see} GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS, \textit{Philosophy of General Rules of Practice} ("These rules are applicable in the Superior and District Court Divisions of the General Court of Justice. They shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them."); \textit{see} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1994) ("Diligence, A lawyer shall act with reasonable diligence and promptness in representing a client. COMMENT: (2) Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.").

\textsuperscript{16} "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. CONST., art. I § 18.
many of the characteristics of trials in judicial branch courts, and moreover, the United States Supreme Court has addressed the issue of delay and its relationship to due process in two significant administrative law decisions.

The ABA Time Standards were not originally intended to be applied to every administrative tribunal. Writing in the official introduction, Judge Robert C. Broomfield, Chairman of the National Conference of State Trial Judges (1983-84), excludes administrative litigation from the ABA Time Standards, not for the reason that administrative litigants are undeserving of timely due process, but that administrative tribunals may lack the necessary authority or resources to meet the standards. Judge Broomfield writes:

As contrasted with judicial branch judges, administrative law judges in the executive branch may have insufficient authority or resources to manage their caseloads in an effective manner. To insure the independence of their adjudicative decisions, the requisite authority should be conferred on these courts and sufficient resources allocated to exercise that authority. In the absence of such control over the means of managing cases effectively, it is not intended that these standards apply to administrative law judges, and they should be deemed exempted from application of them.

North Carolina's Office of Administrative Hearings (OAH) is an example of an administrative hearings system which does have control

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19 AMERICAN BAR ASSOCIATION, supra note 5, at 2.
over the means to manage its cases effectively; thus, it should be held accountable to the ABA Time Standards.

NORTH CAROLINA AS A CENTRAL PANEL

The General Assembly created OAH in 1985. North Carolina was the 13th jurisdiction in the nation to provide for a central panel system for administrative litigation. But what exactly is a "central panel" and how is it distinguished from other administrative law systems? Without delving into a detailed analysis, a central panel is an autonomous, quasi-judicial, executive branch agency composed of an independent cadre of administrative law judges who hear and decide a wide range of administrative cases. This system is designed to separate the hearings function from the investigative and prosecutorial functions in state administrative law. In the other

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decentralized state systems of administrative law, the ALJ is often employed by the same agency which investigates and prosecutes the action. However, the North Carolina General Assembly did not create a central panel solely in response to a need for autonomy. It was created equally in response to economic reasons based upon a study questioning the excessive cost of maintaining a decentralized system.

After its creation, OAH did reduce overall costs with the centralization of these administrative hearings but at that same time the central panel also produced unexpected advances in: competency of the adjudicator, perception of the impartiality of the decision-


24 The Office of Administrative Hearings is an independent, quasi-judicial agency under Article Ill, Sec. 11 of the Constitution and, in accordance with Article IV, Sec. 3 of the Constitution, has such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which it is created. The Office of Administrative Hearings is established to provide a source of independent hearing officers to preside in administrative cases and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process. N.C. GEN. STAT. § 7A-750 (1989).

25 See Hardwicke, supra note 21. ("The separation of adjudication from investigation and prosecution renders each process more efficient, more direct and more accountable.").

26 Tom L. Covington, Legislative Report to Representative William T. Watkins, Regarding the Costs of Rulemaking, Contested Cases, Appeals, etc. (Apr. 23, 1985) (on file with the North Carolina General Assembly, Legislative Services Office); see Michael Crowell (presently serving as Executive Director of the Committee for the Future of Justice and the Courts in North Carolina), Overview of the North Carolina Administrative Procedure Act (APA), History of Administrative Procedure Statutes in North Carolina 1-4 (Jan. 12, 1990) (on file with the North Carolina Bar Foundation).


28 See Segal, supra note 23 (suggesting that a central panel will attract more qualified ALJs).
maker,\textsuperscript{29} quality of the official record,\textsuperscript{30} convenience of hearings' locations, and broader access to administrative justice.


Not all states that have proposed legislation have adopted a central panel system. The State of Oregon has recently failed to enact a central panel after extensive study.\textsuperscript{31} Also, preceded by a lengthy study,\textsuperscript{32} the State of New York's Legislature twice enacted legislation creating a central panel system only to have this legislation vetoed by the Governor.\textsuperscript{33} Presently, the State of New York has introduced legislation to reconsider, for the third time, the wisdom of creating a central panel.\textsuperscript{34} This year, the Illinois legislature considered such a
move; however, the implementing legislation was withdrawn late in the session but will be reintroduced in the fall of 1995.\textsuperscript{35} Maine at one time established an administrative court which was fully judicial (vs. quasi-judicial) to hear administrative cases,\textsuperscript{36} but now this court is no longer in existence. Since 1981, the Model State Administrative Procedure Act has provided an alternative prototype for legislation creating a central panel,\textsuperscript{37} and for more than a decade, Senator Howell Heflin (D-Alabama) has sponsored congressional legislation which has in recent years won passage in the United States Senate, attempting to implement a central panel system on the federal level.\textsuperscript{38}

**COMPARING ADMINISTRATIVE LITIGATION WITH CIVIL LITIGATION**

Article 3 of North Carolina’s Administrative Procedure Act (APA) sets out the procedures governing administrative hearings and confers upon the Office of Administrative Hearings the jurisdiction to hear contested cases for most State agencies.\textsuperscript{39} In fact, North


\textsuperscript{36} See Rich & Brucar, supra note 21, at 10.

\textsuperscript{37} The Uniform Commissioner’s Model State Administrative Procedure Act (1981); see Hoberg, supra note 21, at 89; see also N.A.A.L.J. News, July 1995, at 4 (A committee of the National Association of Administrative Law Judges, chaired by President-Elect John W. Hardwicke, in conjunction with a committee of the National Conference of Administrative Law Judges, chaired by Edwin L. Felter, Jr., Chief Administrative Law Judge (Colorado), is circulating for comment a model state act to create an Office of Administrative Hearings).


\textsuperscript{39} Besides hearings, there are two other major divisions found in the Office of Administrative Hearings. Article 2A of the APA provides for and authorizes the publication of the North Carolina Register and the North Carolina Administrative Code by
Carolina's citizens are granted broad rights under the APA to challenge a wide range of bureaucratic actions.\textsuperscript{40} North Carolina is the only
central panel system that is exclusively petition-generated. Any person aggrieved may file a petition for a contested case hearing.

Prior to September 1994, North Carolina's appellate decisions restrictively interpreted OAH's jurisdiction. The North Carolina Court of Appeals construed the APA to mean that a citizen's right to file a contested case petition originated by reference to an organic statute outside of the APA. This organic statute must have specifically referenced the right to file a contested case hearing before there was subject matter jurisdiction in OAH to file a petition. However, in September of 1994 a unanimous North Carolina Supreme Court ruled

2) The Department of Human Resources in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes;
3) The Utilities Commission;
4) The Industrial Commission; and
N.C. GEN. STAT. § 150B-1(a) (Supp. 1994).

A contested case shall be commenced by filing a petition with the Office of Administrative Hearings... N.C. GEN. STAT. § 150B-23(a) (Supp. 1994). However, Article 3A of Chapter 150B provides for concurrent jurisdiction in OAH for certain agencies, primarily professional licensing boards. When exercising this concurrent jurisdiction, the agency requests that the ALJ preside at the agency hearing and no petition is filed. See RICH & BRUCAR, supra note 21, at 41. With the exception of social services cases in Colorado and public employee discharge and discipline cases in Minnesota, citizens are not granted direct rights to file petitions in other central panel states. (The trend nationally is to permit the citizen to directly file in the central panels, particularly those that hear workers' compensation cases.)

"Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or her person, property, or employment by an administrative decision." N.C. GEN. STAT. § 150B-2(6) (1991).


