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The Central Hearing Agency: Theory And Implementation In Maryland

by John W. Hardwicke*

I. Introduction and Analysis

In his seminal article, "Some Kind of Hearing," Judge Henry J. Friendly writes, "For a state to experiment with procedures for mass administrative justice wholly different from those required in a felony trial, would be a splendid indication of 'one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory.'"1 Opening the door to due process protection for all kinds of cases and for seemingly minor and trivial liberty and property interests in such cases as Goldberg v. Kelly2 and Goss v. Lopez,3 has rendered experimentation both necessary and inevitable. It is perhaps most appropriate that this experimentation has occurred in the laboratory of smaller states where the sheer numbers and costs of due process proceedings seem more manageable and predictable.

Divorcement of the hearing function from other agency functions was well underway among the states in the late 1970's when cases such as Goldberg v. Kelly, Goss v. Lopez and Wolf v. McDonnell4 had made it increasingly clear that government must provide some kind of hearing for citizens affected by agency action in a myriad of situations not before contemplated.5 "Flexible due process," defined in Morrissey v. Brewer as "such

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5 Judge Friendly commented, "Since [Goldberg v. Kelly] we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another, an explosion which gives rise to many questions of major importance to our society." Friendly, supra note 1, at 1268.
procedural protections as the particular situation demands,"\(^6\) when coordinated with the tripartite balancing factors laid down in *Mathews v. Eldridge*,\(^7\) provides a realistic working definition for every kind of hearing, however formal or informal. Of course, flexible due process can be provided by a single hearing examiner employed by a single agency, or even by a high school principal in the act of suspending high school students for misconduct,\(^8\) but due process must be provided.

However, the fundamental fairness of the agencies and their employees is suspect: agencies are equipped for movement and action; agencies are goal oriented; and when fairness is not the single, most important goal, fairness itself may become flexible and negotiable. The constitutional courts are not well suited to provide simple due process hearings; they are hemmed in by formalities, discovery procedures, tactics of delay and burdened with overcrowded dockets. Moreover, the courts long since have abrogated responsibility for holding hearings for administrative agencies, preferring to give great deference to the outcome of hearings held by the agencies and be guided by their "expertise".

In contrast to administrative justice provided by the courts or by the agencies, let us imagine a system of administrative justice provided by a cadre of independent hearers, cross-trained in the substantive law of many agencies, hearers charged with the duty of fairly providing such process as is due within the context of the societal and proper governmental goals of the agencies for which hearings are held, hearers not in the employment of a single agency nor subject to advancement or penalty because of cooperation or non-cooperation. Such a system of administrative justice would not merely serve the purposes of a single agency nor would it be cloaked in the rectitude of a zealous administrator. Rather, this system would operate across the board under a single set of

\(^6\) 408 U.S. 471, 481 (1972).
\(^7\) 424 U.S. 319, 335 (1976).
procedural rules. It consistently would apply properly enunciated agency policies, rules and regulations. It would prepare and preserve a full record of the hearing and decision for review, as appropriate, by the constitutional courts of law.

Commencing January 1, 1990, we have attempted to effectuate an independent system of administrative justice in Maryland. Our Office of Administrative Hearings employs a corps of administrative law judges who are cross-trained in the substantive law of many agencies. They are prepared to hold one-on-one hearings for citizens in entitlement cases; they go to mental institutions to determine the legal sufficiency of involuntary admissions; they go to prisons to hear grievances of inmates; they preside over complex, multi-issue hearings of environmental charges against individuals and corporations. Our goal is to train administrative law judges to preside over traditional common law adversarial evidentiary hearings, or to conduct "inquisitorial" hearings, or a blending of the two, all under "such procedural protections as the situation demands." 9

Of course, a system of independent administrative justice is not a Maryland invention. Maryland is part of a movement among the states to create central hearing agencies -- independent agencies responsible for holding hearings for two or more agencies. However, as Table 1 shows (Appendix 1), there is considerable diversity among the states as to the number of agencies for which hearings are held and the finality of decision making for various hearings within the respective agencies. Appendix 1 Table 2 shows the administrative structuring of central hearing agencies within the framework of state government. Experimentation with "procedures for mass administrative justice," 10 praised by Judge Friendly, does not anticipate uniformity. However, Judge Friendly considers that an unbiased tribunal is the first element of a fair hearing, and that:

there is wisdom in recognizing that the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for

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10 Friendly, supra note 1, at 1291.
other procedural safeguards; while all judges must be unbiased, some may be, or appear to be, more unbiased than others....