The jurisdiction of the OAH over the appeals of state employee grievances derives not from Chapter 150B, but from Chapter 126. The administrative hearing provisions of Article 3, Chapter 150B, do not establish the right of a person "aggrieved" by agency action to OAH review of that action, but only describe the procedures for such review.

in *Empire Power Co.* that any person defined in the APA as a "person aggrieved" and who was not otherwise specifically excluded by the organic statute, met the jurisdictional requirements to file a contested case petition in the Office of Administrative Hearings. Justice Whichard, writing for the court:

*Respondents misconstrue the relation of the organic statute to the NCAPA. The NCAPA confers procedural rights and imposes procedural duties, including the right to commence an administrative hearing to resolve disputes between an agency and a person involving the person's rights, duties or privileges. The organic statute may confer procedural rights and impose procedural duties in addition to those conferred and imposed by the NCAPA, but more importantly, it defines those rights, duties, or privileges, abrogation of which provides the grounds for an administrative hearing pursuant to the NCAPA.*

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In addition to the prerequisites of subject matter jurisdiction, the exhaustion of the mandatory settlement requirements found in G.S. 150B-22 remains as a condition precedent to the filing of a contested case petition. When first enacted, this statutory provision enunciated a new public policy in North Carolina requiring the citizen and agency to


45 *It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."* N.C. GEN. STAT. § 150B-22 (1991).
exhaust informal settlement negotiations prior to filing a contested case in OAH. The General Assembly stated affirmatively in its new public policy that administrative disputes should not lead to litigation without first requiring the parties to seriously explore alternatives. G.S. 150B-22 did not speak to a particular settlement procedure or provide for a neutral mediator. Without the assistance of an ADR facilitator, too often, the agency and citizen were not able to achieve a pre-contested case disposition.

Once the parties exhausted the settlement negotiations requirements, another precondition to OAH jurisdiction arises under G.S. 150B-23(f). The Petitioner must expeditiously file the contested case petition in OAH within 60 days from the date the agency notifies the Petitioner of the right to an administrative hearing.\(^46\) Petitioners who file outside this time limitation are barred.\(^47\)

The petitioner, in some fashion, must allege sufficient facts in the petition to establish one or more of the grounds specified in G.S. 150B-23 in order to state a claim for relief.\(^48\) To assist members of the public who are without legal representation, the Office of Administrative Hearings provides several pre-printed standardized forms (H-06, H-

\(^{46}\) N.C. GEN. STAT. § 150B-23(f) (Supp. 1994); however, the following are statutes which prescribe a shorter time period than 60 days:
1) 105A-7(b) - 30 days to file child support enforcement contested cases;
2) 126-38 - 30 days to file state personnel contested cases;
3) 110-94 - 30 days to file child day care facility contested cases; and
4) 113A-121.1(a) - 20 days to file Coastal Area Management Act contested cases.


\(^{48}\) The Petitioner must allege that the agency: "[S]ubstantially prejudiced the petitioner's rights and that the agency: 1) Exceeded its authority or jurisdiction; 2) Acted erroneously; 3) Failed to use proper procedure; 4) Acted arbitrarily or capriciously; or 5) Failed to act as required by law or rule." N.C. GEN. STAT. § 150B-23(a) (Supp. 1994).
06A, H-06B, and H-06C) where the Petitioner, normally the citizen\(^49\), need only fill in a few blanks, check a few boxes, and name a state agency as the Respondent. The use of a form petition is not mandatory, and most attorneys create their own pleading, alleging facts in enumerated paragraph much the same as with a civil complaint filed in a court systems under the Rules of Civil Procedure.\(^50\)

After completing the petition, the Petitioner must next file the petition with the Hearings' Clerk in the Office of Administrative Hearings.\(^51\) The Hearings' Clerk clocks in the petition with the date and time of receipt printed on the face of the petition. The Clerk also assigns a contested case number and agency designation\(^52\) for each petition. The petition is the initial pleading contained in the contested case file. As the litigation progresses, the parties file other pleadings, all marked with the appropriate number and designation in the contested case file. After the hearing, the recommended decision is

\(^{49}\) However, a "party" is defined as either the citizen or agency: "[A]ny person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate." N.C. GEN. STAT. § 150B-2(5) (1991) (emphasis added).

\(^{50}\) "The Administrative Procedure Act does not require the particularity of the pleadings of an indictment or a statement of the elements of a cause of action, as required at law or in equity, unless the proceedings are mandatory or penal in nature." N.C. Dept. of Correcrion v. Hill, 313 N.C. 481, 484-85, 329 S.E.2d 377, 379 (1985); see also DAVIS, supra note 2, § 8.02 at 196 ("The most important characteristic of pleadings in the administrative process is their unimportance.").

\(^{51}\) Due to the shortness of the time limitation, OAH permits the filing of petitions and other pleadings by facsimile (fax) transmission during regular business hours. N.C. ADMIN. CODE tit. 26, r. 03 .0101(4) (Feb. 1994).

\(^{52}\) The following are agencies and division against whom a large majority of petitions have been filed since 1986: Alcohol Beverage Control Commission (ABC), Crime Control and Public Safety (CPS), Child Support Enforcement Section of the Department of Human Resources (CSE), Department of Human Resources (DHR), Department of Justice (DOJ), Department of State Treasurer (DST), Department of Public Instruction (EDC), Department of Environment, Health, and Natural Resources (EHR), and personnel cases reviewed by the State Personnel Commission (OSP).
usually the final pleading filed.53 Thereafter, the Clerk certifies the decision and transfers the file to the agency making the final decision.

The petitioner must serve the respondent with a copy of the petition in much the same manner as a plaintiff serves the defendant in a civil action. Rule 4 of the North Carolina Rules of Civil Procedure is the preferred method for service in an administrative action. However, N.C. General Statute § 150B-23(a), which proscribes the service requirements under the APA, does not adopt Rule 4 as the standard for service but seems to permit a less cumbersome method. "The party who files the Petition shall serve a copy of the Petition on all other parties and, if the dispute concerns a license, the person who holds a license." Though the service requirements vary slightly, both the civil and administrative systems initiate litigation by service of process.

The foregoing description demonstrates that North Carolina's Office of Administrative Hearings assumes many of the characteristics of a county court system. With the filing and service of the petition, administrative litigation is initiated in a manner similar to the civil system. Litigants and their attorneys regularly file pleadings in the Clerk's Office of the Hearings Division. Likewise, the hearing follows at the conclusion of the pleadings phase in the administrative process. Because of this similarity, OAH generates statistical data which is comparable to the data generated in a civil system. By having all of these characteristics in common with a civil system, North Carolina is

53 The OAH Clerk's Office provides a central repository within State government for information concerning each contested case. A completed file includes all pleadings, exhibits, transcripts (or cassette recordings), as well as the recommended and final agency decisions. As a result of the file created by OAH, the public and courts are able to track and review each step in the OAH hearings' process.
capable of performing a statistical comparison of the relative efficiency between administrative and civil litigation. But before drawing these comparisons, certain other characteristics of administrative litigation must be addressed.

Certain contested cases are more complex causes of action than others. Among these are: Challenges to environmental permits and civil penalties, including claims to funds for leaking underground storage tanks (EHR); review of hospital certificates of need (CON); child day care license revocation and penalties (DHR); awards of competitive bids for state contracts (DOA); discharge of public employees (OSP); and denial of services or entitlement to special education services in public education (EDC). Other contested cases are less complex causes of action. Among these are: contests over the state's right to intercept taxpayer refunds to enforce past due child support (CSE); Alcoholic Beverage Control permit denial and penalties (ABC); and revocation of Women, Infant and Children (WIC) program certification for retail establishments (DHR). Although OAH treats most filings similarly, the more complex contested cases are placed on a slightly slower DCM track to hearing than are the less complex cases.

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54 Mann, supra note 26, app. B. Appendix B contains an enumeration of the causes of action which may be tried before the Office of Administrative Hearings.

55 The 1995 General Assembly transferred to OAH a cause of action previously heard by the Federal District Court, i.e. determination of eligibility for special services in "Willie M." cases (troubled youths). 1995 N.C. Sess. Laws Ch. 249. In addition, the General Assembly created a new administrative law cause of action pertaining to revocation of underwater easement leases in public trust waters of the State. 1995 N.C. Sess. Laws Ch. 529. The City of Raleigh has requested that OAH hear special use zoning cases to begin in the fall of 1995 after the adoption of a city ordinance to specify the procedure.

56 "D.C.M. is a system which provides for management based on individual case characteristics." Simmons, supra note 11, at 1010. However, with the notable exceptions of hospital certificate of need contested cases (complex) which must lead to a fairly rapid decision (within 120 days of the filing of the petition), and the child support tax
The similarities between OAH and a civil court system ends when venue is considered because Administrative Law Judges conduct administrative hearings in all of North Carolina's one hundred counties. N.C. General Statute § 150B-24 determines the venue for contested cases. The priorities are: (1) the county of residence of the Petitioner; (2) the principal office of the State agency; or (3) any other venue which the ALJ determines will promote the ends of justice. As a consequence of the one hundred county venue, OAH is responsible for securing a hearing room, a hearing assistant, a security officer, and a presiding judge for each hearing outside of Raleigh (as well as the other requirements necessary to conduct a hearing in each and every county in North Carolina). But any inconvenience caused to OAH under this system is a source of great benefit to the litigants who are not required to travel great distances to the State's capitol in order to try their administrative grievances. Although potentially OAH is responsible for conducting hearings in all one hundred counties, litigants are routinely directed to regionally convenient cities such as: Asheville (Buncombe County), Newton (Catawba County), Charlotte (Mecklenburg County), High Point (Guilford County), Raleigh (Wake County), Fayetteville (Cumberland County), Wilmington (New Hanover County), New Bern (Craven County), Halifax (Halifax County), and Elizabeth City (Pasquotank County). All the courtrooms in these

intercept contested cases (less complex) which often are delayed to secure district court domestic records, generally, OAH can establish tracks by case profile for purposes of D.C.M, without having to individually examine each petition.

57 The North Carolina General Assembly does not provide budgetary funding for rental of hearings' space for administrative hearings outside of Raleigh and Charlotte but, nevertheless, establishes the preferred venue as the petitioner's county of residence. The 100 county venue is a distinguishing feature of North Carolina's central panel system. Coordination of so many venues greatly increases the case disposition time for administrative litigation in North Carolina.
regional cities (except Raleigh and Charlotte) fall under the jurisdiction of the counties and the Administrative Office of the Courts. The clerks of court and other administrative officials have demonstrated unusual cooperation with OAH in providing hearing space for administrative cases. Since OAH does not lease or otherwise compensate the local governments for the use of these facilities, often the county will "bump" the administrative hearing at the last minute for a higher priority local case. Nevertheless, the use of these facilities for administrative hearings at no cost to OAH produces substantial savings to the taxpayers. To foster these savings, OAH seeks the goodwill and cooperation of local officials in order to continue receiving this windfall to the State. 58

THE OLD AND NEW SYSTEMS

Since the inception of OAH in 1986, there have been two different contested case scheduling systems. The first system was created in 1986 and operated under a decentralized scheduling system. The second system, based upon a calendar, was introduced in 1991. The early method had the advantage of providing each Administrative Law Judge with ultimate autonomy over the scheduling of each contested case. The ALJs individually set cases for hearing without reference to any calendar. This system worked well until the jurisdictional caseload increased to the point that such a random system could no longer

58 By maintaining the hearing location in courthouses, the need for security is greatly reduced. Also, courtrooms are by design a more efficient setting to conduct a hearing than are other sites. Attorneys and witnesses are more comfortable in this setting, and most courtrooms provide adequate space for court reporters and hearing assistants which lends itself to the creation of a better record of the proceedings. Lastly, courtrooms provide a neutral setting to hear contested cases. See also Hardwicke, supra note 21, at 43 (noting the importance of securing neutral locations for hearings).
efficiently accommodate the growing number of cases. The solution was to either add additional Administrative Law Judges to hear the cases or create a more efficient system. Thus, the second system was created to accommodate the need for efficiency.

Under the decentralized system, within five days of the filing of a petition, the Chief Administrative Law Judge randomly assigned each case to an Administrative Law Judge. The controlling assignment criteria was to insure that each judge maintained approximately the same number of pending cases. After assignment of the contested case, the Administrative Law Judge routinely issued an Order for Prehearing Statements. The parties had 30 days to complete and file this pleading. The Prehearing Statement is analogous to a responsive pleading in a civil action that when filed provides certain basic information about the case. After the return of the Prehearing

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59 Infra Table 2.1, at 186.

60 "While study is indispensable for disclosing the exact additional judge power needed to cure delay, it takes no ghost come from the grave to tell us that delay can be cured by adding more judges." HANS ZEISEL ET AL., DELAY IN THE COURT 8 (2nd ed. 1959); but see Mahoney, supra note 14, at 53 (suggesting that there may not be a valid correlation between number of judges and case disposition); see also CHURCH, supra note 12, at 80 (altering the relationship of judges to caseload without the court's control over pace of litigation may cause a fall in productivity); see also Thomas W. Church, Jr., Who Sets the Pace of Litigation in Urban Trial Courts?, 65 JUDICATURE 76, 78 (1981) (Court delay may not respond to the addition of more judges).

61 Under the authority of N.C. GEN. STAT. § 7A-751 and N.C. GEN. STAT. § 150B-32, the Chief Administrative Law Judge serves as the Director of OAH and makes all contested case assignments in both the old and new systems. See Russell L. Weaver, Management of ALJ Offices in Executive Departments and Agencies, 47 ADMIN. LAW REV. 303, 334 (1995) (concluding that it is preferable to have a Chief ALJ in charge of ALJ offices).

62 The old system may have unwittingly provided the ALJ with a disincentive to dispose of the assigned caseload. As long as the ALJ maintained an inventory of cases, no new assignments were made.

63 N.C. ADMIN. CODE tit. 26, r. 03.0104 (Oct. 1991).

64 An Order for Prehearing Statements requests the parties provide the following information: 1) The nature of the proceeding and the issues to be resolved; 2) A brief statement of the facts and reasons supporting the party's position on each matter in dispute; 3) A list of proposed witnesses with a brief description of his or her proposed
Statement within 30 days (or later if the time is extended), the Administrative Law Judge typically requested a telephone conference with the parties in order to establish a date and location for the hearing. Each case was individually scheduled in this manner, with little consideration directed towards collecting cases or creating a calendar.

Normally, about thirty to forty-five days elapsed between the filing of the petition and the scheduling of this telephone conference. The (one) calendaring clerk responsible for scheduling the telephone conference often had difficulty making contact with the parties or arranging a convenient time for all parties to be available for the conference. If successful, it was not unusual for the Clerk to have to deal with last minute cancellations because of conflicts which took precedence over the telephone conference. In this instance, the process was started again from the beginning. This OAH clerk spent most of each day scheduling conference calls for nine Administrative Law Judges.

During the telephone scheduling conference, the ALJ instructed the parties to select a hearing date and location. If agreement was reached, the presiding ALJ confirmed the setting in a scheduling order subsequently mailed to the parties. The scheduling clerk's next responsibility was to locate a hearing site in accordance with the scheduling order. The first priority was to secure a courtroom in a county courthouse, followed by a county commissioners' room or as a
last resort a conference room in a lawyer's office. Sometimes, no hearing site could be found that conformed with the scheduling order, prompting a second telephone scheduling conference. Nine Administrative Law Judges participated in this system on a case-by-case basis, funneling all requests for scheduling through one scheduling clerk.

North Carolina is a state spanning over 500 miles in length and 200 miles in width. It encompasses 100 counties with 100 courthouses. The Administrative Law Judge endeavored to set the case for hearing in the venue of the Petitioner's home county. Since there was no OAH calendar, the Administrative Law Judge, in theory, could schedule a hearing in Murphy one day, followed the next day by a hearing in Manteo over 500 miles away. Of course, this seldom occurred, but a typical week of hearings for an Administrative Law Judge required a diverse traveling schedule. There was seldom more than one case scheduled in a single location. Although the trial rate was fairly high in comparison to the number of cases scheduled overall, the total disposition rate was low merely because too few cases were set simultaneously for hearing.

Since only one case was scheduled at a time, continuances presented a dilemma for the Administrative Law Judge. A premium was placed upon the hearing of that one case as scheduled. If the judge granted the continuance, there was nothing remaining on a

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65 Actually, hearings have been tried in many different locations. One Administrative Law Judge tried a contested case to conclusion in a restaurant; however, this is a rare exception, as good hearing sites are normally available in all of North Carolina's 100 counties.