[A]gencies might be offered an option of less procedural formality if the decision maker were not a member of the agency....

This is a didactic essay -- perhaps didactic as much to states committed to the experiment as to those states contemplating the experiment. The experimenters have much to learn. Our purpose here is not only to describe what has been done in Maryland, but also to respond to objections that the system would be too expensive, that it would become a bureaucratic nightmare, that it would intrude into executive responsibility, or that it would be a new and superfluous court system.

Our response to objections is in two parts: first, to demonstrate that a central hearing agency is less expensive and more efficient, and second, to demonstrate that a central hearing agency is sound in theory, and is in fact supported by a superior underlying administrative jurisprudence. We intend not only to address juridical and practical concerns raised since Maryland's OAH came into being in 1990, but concerns expressed elsewhere by state task forces and by agency critics. Concerns listed are illustrative only; the list is not prioritized, nor is it by any means exhaustive:

1. In many states, including Maryland, the body of administrative common law assumes that agency hearings are surrounded by a mystique of agency expertise and that this expertise is entitled to great deference in a court of law. Does this deference continue with respect to a hearing held by an independent hearer, not attached to the agency?

2. In most states the independent administrative law judge only makes "recommended" decisions. In some instances the independent administrative law judge

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11 Id. at 1279.
makes recommended findings of fact and the agency then applies the law to the facts. In other instances, the administrative law judge makes recommended findings of fact and conclusions of law; the agency may modify the findings or conclusions following a hearing on exceptions. If, in principle, it is necessary to separate the hearer from the agency, is fundamental fairness sacrificed by permitting the agency to superimpose its will upon the final result?

3. Agencies must be free, within proper legal constraints, to establish their policies through the proper promulgation of rules and regulations. Must all such rules and regulations, even informal pronouncements and guidelines, be duly published in state registers or is the agency permitted informally to develop policies and guidelines duly printed and published in manuals, brochures and miscellaneous handouts? How does the independent administrative law judge know of such policies, informal pronouncements and guidelines, assuming that they may be so informally published?

4. To what extent is it necessary to obtain consistency of decisions in hearings held before central administrative agencies? Should lawyers and pro se litigants be permitted to argue previous cases decided by other administrative law judges? Should they be permitted to argue decisions made by the agency head or commission on exceptions taken to the agency from the decisions of the central hearing agency?

5. Most, if not all, state administrative procedure acts are premised upon the theory that hearings are held within the agencies by agency employees and no accommodation is made for a central hearing agency. To what extent will it be necessary

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for each state to modify its Administrative Procedure Act to develop an underlying statutory jurisprudence for its central hearing agency function?

* * * * *

We believe that the chief problems underlying the creation of a central hearing agency are not problems of logistics, organization or even cost. Maryland's experience indicates that logistical, organizational and costing problems can be minimized by a well designed statute, by careful planning, and by appropriate legislative and executive management. Implementation of productive and cost effective government can be a matter of will and determination. However, it is development of a basic jurisprudence which will require the best efforts and thought processes of the bench and bar alike as modern law moves forward with this concept of an independent system of administrative justice.¹⁴

¹⁴ Maryland has a well-conceived system of Administrative Law, developed through a long line of cases commencing at least as early as 1843. Harrison v. Mayor and City Council of Baltimore, 1 Gill 264 (1843) (holding that the legislature could delegate powers to administrative agencies). This history is surveyed in Department of Natural Resources v. Linchester, 274 Md. 211, 218-221, 334 A.2d 514, 520-522 (1975). See also Criminal Compensation Board v. Gould, 273 Md. 486, 331 A.2d 55 (1975), discussing judicial review of administrative action, attempted legislation prohibiting judicial review of a state "gratuity", rejection of the "right, privilege" doctrine, discussing and approving of Goldberg v. Kelly, etc.

Judge Oppenheimer comments that "[w]hile the subject of administrative law has not as yet found a place in any Maryland Digest, it is, in the opinion of many, the most important in modern jurisprudence. . . . The average Maryland citizen is far more apt to come into contact with legal processes as they are carried on by these administrative boards than he is to be involved in court proceedings." [Judge] Reuben Oppenheimer, "Administrative Law In Maryland," II Md. L. Rev. 185 (1938). See also, Anderson v. Department of Pub. Safety and Correctional Serv., 330 Md. 187, 623 A.2d 198 (1993)(discussing Maryland's new Administrative Procedure Act and the Office of Administrative Hearings); Edward A. Tomlinson, "Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland," 35 Md. L. Rev. 414 (1976); Leonard E. Cohen, "Some Aspects of Maryland Administrative Law," XXIV Md. L. Rev. 1 (1964).

Although this article is designed for discussion in a generalized forum, we are well aware that a sound common law jurisprudence in this state has significantly aided the creation and operation of a central hearing agency.
II. Inherent and Unsolvable Problems in the Present System.

[Even if "expertness" is no longer as revered as it used to be, impartiality is. Whatever else an agency's choice among the various interpretive options may be based upon, it should not be based upon the desire to win a particular law suit.]

[A] central common thread binds this Report together: the need to assure and preserve the independence of the administrative law judges in adjudicatory administrative hearings.

A. Present System Defined, Distinguished from the Central Agency System

As a matter of pure theory, the existence of a "judiciary" (sometimes "quasi-judiciary") within the executive branch of the government, seems implicitly self-contradictory or, at best, a violation of the Doctrine of Separation of Powers. It is our purpose in this section to present an overview of the prevailing system of administrative hearings as it exists in jurisdictions in which the hearing function is performed (a) by the head of an agency or by a commission, or (b) by delegation to hearing examiners in the employ of the agency or commission.

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16 New York Bar Association, Report of the New York Task Force on Administrative Adjudication (July 14, 1988) [hereinafter Task Force]. Presumably this Report can be obtained from the New York State Bar Association. The copy in the possession of the writer is marked "Clearinghouse No. 43,625; Accession No. 1099147."

17 However, it is settled beyond all peradventure of doubt that "administrative mechanisms" are not to be thwarted by the separation doctrine. Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1465, 1467 (1975). See also, Freytag v. CIR, 111 S. Ct. 2631, 2644 (1991) ("this Court's time-honored reading of the Constitution as giving Congress wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals.").
This system, "present system," is distinguished from the so-called central panel system or "central hearing agency" system (as we prefer to call it) in that, in the latter, there exists an independent agency within the executive branch whose sole function is to perform hearings for other, co-equal, executive agencies. In all cases, with respect to either the present system or the central hearing agency system, the hearer, whether he or she is called a "hearing examiner" or "administrative law judge," is an employee of the executive branch. However, in the central hearing agency system, the executive judges report to a Director or a Chief Administrative Law Judge, who reports to the Governor or to some other non-agency official, such as the Secretary of State.

As a general rule, the employment of hearing examiners as quasi-judicial hearers is a matter of expediency rather than a philosophy of detached impartiality because the holding of hearings and the preparation of decisions is frequently too burdensome to the chief administrator or commission and, in order to be freed from the complexity of time-consuming adjudicatory duties, the agency head employs others to perform this function. Persons employed as hearers may be lawyers, scientists or other experts; they may be lawyers with ancillary training as scientists or as other experts; they may be lawyers with undergraduate or graduate degrees in one of various pertinent specialties. Sometimes the hearer is an agency employee with other duties and the hearing of cases simply fills out the work day, or takes up slack in the work year.

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18 In this paper, central hearing agency ("CHA") is the generic designation for the "central panel" concept; Office of Administrative Hearings ("OAH") designates Maryland's central hearing agency.


20 See Appendix 1. The reference is to Tennessee on Table #2.

Generally, the hearing examiner does not render a final decision at the hearing but makes a recommendation to the agency head or commission which may be adopted, modified, or rejected. The hearing examiner always is required to develop a full record so that the hearing may be reviewed by the agency head and by the constitutional courts, if an appeal is taken from the final decision of the agency or commission. Indeed, preservation of a full and complete record, reviewable by the constitutional judiciary, is the ultimate answer to those concerned about separation of powers since the judiciary always has the last word.\textsuperscript{22}

Most authorities date the modern administrative state to 1887, when Congress passed the first Interstate Commerce Act mandating federal regulation of the railroads.\textsuperscript{23} A necessary and inevitable adjunct to the creation of a powerful executive agency was a concomitant responsibility of that agency to provide affected citizens with an opportunity for a hearing - the greater the power of the agency, the greater the need of the citizen to be heard.\textsuperscript{24} Consequently, in the early 1900s some federal administrative agencies began to hire employees to aid them in their decision-making. A federal statute established 12 permanent positions in the Interstate Commerce Commission providing for "special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence."\textsuperscript{25} These modest duties marked the advent of the hearing examiner at the federal


\textsuperscript{23} This background is reviewed in many places; one excellent article is Ann Wollhandler, "Judicial Deference to Administrative Action- A Revisionist History," 43 Admin. L. R. 197, 199 (Spring 1991).