66 See 2 ROBERT P. BURNS, 100 COURTHOUSES, A REPORT ON NORTH CAROLINA JUDICIAL FACILITIES (1978). This work provides a rich history of North Carolina's 100 courthouses, as well as an excellent architectural analysis of each building.
Striving For Efficiency In Administrative Litigation

calendar to try, and if the Administrative Law Judge denied the continuance, one side might gain an unfair advantage. As a consequence of the dilemma, most of the Administrative Law Judges rigidly resisted granting any continuances. However, under hearing's rule .0118 in title 26, chapter 3 of the N.C. Administrative Code, continuances were allowed for good cause, and when they were granted, the ALJ returned the case to the calendaring clerk for rescheduling, i.e. establishing a telephone conference with the parties; procuring agreement on a new trial date and location; and issuing an amended scheduling-order confirming the new dates.

"NECESSITY IS THE MOTHER OF INVENTION"^67

Until the OAH caseload became unmanageable, the old system worked well enough and provided the Administrative Law Judge with greater autonomy in scheduling hearings. However, the public and their elected representatives began to take notice of the lengthening administrative hearings' process that prolonged resolution of administrative law cases. If OAH "drug its feet" in filing a recommended decision and then the agency took an additional year to make the final decision, it could be two years before an administrative case was reviewed by a judge of the Superior Court sitting in an appellate capacity. 68 Critics of the central panel began to voice concerns about the overall delay in resolving administrative law cases,

^67 Wycherley, Love in a Wood, Act III Sc. iii (1671)
^68 "Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article..." N.C. GEN. STAT. § 150B-43 (1991). See also N.C. GEN. STAT. § 150B-45 (1991) (designating where to file the petition for Superior Court review) and N.C. GEN. STAT. § 150B-51 (1991) (setting out the standards for review in Superior Court).
particularly in light of the economic value of some of the issues litigated.\textsuperscript{69} The General Assembly all but directed OAH to create greater efficiency measures in the hearings process in order to reduce delay. The General Assembly also amended the APA to require that the final agency decisionmaker issue its (final) decision no later than 180 days from the receipt of the OAH record.\textsuperscript{70}

With the assistance of several of the Administrative Law Judges and staff members, OAH created a calendaring system\textsuperscript{71} patterned after a docketing system which was already in place. The Alcoholic Beverage Control (ABC) cases were traditionally set on a calendar in regional cities every month. The regional cities were within a short driving distance, although not always in the same county, of the Petitioner’s residence. Since the ALJ cadre rotated to these regional cities for a specific week each month, why not set all contested cases in these regional cities? The new system would be fairly simple to incorporate into the existing ABC system.

Under the new system, the Chief ALJ still assigns the case to an Administrative Law Judge within five days of the date the petition was

\begin{footnotesize}
\textsuperscript{69} Some of these concerns were raised by the Legislative Study Commission at the time of the General Assembly’s consideration of the continuation of Office of Administrative Hearings in repealing the OAH sunset provision. See 1991 N.C. Sess. Laws Ch. 103; see infra text p. 185 and GPAC, infra note 111.

\textsuperscript{70} If the final decision is not issued within this time limitation, the recommended decision of the Administrative Law Judge is considered as adopted by the agency as its final decision. N.C. GEN. STAT. § 150B-44 (1991). This time period varies depending on whether the final decision maker is a board or commission.

\textsuperscript{71} This new master calendaring system captured many of the advantages of the civil calendaring system utilized by the Federal Eastern District Court of North Carolina. Under the Eastern District’s system, the Judge travels to the regional courthouse in the locality where the civil case was filed to conduct the trial. (This is not the same practice for the Eastern District’s criminal calendaring system.) SUSAN M. OLSON, CALENDARING PRACTICES OF THE EASTERN DISTRICT OF NORTH CAROLINA 9 (1987). OAH utilizes a rotational assignment system as is the case with the North Carolina Superior Court Judges who rotate every six months to a new district.
\end{footnotesize}
filed. Unlike the old system, however, the presiding ALJ immediately sends a Scheduling Order to the parties, setting a tentative week for hearing between 120 and 150 days from the date of the filing of the petition. The location is determined by the week of the ABC master calendar. It is no longer necessary to wait for the return of a prehearing statement or the scheduling of a telephone conference before calendaring a contested case. The assumption is that most litigants will be available for the hearing if informed of the hearing date four to five months in advance. The Chief Administrative Law Judge no longer randomly assigns cases. Following the ABC docketing system, venue is automatically established in the district in which the Petitioner lives although not always the same as the county of Petitioner’s residence. Nevertheless, this venue is, more often than not, within a short distance of the Petitioners’ residence. Consequently, many of the advantages of the local county venue are preserved. There are eight ABC districts encompassing five or more counties with a regional city in the middle of the district. All parties, including the agency officials, travel to the regional city for trial.

The Scheduling Order provides for flexibility as it only tentatively sets the week of hearing and location. The initial setting may be modified for good cause at the request of a party. Early conflicts are

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72 See Weaver, supra note 61.
73 “One of the most effective remedies to the cost of the litigation system is the establishment of rigid trial dates. Trial dates have a galvanizing effect on attorneys and parties alike; establishing the date promptly and firmly reduces the occasions for delay and gamesmanship.” A Report from the President’s Council on Competitiveness, Agenda for Civil Justice Reform in America 19-20 (Aug. 1991).
74 “Note that this schedule [order setting pretrial conference, discovery deadline and hearing date] was set by the court from the pleadings and other papers available quite soon after filing, without benefit of any discussion with the attorneys.” Steven Flanders, Case Management in Federal Courts: Some Controversies and Some Results, 4 JUST. SYS. J. 147, 151 (1978).
resolved. Rarely do the Petitioners or Respondents request their local county venue, unless it is necessary to accommodate a great number of witnesses or to accommodate some other legitimate venue consideration. The greatest advantage attributable to the new system is the multiple setting of cases during a trial week in a regional city. As a consequence, calendars are created in these central locations, and often ten to twenty cases are set for trial during a particular week.

The Scheduling Order also establishes discovery deadlines. All discovery is to be completed within two weeks before the hearing.\(^75\)

The hearing procedures governing administrative hearings vary widely from state to state.\(^76\) In North Carolina, both the Rules of Evidence\(^77\) and the Rules of Civil Procedure\(^78\) apply to the contested case process. Not all states require as much procedural formality as North Carolina but one advantage of this formality is to promote greater similarity between civil and administrative litigation. Also, the rules governing evidence and procedure are designed to make the process fair.\(^79\) However, these same procedures also cause litigation to become more complex, particularly in applying the rules of discovery.\(^80\)

\(^75\) "The task force recommends that each track within the district's system should provide time guidelines not only for trials but also for the completion of discovery." The Brookings Institution, supra note 9, at 19.

\(^76\) Hoberg, supra note 21, at 78 (Jurisdiction and Structure of Central Panels).

\(^77\) See N.C. GEN. STAT. § 150B-29(a) (1991) ("Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed, ... "); see also N.C. ADMIN. CODE tit. 26, r. 03.0121 (Nov. 1987).

\(^78\) See N.C. ADMIN. CODE tit. 26, r. 03.0101(1) (Feb. 1994). (This OAH rule applies the Rules of Civil Procedure to contested cases.)


\(^80\) "Parties in contested cases may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1." N.C. GEN. STAT. § 150B-28(a) (1991); see
For this reason, some administrative tribunals do not provide for or greatly limit discovery. Some commentators believe that the abuses in discovery may outweigh the advantages. Naturally, in the tribunals where discovery is not permitted, hearings proceed (or should proceed) along a faster track. However, in North Carolina most hearings are delayed at least 90 days to give the parties an opportunity to engage in discovery. The Office of Administrative Hearings does not have subject matter jurisdiction over many high volume administrative cases (e.g., motor vehicle drivers license revocation). Most OAH administrative litigation is either complex or highly complex. For complex administrative litigation, time for discovery must be built into the scheduling order. Not all lawyers engaging in administrative litigation will avail themselves of this much time for discovery. At the time of the filing of the contested case petition, it is difficult to predict which cases will require extensive discovery. By setting a discovery deadline for all cases (except CSE, EDC, and ABC cases), parties will know within five days of the filing of the petition not only what the discovery deadlines are, but that the discovery process must begin immediately. This technique avoids, too,
the need for telephone conferencing to determine discovery deadlines. It is true that significant reductions in delay can be realized by eliminating or greatly reducing discovery; however, the elimination of discovery flies in the face of the modern day approach to complex litigation, whether that complex litigation is in a civil courtroom or an administrative tribunal. Furthermore, discovery will not be utilized in all contested cases because of the expense involved. If the economic value of the litigation is small, likely the parties will forego the additional discovery costs of the litigation and proceed to a determination of the case at hearing. Most of North Carolina's minor civil litigation is governed by the Rules of Civil Procedure. Little delay is caused by applying the civil rules governing discovery to even simple litigation because the economic value will not justify costly discovery measures. The same is true in administrative litigation.