\textsuperscript{24} F. Davis, \textit{supra} note 21. "The judicialization of the administrative process, a phenomenon largely taken for granted by both lawyers and the general public in contemporary America, is probably one of the most mysterious, yet significant, features of American government." \textit{Id} at 389. This judicialization is the handmaiden of the not-so-mysterious growth and proliferation of agencies.

\textsuperscript{25} Act of June 29, 1906, ch. 3591, §7, 34 Stat. 595 (1906).
The salary and job tenure of these employees were under the control of the agency, which could ignore the examiners' decisions and enter *de novo* rulings instead. The agency also could order the hearing examiners, since they were agency employees, to act as agency prosecutors. However, beginning in about 1917, the ICC introduced the practice of having its examiners file proposed reports containing summaries and recommended decisions, thus moving the hearers from mere ministerial functioning to participation in the final adjudicatory process.

Enactment of the Administrative Procedure Act of 1946 began a period that has seen the steady increase of independence, stature and authority of the hearing examiner. Nearly all states have adopted legislation governing their administrative procedures, just as the federal government did. The Model State Administrative Procedure Act (Model Act) was adopted in 1946 to function as direction to the states. It was revised in 1961 and, again, in 1981. The 1981 Model Act recognized, as an alternative to the present system, special provisions which would establish an "office of administrative hearings" panel to balance

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28 See K. Davis *supra* note 26, at 2.
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due process concerns with administrative effectiveness while retaining administrative law judge independence.31

The central agency system was seriously considered at the outset as a model for the federal system. Indeed, the 1941 Report of the Attorney General's Committee on Administrative Procedure suggested that the "hearing commissions" be a "separate corps, not attached to specific agencies."32 Although rejected, this view has persisted and has been seriously advocated from time to time by no less an authority than the Hoover Commission (1955).33 It also has been favored as an effective alternative by Justice Scalia.34 Senator Howell Heflin, D.-Ala., has introduced bills since September 1980, for this purpose, and, finally, one of these bills has passed.35 Senator Heflin's project has


The problem of improper influence would also be solved by implementing proposals for establishment of a unified ALJ corps, headed by an independent administrator. There would be no obstacle to giving such an administrator authority over promotion. . . . Moreover, the unified- corps concept has some independent managerial advantages- notably, the efficiency of scale which would eliminate the phenomenon of highly paid judges who occasionally have no work within their own agency, and which would make possible a range of grade levels not feasible within many single agencies. On the other hand, it seems unlikely that the administrator of a unified corps would have the same degree of knowledge concerning the judges' performance, or the same degree of incentive to maximize the quality of that performance, as the agencies whose substantive programs are affected. Id. at 79.

35 Senator Heflin's latest effort, Senate bill S.486 with seven additional sponsors, passed the Senate on November 19, 1993. A similar bill, H.B. 2586, by Glickman and two others, is pending in the House.
gained considerable in-depth support and has a substantial chance of success.\textsuperscript{36} Federal agency decision making is, of course, the most complicated of all. Not only is it profoundly far-reaching, touching every aspect of a sprawling bureaucracy, it is divided among a judiciary which offers "a stunning diversity of decider qualifications, benefits, and independence."\textsuperscript{37} This federal system includes 1200 ALJs assigned to 30 federal agencies and over 2500 non-ALJ hearing officers. It is estimated that these 2500 non-ALJ hearing officers (styled administrative judges) annually hear over 350,000 cases including over 150,000 immigration cases and 68,000 cases in Health and Human Services.\textsuperscript{38}

B. Bias – Perceived or Real? Other Problems.

1. The New York Study

We found that all too often the substantive findings and decisions of agency administrative law judges in this State are influenced by executive officials within the agency. Often the influence of executive agency officials upon those within the agency who have adjudicative responsibilities is so pervasive as to prevent agency hearings from being truly fair and impartial. The goal of any adjudication system -- including a system provided administratively -- must be to dispense justice. Any system in which executive personnel can manipulate what transpires in the hearing room is a system which falls short of its goal and which needs to be reformed.\textsuperscript{39}


\textsuperscript{38} John H. Frye, III, Administrative Judge, U.S. Nuclear Regulatory Commission, Survey of non-ALJ Hearing Programs in the Federal Government, August 1991. This survey discusses due process aspects of the hearing programs as well as the relationship of administrative judges to administrative law judges. A copy of this survey can be obtained from the Administrative Conference of the United States, 2120 L. Street, N.W., Suite 500, Washington, D.C. 20037.

\textsuperscript{39} Task Force, supra note 16 at i and ii.
The New York study was conducted by a Task Force of the New York State Bar Association. The Task Force was created in August 1987, and chaired by Matthew J. Jason, retired Senior Associate Judge of the New York Court of Appeals. The Task Force filed its 255 page "Report on Administrative Adjudication" on July 14, 1988. This in-depth study is devoted to five state commissions or agencies: the Department of Motor Vehicle Administration; the Workers' Compensation Board; the Department of Health; the Department of Social Services; and the Department of Environmental Conservation.

It would be difficult to find fault with the depth of the study conducted by the New York Task Force. Public hearings were held in Buffalo, Manhattan and Albany; subcommittees were appointed and assigned to each of the 5 separate agencies. Where possible, the members of the Task Force observed agency hearings in progress, not announcing their attendance in advance, nor identifying themselves at the time of the hearing. Some agency employees were willing to speak with members of the Task Force only "in confidence" and the group attempted to honor its agreement to keep discussions confidential.

The report explains the hearing process in each of the observed agencies. In addition, the report contains a monograph on the nature of administrative adjudication and concludes with a general study of central hearing agency programs in effect at that time in 12 states. In connection with the latter, the Task Force members attended the annual National Administrative Conference of Central Panel Directors held in October, 1987 in Orlando, Florida. Two directors of central agency programs testified before the Task Force at the public hearing held in New York City on November 10, 1987.

By way of summary, and in conclusion, the Task Force found that bias was both perceived and real. It also found other problems -- problems of incredible overload.

40 Task Force, supra note 16.
41 Id. at 3.
exacerbated by lack of management and by "style." Significantly, however, the Task Force did not recommend creation of a central hearing agency.

According to the Task Force, the Motor Vehicle Administration exemplified both "unmanageable" overload and "inherently unfair" hearings. As to the volume of cases, the Task Force reported that the system, in 1987, handled 1,900,000 complaints, conducted approximately 600,000 hearings and, of these, nearly 160,000 were contested. The Task Force found that "the Department has directly interfered with their (ALJ) decisional process," that "irrelevant, extraneous considerations have been introduced," that "quotas" were imposed on ALJs, that monthly review sessions were routinely held with ALJs by officials demanding "higher conviction rates and the elimination of aberrations." The Task Force found that a number of techniques were employed to punish uncooperative judges including transfer from one office to another.

Much of the criticism of the Workers' Compensation Board was derived from its excessive overload. Many cases prematurely closed were reopened after the passage of months or even years; the Board had adopted policies emphasizing both speed and volume without regard to quality of hearings and decisions. The Board had policies restricting the amount of time that an ALJ could spend per case (15 minutes to examine a witness) and, if the time allocated for a case expired, the case would be adjourned to a much later date. The Task Force found that the Board administrators placed a premium on an ALJ's endorsement of Board policies, noting that a critical judge might be rotated to a different location. Furthermore, judges were appointed on a strictly political basis for set terms of 7 years; disagreeable judges might not be reappointed. It also was noted that ALJs

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42 Id. at 34, 35.
43 Id.
44 Id.
45 Id.
46 Id. at 43.
47 Id. at 89-90.
48 Id. at 100.
lacked essential support services and that the Board adopted policies which tended to interfere with the discretion of the ALJs' handling of cases. 49

In other agencies, the Task Force found many problems, particularly, problems of delay. For example, in the Department of Health, decisions frequently were late or there were delays in holding any hearings at all. It found that there was some fraternizing of the ALJs with the other employees of the agency and that this fraternizing created an impression of partiality. 50

In the state Department of Social Services, the Task Force found that, in general, the hearing performance was adequate; however, performances by the local agencies' staff persons were grossly inadequate: presentations were poorly framed, poorly prepared, or not prepared at all. Cases were literally "bounced upstairs" for a hearing rather than sorted out administratively for the protection of the rights of affected citizens. The result of this procedure was that the New York City DSS office was affirmed by ALJs only 11% of the time; in up-state New York the affirmation rate fell substantially short of 50%.