Mediation in administrative litigation was first established in North Carolina with the enactment of G.S. 150B-23.1 in 1993. It furthered the existing public policy favoring settlements between citizens and State agencies found in G.S. 150B-22. Not all contested cases are automatically referenced to mediation, but if the Chief Administrative Law Judge deems the case appropriate, an Order for Mediated Settlement Conference is issued within five days of the filing of the Petition. The parties are notified that they are required to select a

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84 See N.C. GEN. STAT. § 1A-1, Rule 1 (1990) (making Rules of Civil Procedure applicable to all proceedings of a civil nature); see also N.C. GEN. STAT. § 7A-220 (1989) (including de novo appeals of small claims to District Court).
86 Generally, the more complex contested cases heard in OAH are selected for mediation. See supra text, at 18.
mediator by agreement and if they fail to agree, the presiding ALJ will make the selection for them. The time for completion of mediation is also scheduled in the initial order. The entire mediation process is modeled after North Carolina's program for civil mediation.\textsuperscript{87} Mediation is not the only alternative dispute settlement technique available to the parties. In certain cases, a settlement conference may be held in lieu of mediation.\textsuperscript{88} One major difference between the two methods is that a settlement judge presides at the settlement conference instead of a certified mediator. All of North Carolina's ALJs have training in mediation. They utilize these skills at the settlement conference and, in addition, bring to the table their years of experience in presiding over similar cases. The settlement judge is never the presiding judge.\textsuperscript{89} As a consequence, no incompetent or prejudicial statements are heard by the judge who will try the case. ADR techniques are not employed in every instance. Only contested cases involving substantial rights or having significant economic value are referred for ADR.\textsuperscript{90} Cases initially selected for mediation will normally extend the scheduling of a

\textsuperscript{87} Due to the penal nature of many of the administrative actions which result in contested cases, administrative litigation may actually be a hybrid of criminal and civil law, e.g., a substantial environmental penalty is analogous to a criminal fine or forfeiture. Criminal sanctions are probably more difficult to mediate than are tort cases where the relief is purely monetary.

\textsuperscript{88} \textit{N.C. ADMIN. CODE} tit. 26, r. 03.0107(b) (Feb. 1994) ("A settlement conference shall be held at the request of any party, the [presiding] administrative law judge, or the Chief Administrative Law Judge.").

\textsuperscript{89} "Judges ordinarily should not adjudicate disputes which they have attempted to settle or about which they have received information on the merits through a non-adversarial route." Barry R. Schaller, \textit{Managerial Judgng: A Principled Approach to Complex Cases in State Court}, 68 CONN. BAR J. 77, 83 (1994).

\textsuperscript{90} The early statistical data collected by OAH regarding the mediation settlement conferences indicates that 37\% of these complex contested cases referred to mediation between February, 1994 and July, 1995 settled prior to, during, or after the mediated settlement conference. (Statistics are not available to measure the effectiveness of ALJ settlement conferences).
hearing date and, as a consequence, will lead to a slightly varied differentiated case management track for these cases.\textsuperscript{91}

In summary, within five days of filing the petition, the presiding Administrative Law Judge issues a scheduling order setting forth the following information: (1) the week of hearing; (2) the hearing site; (3) the identification of the presiding ALJ; (4) a discovery deadline; and (5) (if selected), an order referring the case to mediation or settlement conference with deadlines for completing ADR.\textsuperscript{92} Once this scheduling order is served, the parties and their attorneys know the time constraints of litigation, and they must begin to make arrangements to comply with deadlines. Only rarely will there be scheduling conflicts because everyone involved in the administrative litigation has at least four to five months advanced notice of deadlines. The parties know they must either settle their litigation or be prepared to go forward with the trial at the appointed time, notwithstanding protests by some attorneys.\textsuperscript{93} Actually, only fifteen to twenty percent of the cases calendared for hearing will be tried.\textsuperscript{94} The overbooking of a trial week is a common experience in trial courts and is similar to overbooking of

\textsuperscript{91} "The design of management tracks includes specific processes, procedures, time frames, management tools, and alternative dispute resolution techniques situated to the needs of the category of cases in general and tailored to the needs of individual cases." Simmons, supra note 11, at 1011.

\textsuperscript{92} Goerdt, supra note 4, at 67 ("One of the constant themes in this case management literature is the call for early and continuous control by the court over the scheduling of case events."). "Early and continuous court intervention in scheduling case events... has been espoused as effective devices for reducing delay in civil litigation." Id. at 47.

\textsuperscript{93} See Church, supra note 60, at 85 ("More court control over the pretrial period may force counsel to trial or disposition faster than they believe to be appropriate, but such actions by the court will generate a predictable and (if experience is any guide) intense outcry from practitioners who believe the accelerated pace is improper.").

\textsuperscript{94} Lisa Driscoll, Innovations Speed Civil Case Flow in First District, BAR BULLETIN, STATE BAR OF N.M., Feb. 11, 1993, at 1,4.
airline flights. Seldom will there be too many cases for the Administrative Law Judge to try during the week calendared for hearings. Setting more cases on a calendar than can apparently be tried recognizes that a certain number of cases will settle at the "courthouse steps."  

Although the new system is less than perfect, it is much more efficient than the previous decentralized system. Due to North Carolina's one hundred county venue, problems still remain with continuances and motions practice before OAH.

Prehearing motions in the nature of Rule 41(b) (Involuntary Dismissals) and Rule 56 (Summary Judgment) may be heard upon written motion without oral argument. If oral argument is deemed necessary, most Administrative Law Judges set a prehearing telephone conference to hear the motion. In other more complex cases, the Administrative Law Judge may actually set a special hearing for oral argument on the motion, particularly if the case is scheduled in a regional city. This normally means that the ALJ must make special calendaring arrangements with the parties in order to hear dispositive motions on the record.

Under the new system, Title 26, rule 3.0118 of the N.C. Administrative Code still governs continuances. Continuances are granted only upon proof of specific grounds: (1) death or illness of a party or attorney; (2) a court order; (3) lack of statutory notice of

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95 "Our system acknowledges that cases will be settled on the courthouse steps." Id. at 4. See also infra Table 3.1, at 187.
96 N.C. ADMIN. CODE tit. 26, r. 03.0115(b) (Nov. 1987).
97 Id.
hearing; (4) substitution of legal counsel; (5) any other good causes defined in the Rule.98

Firm trial dates settle cases.99 Attorneys who know that a continuance is an option concentrate less on the business of settlement. Title 26, rule 03.0118 in the N.C. Administrative Code is rather specific in its terms about the standards for continuances. The administrative law judges who strictly follow the grounds for continuances ultimately enhance settlement possibilities by resisting the motion for continuance. Once an ALJ earns a reputation for denying such motions, attorneys know what to expect, and they must make arrangements to either try or settle their contested cases. After all, the lawyers have been informed at least four to five months in advance of the date of trial as well as the deadlines of other significant case events. If these deadlines cannot be met, attorneys must move for a continuance.100 Under a new OAH policy,101 when continuances

98 "The objectives of setting early, firm trial dates can be easily defeated if attorneys are freely permitted to obtain continuances. Thus the task force recommends that each plan include a stringent 'good cause' justification for delaying trials and discovery deadlines." THE BROOKINGS INSTITUTION, supra note 9, at 21.

99 The trial should commence on the first date scheduled. Unpredictable trial dates breed last minute continuances and settlements. When the court creates pervasive doubt about the firmness of trial dates, counsel tend to defer trial preparation and then seek a continuance when pressed for trial. With sufficient notice of a trial date and the beginning of the trial on the first day set, counsel learn that the court means business, resulting in earlier settlements or pleas without an increase in the trial rate. AMERICAN BAR ASSOCIATION, supra note 5, at 10-11.

100 Unavailability of witnesses is a common reason for requesting a continuance. Some ALJs will now start the hearing without the witness and require the taking of the testimony of the absent witness by deposition or continue the hearing after the completion of all the other evidence and take the absent witness's testimony at a later date.