At Social Services the Task Force also observed that the hearing facilities were poor, that they were warehouse-like, contained battered furniture, and poor lighting. The Task Force found occasional interference by the agency with its hearing officers in that officials sometimes would instruct ALJs on how to write up a decision. 51 It discovered occasional over-familiarity among hearing officers and other employees. There were also wide variations in pay, benefits and assignments among the ALJs.

In the Department of Environmental Conservation, only 3 of the 11 ALJs were lawyers, since the Department placed great priority on scientific knowledge rather than legal knowledge. In recent years, however, a greater effort had been made to employ attorneys and, if possible, attorneys with scientific backgrounds.

49 Id. at 101.
50 Id. at 149.
51 Id. at 187.
In order to assure proper "expertise" the Department furnished an "expert" to give advice and information to the ALJs. The name of the expert or the substance of the advice was not disclosed to the parties. Also, there was informal communication between Department staff and the ALJs presiding over cases.

Notwithstanding the findings of bias and interference with the functioning of the ALJs, the Task Force concluded that a central hearing agency solution was "too radical," unnecessarily complex and impracticable because of the vast volume of hearings which would be involved. More importantly, the Task Force concluded, "The principal disadvantage of a central panel involves loss of agency control over the policies agencies are traditionally assigned to implement and loss of expertise of the decision-maker." 52

Philosophically, the Task Force considered that the principal goal underlying judicial process within the executive branch is the retention of "specialized knowledge [by] . . . decision makers who are, by professional training and experience, possessed of learning in the relevant field. . . . Moreover, the administrative process allows the agency to continually monitor and supervise the case, a task which the courts may not be capable of performing with efficiency." 53 (emphasis supplied)

Given this premise, the creation of a central hearing agency could not reasonably have been proposed as a viable alternative by the New York Task Force.

The report recommended that the adjudicatory functions remain within each agency but that the hearing function should be separated from the agency's administrative duties and placed under the jurisdiction of a chief administrative law judge.

Notwithstanding the negative tenor of the Task Force report, the State Legislature passed Senate Bill 3613-A, designed to implement a CHA, in its 1989 session. This legislation was vetoed by the Governor, who by Executive Order 131, required the Executive Agencies to devise plans for the separation of the hearing function. Even so,

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52 Id. at 222.
53 Id. at 8-9.
legislation was again passed and vetoed. At the time of this writing, the matter was under study by the State Office of Regulatory Management.

2. The Maryland Study

Maryland's Task Force drew a different conclusion from that of New York: 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 the 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.54

Maryland's Task Force grew out of hearings on a joint resolution of the General Assembly during the 1987 legislative session requesting the Governor "to appoint a Task Force on administrative hearing officers." Although the joint resolution was not passed, issues raised during the hearings caused the Governor, nevertheless, to appoint a Task Force.55


54 Governor's Task Force On Administrative Hearing Officers, Final Report 3 (June 28, 1988).
55 See charge letter from Governor William Donald Schaefer to William F. Clark, Esq. dated December 24, 1987 available at the Office of Administrative Hearings, Administrative Law Building, 10753 Falls Road, Lutherville, Maryland 21093.
56 Maryland Task Force on Administrative Hearing Officers Final Report (on file with author).
Following is a summary of the findings of the Maryland Task Force presented to the Governor and the Maryland General Assembly:

(a) Since hearing examiners are employed by, and under the control of, the agency where the contested case or disputed action arises, there is an appearance of inherent unfairness; citizens believe they do not receive impartial adjudication.

(b) Hearing examiners in several agencies are paid vastly divergent salaries, some as little as $25,000 per annum.

(c) Since hearing examiners spend years and years hearing the same type of cases, burnout exists to one degree or another.

(d) Small agencies may have only one hearing examiner who has no opportunity for peer consultation or back-up coverage. Other small agencies employ contractual hearing examiners who have little or no skill in holding hearings and no sense of judicial responsibility.

(e) The workload among the agencies is uneven; in many agencies the work fluctuates seasonably and the case-load may be a matter of feast or famine.

(f) The hearing officer function is perceived to be unimportant; there is a lack of prestige or lack of respect; recruitment is difficult.

(g) There is little training given to hearing officers except that which is given sporadically or haphazardly.

(h) The quality of decision writing is frequently challenged, by the reviewing courts, by the agencies, and by the litigants.

(i) Some hearing examiners display a bias against one of the parties, either against the citizen/business or against the agency.

(j) Some hearing examiners exhibit boredom and disinterest; some "are merely doing time until retirement." Some hearing examiners fail to develop a record when the citizen is not represented by legal counsel. If the citizen appeals an adverse finding,
correction of the result can be time consuming, expensive, and detrimental to the citizen or his business.

(k) The assignment of resources to the hearing examiners among the several agencies is uneven. Most of the hearing examiners, for example, do not have available a library; some do not have an office or secretarial assistance.

(l) At many boards and commissions evidence is presented against the citizen by an assistant attorney general separated by a "Chinese wall" from another assistant attorney general advising that board or commission on motions and rulings and providing guidance on the content and form of the decision.

(m) The agencies themselves, in many instances, perceive that the hearing examiner is captive to the agency. Consequently, legal counsel for the agency may not fully present or fully develop their facts and arguments, believing such work to be unnecessary.

(n) Hearing examiners who are not attorneys are not subject to any code of professional responsibility or judicial code of ethics.

(o) Frequently, hearing examiners from different agencies will simultaneously hold one or two hearings at some remote part of the State. Consolidation of hearing functions would be more efficient and would permit one hearing examiner to fill out his schedule by holding hearings for several agencies.

3. Hawaii Study

In its 1990 legislative session the Hawaii legislature requested the state auditor to make an analysis of administrative adjudication in that state and to make a recommendation as to whether placing all hearing officers into a central hearing agency would promote efficiency and impartiality in decision making. The auditor also was asked to investigate any other measures which might improve efficiency, fairness and impartiality. The
auditor's report, "Overview: Study of Administrative Adjudication in Hawaii,"\textsuperscript{58} was presented in February, 1991.

The Hawaii report, in summarizing the advantages of centralization concluded, "Proponents also say that centralization heads off conflicts of interest, bolsters public confidence in the administrative process, promotes the diversification of caseload (which keeps hearing officers from becoming stale), and lessens the politicization of the process when hearing officers are subordinate to political appointees."\textsuperscript{59}

In summarizing the disadvantages of centralization the Hawaii report cited the loss of subject matter expertise, the loss of agency administrative power and accountability, decisions which would undercut the agency prerogative to change procedures and policies, and, finally asked, "Why fix something that might not be broken?"

The Hawaii report concluded with the recommendation that the legislature develop a "pilot test" of the central hearing concept involving suitable agencies with a subsequent evaluation of the cost effectiveness to be realized.

While it no doubt is likely that a number of other states have made studies of the advantages and disadvantages of creating central hearing agencies, the three studies analyzed present an overview of the present system and describe the perceived advantages and drawbacks associated with central hearing agencies. They also represent three reactions to independent centralization: rejection, acceptance, and limited experimentation.

C. Exhaustion of Remedies, Presumption of Agency Correctness, Jeopardy to Due Process.

Arguably, the obligation of the citizen (1) to exhaust his administrative remedies before taking an appeal to the constitutional courts from an adverse agency decision,

\textsuperscript{58} Report #91-12, February, 1991. A copy of this Report may be obtained from the Legislative Auditor, Office of the Auditor, 465 South King Street, Honolulu, Hawaii 96813 or the Office of Administrative Hearings, Administrative Law Building, Green Spring Station, 10753 Falls Road, Lutherville, MD 21093.

\textsuperscript{59} Id.
coupled with (2) a judicial refusal to substitute its judgment for the "expertise" of the agency, diminishes the right of the citizen to obtain due process of law. This is true even though the agency decision cannot be proven to be tainted with bias or prejudice, although it may nevertheless be inherently unfair, abusive or unresponsive.

According to the reasoning in *Myers v. Bethlehem Shipbuilding Corp.*, 60 exhaustion is required because it (a) protects agency authority, and (b) promotes judicial efficiency.