101 "Essential elements which the trial court should use to manage its cases are: (G) A firm, consistent policy for minimizing continuances." AMERICAN BAR ASSOCIATION, supra note 5, at 7.
are granted\textsuperscript{102} for meritorious reasons, the parties, whenever possible, must consent to the following: specify the exact reason for the continuance; indicate how a postponement will cure the need for the continuance; and otherwise announce the cases ready for hearing at the time of the future trial date. This new policy will eliminate objections to the next trial date by anticipating potential grounds for delay. Resisting unwarranted continuances is one of the court's best tools to resolve contested cases.\textsuperscript{103}

Statistical data is necessary in order to evaluate the effectiveness of any delay reduction program.\textsuperscript{104} Computer-generated statistical data for contested cases has always been available in the Office of Administrative Hearings. The computer software was specifically designed for this purpose in 1986. This software enables the Clerk's office personnel to track and retrieve statistical information based on certain queries.\textsuperscript{105}

\begin{footnotesize}
\textsuperscript{102} "We do not propose an excessively rigid continuance policy or mindless enforcement of arbitrary rules. Rather, a court should create the expectation that a case will be tried on the first scheduled trial date unless there are compelling reasons for a postponement..." CHURCH, supra note 12, at 69.

\textsuperscript{103} "Court readiness to try civil cases may well be the most effective settlement-inducing device. The assertion that only the reality of imminent trial produces fast and sure settlements was made by judges and attorneys in every court visited." Id. at 76.

\textsuperscript{104} "Computerized case tracking is essential to trial delay reduction and early case resolution." Goodman, supra note 8, at 256.

\textsuperscript{105} The IBM System 36 (and specially designed software) used by the Hearings Division, once state-of-the-art, is now clearly surpassed by new technology. A comprehensive study suggests the development of a new software program with integration of the new calendaring system into the Hearings Program with connection to a LAN (Local Area Network) as the System 36 is phased out. See State Information Processing Services (SIPS), Office of Administrative Hearings Needs Analysis, Tab 1 (March 30, 1995) (on file with OAH). Cost of the implementation of the computer study at OAH approaches $280,000. Legislative funding for this project was deferred to the 1996 Session of the General Assembly.

\end{footnotesize}
STATISTICAL REVIEW

Statistical data has been compiled and profiled into various tables which are depicted on the following pages. The primary function of the tables is to illustrate trends by comparing statistical data between the old and new calendaring systems. The important comparison years are 1989-1990, which were the last years under the old system, and 1993-1994, which are the years for which statistical data is available under the new system. It is beyond the scope of this paper to compute statistical correlations in order to establish relationships between independent and dependent variables. However, there are certain broad conclusions which may be drawn from the trends established by the data. An explanation of these conclusions will follow.

Table 1.1 and Tables 1.2(a) and (b) address OAH time dispositions in administrative law contested cases as compared to the ABA Time Standards.

The ABA Time Standards are generally recognized as the benchmark for case disposition in civil courts.\textsuperscript{106} Section 2.52 of the ABA Time Standards relating to trials in civil courts is in part quoted below:

\begin{quote}
\textsuperscript{106}At the aggregate or court level, however, the ABA disposition time standards provide a useful and widely accepted tool with which to determine the degree to which courts are concluding civil cases within a reasonable time period. In this study, the incidence of delay in civil litigation in a court is inferred from its performance in relation to the ABA disposition time standards. It is assumed that courts with a higher percentage of cases that exceed the ABA standards probably have
\end{quote}
(A) General civil - 90% of all civil cases should be settled, tried or otherwise concluded within twelve months of the date of case filing;  
(B) 98% within 18 months of such filing; and  
(C) the remainder within 24 months of such filing, except for individual cases, in which the court determines exceptional circumstances exist and for which a continuing review should occur.\textsuperscript{107}

![AVERAGE NUMBER OF DAYS BETWEEN FILING AND CLOSING DATES FOR OAH CONTESTED CASES](image)

**Table 1.1**

Tables 1.1 and 1.2(a) and (b) indicate that the Office of Administrative Hearings is in substantial compliance with the ABA Time Standards for civil case dispositions.

\textit{more delayed cases than courts that perform better compared to the ABA standards. GOERDT, supra note 4, at 36.}

\textsuperscript{107} AMERICAN BAR ASSOCIATION, supra note 5, at 11. In addition to the civil court dispositions, the ABA Time Standards also set guidelines for case dispositions in other types of litigation: Summary Civil, Domestic Relations, Felony, Misdemeanor, Persons in Pretrial Custody, and Juvenile proceedings.
Breakdown of length of time for OAH files to close

Table 1.2(a)

breakdown con't

Table 1.2(b)

One feature that distinguishes administrative litigation from civil litigation is that in a civil bench trial, the presiding judge renders a conclusive
decision subject only to review by an appellate court by a party who claims error. The percentage of appeals in comparison to trials is relatively small. In most central panel administrative tribunals, however, the administrative law judge renders a recommended decision which in every case must be reviewed by the administrative agency making the final decision. The initial appeal lies with the Superior Court (North Carolina's highest level trial court) which serve as the first tier of appellate review, and may, thereafter, be appealed as in any other civil case. These tables do not account for the time between the filing of the petition and the date of the final decision, but Table 1.1 does confirm a major OAH goal, i.e., the average disposition of all cases in a range of six to seven months. As Table 1.1 indicates, the case disposition time has increased slightly since 1992, but again, the case filings have substantially increased with the addition of 400 more cases in 1994 than in 1989.

The Governmental Performance Audit Committee, in reviewing the Office of Administrative Hearings in 1993, noted that there was an inherent delay to the citizen in this process. Nevertheless, the Office of

108 It is beyond the scope of this article to discuss the policy implications of the friction between the recommended and final decision maker. See generally Hardwicke, supra note 21, 49-53, citing George R. Coan, Operational Aspects of a Central Hearing Examiners Pool: California's Experience, 3 U. FLA. L. REV. 86, 89 (1975). For a statistical summary of agency agreement with the recommended decision, see Mann, supra note 27, app. C (subsequently updated through 1995).

109 See supra note 68.

110 See supra note 70.

111 A comprehensive performance audit was undertaken for each state agency in North Carolina by the General Assembly in 1992 which included the Office of Administrative Hearings. Government Performance Audit Committee [GPAC], Our
Administrative Hearings, for its part, is consistently on the mark with the ABA Time Standards for civil trials. Actually, the new calendaring system at OAH may have initially lengthened the case disposition time slightly because the hearing date is set at least 120 days from the date of the filing of the petition in order to accommodate time for discovery. This delay was not factored into the old system. However, the new system has allowed OAH to dispose of the increased case filings with the same number of ALJs with only a slight increase in the case disposition time.

### Table 2.1

Table 2.1 indicates the number of contested case petitions filed. North Carolina is not a high volume state in terms of the number of administrative filings; it is better known as a mid-size state, albeit on the lower end.¹¹²

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¹¹² Hoberg, supra note 21, at 87 n.93.
Table 2.1 not only clearly shows the 400 petition increase since 1989, but it also illustrates the upward trend in filings over the years, particularly the sizeable jump between 1991 and 1992. Again, case filings have significantly increased but the number of administrative law judges has not changed since the creation of the Office in 1986. The same number of judges hear and decide the increased case volume which averages 50 cases per judge per year.

**CONTESTED CASE PETITIONS WITHDRAWN OR SETTLED**

<table>
<thead>
<tr>
<th>Year</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>615</td>
</tr>
<tr>
<td>1990</td>
<td>744</td>
</tr>
<tr>
<td>1991</td>
<td>704</td>
</tr>
<tr>
<td>1992</td>
<td>878</td>
</tr>
<tr>
<td>1993</td>
<td>959</td>
</tr>
<tr>
<td>1994</td>
<td>910</td>
</tr>
</tbody>
</table>

Table 3.1 demonstrates the apparent success of the new calendaring system at OAH. Recall that the old system, at least as it pertained to withdrawals and settlements, required individual case settings with very few cases being calendared at the same time. The new system schedules cases in a particular region on a calendar numbering from ten to fifteen cases per setting. Table 3.1 indicates there was a 47% to 55% increase in the number of cases withdrawn or settled in 1993 and 1994 over the
number that was withdrawn or settled in 1989. The table also illustrates that the number of cases withdrawn or settled has increased steadily for every year, except for 1991.

Setting a firm trial date at the time that the Petition is filed requires lawyers to settle the case prior to hearing or be prepared to try the case as scheduled.113 The judicial administration literature stresses and reiterates the necessity of early and firm setting of trial dates.114 The OAH data supports the conclusion that cases will settle or be dismissed or withdrawn when parties are confronted with a firm trial date. It also serves to provide a method for quick termination of the weak case or one that is meritless. The administrative law judges take charge of their own calendars after the initial setting. Thomas Church suggests that in a system where judges take responsibility for the disposition of cases, this results in a more effective calendaring system.115 In the OAH system, the presiding judge takes a personal interest and responsibility for managing the calendar. The Administrative Law Judges are reviewed each year on their total case dispositions and number of decisions written.116 If cases are not moving

113 "When judges efficiently manage their cases, they assist the parties in resolving their disputes. Hands-on management policies have resulted in increasing settlements within nine months of filing to nearly 85% in some courts." A Report from the President's Council on Competitiveness, Agenda for Civil Justice Reform in America, supra note 73, at 18.

114 CHURCH, supra note 12, at 68-69.

115 Id. at 73.

116 "The two summary statistics commonly used to assess individual judge's performance in the individual calendar courts are the number of terminations in a given period attributable to a judge and the number of pending cases in the judge's inventory." Id.
through the system, the ALJ realizes that their case disposition rate will suffer. The ALJs are competitive by nature and each one strives to do the best job possible.\footnote{171}

**CONTESTED CASE PETITIONS PENDING AS OF 12/31**

Table 4.1 indicates that there is an increasing backlog of cases each year at OAH. The backlog per judge is normally an indicator of the pace at which a court system disposes of cases.\footnote{172} The pending cases at OAH have increased at a 50% rate between 1989 and 1994, but the ratio of pending cases to the total number of cases closed has remained relatively constant, and for each year the case dispositions have exceeded those pending at the end of the year. A ratio of one-to-one is considered by most experts as an indication of efficiency. Again, the total contested case filings have increased and the total backlog has also increased; however, the

\footnote{171}{Id.}

\footnote{172}{"Size of the pending caseload per judge emerges as the strongest correlate of the pace of civil case litigation in these urban trial courts." GOERDT, supra note 4, at 54.}
number of ALJs has remained constant.\textsuperscript{119} Also, the ABA Time Standards have remained relatively constant despite the increased case filings.\textsuperscript{120} Thus, the pace of administrative litigation has not been significantly affected by pending cases per judge. The Office of Administrative Hearings will monitor the pending backlog of cases under the new continuance policy implemented in 1995 to see if the new policy reduces the rate of increase in the backlog. Under this new (but still restrictive) policy, the Administrative Law Judge will not retain control over the cases continued but will set a continued case onto the calendar of the next Administrative Law Judge who will appear in that same region the following month. Perhaps, this new policy of "rolling" cases will reduce the volume of pending cases by moving the case forward onto the next calendar as opposed to individually resetting a continued case.

The Office of Administrative Hearings has designated one of its employees as its Trial Court Administrator. Previously, the Clerk's Office, in coordination with the Hearings Division, was responsible for maintaining

\textsuperscript{119} "Lack of resources, especially an insufficient number of judges to handle increased workloads, may be one reason courts develop large pending caseloads per judge." Id. at 67.

\textsuperscript{120} It is noteworthy, however, that the number of filings and dispositions per FTE judge does not display a significant correlation with case processing times or court performance compared to the ABA standards. Moreover, there is little, if any, association between filings or disposition per judge and pending cases per judge. These findings suggest indirectly that factors other than judicial resources may be important in explaining the buildup of pending cases per judge and the pace of litigation. Id.
docket control. Now, with the addition of this new position, the Trial Court Administrator will be responsible for monitoring the progress of every case filed in the Office of Administrative Hearings until conclusion. If an Administrative Law Judge continues a case or if a case is not reached by the Administrative Law Judge, no longer will this Judge retain this case. It will be referred to the Trial Court Administrator and reset upon another calendar or docket.

Many of the Judges in the Office of Administrative Hearings take pride in disposing of all cases assigned and are serious about resisting continuances. What may be lost in the new system, through the loss of "ownership" of each case, is that the Administrative Law Judge may not scrutinize the grounds for a continuance or take the same pride in the reduction of pending cases if the ALJ continues the case to the next calendar. What is expected to offset this phenomenon will be the contrasting efficiency gained by placing the continued case back on a calendar as opposed to returning it to an individualized scheduling system. Also, the Trial Court Administrator will oversee the calendar of each ALJ in order to assure that cases are not being needlessly prolonged through continuances.

In order to reduce the existing case backlog, it may be necessary to place all pending cases that have not been calendared on a "clean up" calendar in 1996. Some of the pending cases have been stayed pending
disposition of a companion case or an appeal. Nevertheless, a clean up calendar constructed by the Trial Court Administrator may be one method employed to reduce the backlog. One ALJ has already volunteered for this assignment. The adding of additional ALJs, although attractive, is not necessary at this point.\textsuperscript{121} The efficiencies gained in the new calendaring process since 1991 as yet have not been fully realized. Until such time as the office is operating under maximum efficiency, there will be no need to add additional Administrative Law Judges.

Table 5.1 shows the number of contested cases closed by decision. This trend clearly indicates that there are more cases reaching decision under the new system than there were under the old system. The ALJs have been able to manage the additional case load under the new scheduling system and continually are gaining efficiency. Fortunately, the ALJs are closing contested cases in higher numbers than in 1989 since the contested case petitions filed have also substantially increased. Again, the apparent increase in productivity has come in part because the number of cases available for hearing has increased because of multi-case settings. Under the new system, if between ten and fifteen cases are set for hearing during the same week, only two or three of these cases may actually be tried to conclusion. Under the old system, only one case was scheduled at

\textsuperscript{121} See ZEISEL ET AL., supra note 60.
a time and, therefore, the set of cases that could result in a disposition was greatly reduced.\textsuperscript{122}

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\textbf{CONTESTED CASE PETITIONS CLOSED BY DECISION}
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The greatest efficiency gained under the new system is the immediate scheduling of all cases on calendars within five days of the date that the petition is filed. This one addition is the most prominent of all of the new system's characteristics. The firm and certain trial date established in the initial scheduling order is the single most effective means of ending administrative litigation.\textsuperscript{123} Notwithstanding that the Office of Administrative

\textsuperscript{122} It might be noted here that not only has the number of decisions written dramatically increased since 1989, but the quality of the decision writing has also markedly improved. Under the North Carolina system, the Administrative Law Judge is responsible for writing the Recommended Decision. In the trial courts, often the civil judges have the judgment prepared for them by the attorneys who prevail in the case. However, in the Office of Administrative Hearings system, although many of the attorneys assist in the preparation of these orders, the ultimate writing of the decision in most cases rests with presiding Administrative Law Judge. Over this same period of time, the judges have improved their skills in legal writing. Selected ALJ decisions are published in the \textit{North Carolina Lawyer's Weekly} (newspaper). Beginning in September of 1995, all of the Administrative Law Judges' decisions (and projected for 1996 the final agency decisions) will be published by Barclays Law Publishers and will be available by subscription.

\textsuperscript{123} Providing firm trial dates has several important benefits for the courts and public. Firm trial dates provide certainty to litigants and their attorneys.
Hearings refers cases for prehearing settlement conferences and mediation, and that these ADR techniques may well influence the settlement rate, nevertheless, the single most effective means of bringing conclusion to litigation is the firm and certain trial date. Many court systems that have experimented with delay reduction find that this is also true.

Most scheduling systems do not calendar a case until after the initial responsive pleading is filed, and often the setting is accomplished in a scheduling or prehearing conference. If there is one conclusion that may be drawn from this study of administrative litigation in North Carolina, it is that the earlier the hearing date is established, the earlier the disposition.

Greater certainty that a case will go to trial probably increases the likelihood of early settlements in civil cases and early pleas in criminal cases. Equally as important, firm trial dates reduce the number of times litigants and witnesses must go to court, thus reducing the overall cost of litigation for the public and improving the public's perception of the efficiency and effectiveness of the judicial system. Goerdt, supra note 4, at 67; see also E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306, 313 (1986) ("Perhaps the most important single element of effective managerial judging is to set a firm trial date.").

As discussed above, the data produced by our interviews and by other studies indicate that fixing early and firm dates for the completion of trial preparation and for the trial itself is probably the single most effective device thus far developed for encouraging prompt and well-focused case development. There does not appear to be any consequential practical obstacle to setting these dates very shortly after an action is commenced. Several judges we interviewed reported that they routinely followed such a procedure and that it has had very beneficial effects. Other studies and commentaries have described the successful use of this approach in several federal courts. Wayne D. Brazil, Improving Judicial Controls Over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions, 1981 Am. B. Found. Res. J. 875, 917.

"Judges should establish an early trial date immediately after the initial pleadings are complete. Once established, the trial date should be delayed only for compelling reason or the needs of the court." A Report from the President's Council on Competitiveness, Agenda for Civil Justice Reform in America, supra note 73, at 15.
The calendaring of a case should not wait until thirty or sixty days after the case is filed. The administrative scheme in North Carolina requires the filing of a Prehearing Statement by all parties within thirty days after the contested case petition is filed. Again, the Prehearing Statement is analogous to an answer or other responsive pleading in a civil trial. No gain is made by waiting for the filing of this responsive pleading before scheduling the case, no matter how tentative that initial setting may be.  

Efficiency is also gained by the setting of preliminary discovery deadlines in the initial scheduling order. This provides the parties ample time to conclude discovery prior to the hearing. This simple scheduling technique of setting the trial date and the discovery deadline at the time of filing might well result in the disposition of over ninety percent of the cases filed.

Cases that do not have great economic value will normally not generate much discovery. Cases of great economic value may need to be placed on a slower track because of their complexity and the need for more discovery. One response to economic value in a calendaring system is Differentiated Case Management. In the Office of Administrative Hearings, the simple cases, such as the ABC and WIC, are placed on a different track than the more complex cases, such as the Certificate of Need or Special Education cases. The need for Differentiated Case Management is not

\[126\text{ See supra text, at 173.}\]
great in the Office of Administrative Hearings, and only a small percentage of the cases at the extremes of the spectrum require such treatment.

SUMMATION

Judicial efficiency is being accomplished in the Office of Administrative Hearings by the simple technique of requiring the scheduling of cases with a firm trial date and a discovery deadline within five days of filing of the petition. Trends must be monitored by the Trial Court Administrator in this process to maintain the current pace of litigation, reduce the pending cases per judge, and ensure that cases meriting continuances are moved from calendar to calendar. Delay reduction under the new system achieves due process as evidenced by the increase in the settlement and withdrawal of petitions and the number of cases reaching decision. Although the pace of litigation is increasing slightly each year with the rise of case filings, litigants are not being inordinately delayed in their pursuit of administrative due process. It should therefore follow that North Carolina's Office of Administrative Hearings delivers both justice and due process in its system of administrative adjudication.

This article is not intended to be a comparative analysis of administrative litigation among the central panel states since the only frame of reference is the North Carolina Office of Administrative Hearings; OAH is simply comparing its case processing time with the ABA Time Standards. Other administrative tribunals throughout the United States may operate
more efficiently and exceed OAH's contested case disposition rate. This article does illustrate that administrative tribunals are capable of operating within the ABA Time Standards, notwithstanding Judge Broomfield's exception.\textsuperscript{127} Due to the similarities between civil litigation and administrative litigation, particularly as to the commencement of the proceedings, OAH finds itself in a unique position to measure its relative efficiency with the ABA Time Standards, perhaps more so than other central panel systems. Administrative litigation in North Carolina has a clear point of initiation because OAH is the only central panel exclusively petition-generated. Since the contested cases are not referred from the agencies, the commencement point has a distinct beginning. In other systems, the central panel may not become involved until the actual hearing, making it difficult to consistently measure the length of time between the commencement date and the completion date.

Lastly, sometimes the goal of effective implementation is lost in focusing singularly on efficient implementation.\textsuperscript{128} It is axiomatic that

\textsuperscript{127} See supra text, at 127.

\textsuperscript{128} Close observation of the six courts suggest that they succeed at something more profound and important than moving cases to disposition quickly. As is explicit in the Trial Court Performance Standards, Expedition and Timeliness is but one of five general areas in which a healthy court achieves excellence. Others are Access to Justice, Equality, Fairness and Integrity, Independence and Accountability, and Public Trust and Confidence. In the demonstration courts, management views delay both as a disease in its own right - something to treat and prevent from recurring - and as a symptom that may indicate a more pervasive unhealthy conditions. By maintaining and regularly examining information on delay, the demonstration courts routinely monitor the general health of the organization, something which
promoting a delay reduction program in a hearing system should serve the ends of justice and due process. However, speed for the sake of efficiency may also produce ineffectiveness as an outcome. The quality of the service rendered must be compatible with the delivery of efficiency in that service. Thus, Total Quality Management (TQM) has surfaced in recent years as a goal for the delivery of services to the public by administrative agencies, including courts.

The Office of Administrative Hearings attempts to measure the effectiveness of the delivery of this service by developing a "client" (user) survey form. This form is presented to each attorney and party at the close of each administrative hearing but before the administrative law judge renders a decision. The litigants are asked to assess the quality of the service that they received in OAH. The forms are anonymously completed and are returned confidentially to the Deputy Director of OAH in a postage pre-paid envelope. The Deputy Director compiles a statistical

is measurable in broad terms that are defined by the Trial Court Performance Standards. Hewitt, supra note 7-8.

129 DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 351 (1993) (so often efficiency studies become oriented to outcomes that the quality of the service becomes secondary).

130 See Alexander Aikman, TOTAL QUALITY MANAGEMENT IN THE COURTS: A HANDBOOK FOR JUDICIAL POLICY MAKERS AND ADMINISTRATORS (1994); see The Federal Judicial Center, MAXIMIZING PRODUCTIVITY: NEW PERSPECTIVES AND PRACTICAL STRATEGIES, 21 (1994) ("The results of an integrated and thorough total quality service approach can be startling. All levels of staff focus on their customers' needs and become involved in assuring quality."); see Fetter, supra note 21.

131 See Aikman, supra note 130, at 33 ("A relatively easy technique for identifying problems is to develop new survey forms. These can be placed on the front counter and other strategic locations. This is a technique used effectively by the Los Angeles
profile, based upon the returned forms. Since the recent inception of the survey program, 49 responses have been received. The Deputy Director breaks down the information on charts and reviews the information with the applicable staff.\textsuperscript{132} Based upon an original assessment of the information collected by the survey, OAH appears to be delivering its adjudicatory service in a manner which is deemed effective by the public and private parties to the litigation, as well as the public and private attorneys who represent these parties. In response to the question, "Did you receive a fair hearing from the Administrative Law Judge?" Forty responses indicated "yes" and only seven indicated "no."

The supreme purpose for which all central panel systems exists is to promote fair hearings. This guiding principle cannot be overlooked. No amount of speed in producing hearings can outweigh the commitment to fairness. Delay in reaching due process can, in fact, produce unfairness. However, negating delay does not ensure a fair hearing. North Carolina's Office of Administrative Hearings strives to achieve both goals in its system of administrative justice.

The title of this article indicates that North Carolina is "Striving" and does not indicate (nor should it be inferred) that North Carolina has

\textsuperscript{132} \textit{id.} at 33 ("If you use survey forms, to be useful they must be tabulated and the results fed back to affected staff. Simply putting them on the counter, collecting them, and then ignoring them, is not useful and does not manifest a quality program.").
achieved the ultimate efficiency in administrative litigation. What it does indicate is that North Carolina's Office of Administrative Hearings focuses on time delay in administrative litigation and approaches due process in a timely and efficient manner. If any credit is to be taken for the success of the new system, it belongs to the administrative law judges who work tirelessly each day on delay reduction in North Carolina's Office of Administrative Hearings.\textsuperscript{133}

\textsuperscript{133} The eight administrative law judges at OAH presently: Senior Administrative Law Judge Fred G. Morrison, Jr.; and Administrative Law Judges Brenda B. Becton; Sammie Chess, Jr.; Beecher R. Gray; Delores O. Nesnow-Smith; Meg Scott Phipps; Robert R. Reilly; and Thomas R. West.