Kenneth Culp Davis points out that one of the principal reasons that a reviewing court may not require an exhaustion of remedies is a perception of bias on the part of the agency or on the part of the hearing examiner employed by the agency. In analyzing seven cases Davis concludes that "exhaustion was required in the four cases in which the charge of bias was weakly supported and was not required in the three cases in which it is strongly supported." 61

Maryland law is in accord with the general law, "when a party attempts to bring a judicial action without exhausting exclusive administrative remedies a trial court properly should dismiss the case." 62 Even when the administrative remedy is not exclusive and there is a concurrent judicial remedy the courts, nevertheless, may require that "the administrative remedy be first invoked and followed." 63 This latter doctrine, "primary jurisdiction," is a flexible doctrine permitting an adjustment between a court's responsibility

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60 303 U.S. 41, 50-51 and n.9 (1938). See also *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992) for a recent discussion of the exhaustion doctrine and the exceptions, one of which is that exhaustion is not required if the agency is "biased or has otherwise predetermined the issue before it." *Id.* at 1088.


and the agency's responsibility in order to effectuate an expeditious and meaningful solution to multifaceted, complex litigation.64

Bits "N" Bytes, concludes, for emphasis: "We repeat, the only opportunity for judicial consideration of a claim to which the exhaustion doctrine is applicable is through limited judicial review of the final administrative decision."65 This limited judicial review primarily is designed to determine if the agency action is supported by "substantial evidence." 66

A recent (1988) Maryland case provides the following analysis of "substantial evidence":

In determining whether an agency's decision is supported by substantial evidence, we are mindful that substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' In applying the substantial evidence test, we must not substitute our judgment for the expertise of the agency, for the test is a deferential one, requiring restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusion[. This deference applies not only to agency fact-finding, but to the drawing of inferences from the facts as well. When, however, the agency's decision is predicated solely on an error of law, no deference is appropriate and the reviewing court may substitute its judgment for that of the agency. In brief, so long as the agency's decision is not predicated solely on an error of law, we will not overturn it if a reasoning mind could reasonably have reached the conclusion reached by the agency.67

64 See Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973), and cases collected in L. Modjesha at §6.10, Primary Jurisdiction.
65 Bits "N" Bytes, 97 Md. App. at 572.
This statement is a full exposition of the position of most state and federal courts with respect to judicial deference to agency decisions. On the face of it, a citizen's adherence to the administrative process creates an incredibly high hurdle for obtaining a thorough and impartial judicial review of agency action. The statement "we will not overturn it" is, in its finality, an abdication to the agency's "expertise" in matters of fact. This strong deference in matters of fact, coupled with the new "extreme deference" to the agency in matters of law under the *Chevron* doctrine, creates a serious imbalance in favor of agency action in the course of judicial review.

I propose that this imbalance may be adjusted, if not fully corrected, by the creation of a central hearing agency at the pre-judicial level. Further, I propose that, absent a central hearing agency, a reviewing court should give greater scrutiny to the

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68 A recent case in the Supreme Court states the principle succinctly:

Because we agree with the Agency's Chief Judicial Officer that these findings are supported by substantial evidence, we conclude that the Court of Appeals should have affirmed both the EPA's construction of the regulations and the issuance of the Fayetteville permit.

... A court reviewing an agency's adjudicative action should accept the agency's factual findings if those findings are supported by substantial evidence on the record as a whole. *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1060 (1992).

administrative decision when the agency, either through its chief executive, a commission, or an agency employee (a hearing examiner), is wholly responsible for initial due process.

On the other hand, the greatest weight should be given to the judgment of an administrative law judge who is structurally independent of the agency. If his position, salary, work conditions, job evaluations, and circumstances of employment are fully protected, his only motivation is to hold a fair and impartial hearing. The fact that this executive branch judge must work within the confines of the law does not preclude him from furthering executive goals, applying executive policies, and imparting agency expertise. In sum, although the Central Hearing Agency administrative law judge possesses true independence in that his judgment is free and not impeded, he is, nevertheless, on a short leash because of dependence upon the goals, objectives and policies of the executive branch, in whose service he is.

Where adjudication is separated from the agency policy maker, the citizen is fully protected by the non-negotiable mandate of due process and by the overall requirement of uncompromising conformity by the agency to the law. Separation does not threaten policy. The key to due process is that citizens affected by agency action must know the rules of the game before the game is played; they must know those policies which will affect their conduct before those policies are brought to bear. So long as full knowledge of policy is available to the affected public and that policy meets other constitutional requirements, i.e.,


Sections 3(1)(c)-(d) and 3(2) [of the Iowa Administrative Procedure Act ("IAPA") are dedicated to the elimination of secret law. As noted, nothing is more pernicious than a system in which the operative principles employed to settle the rights of individuals are kept hidden from them. After all, it would be intolerable if an agency poured forth streams of departmental law in the form of rules, general statements of policy, and decisions and orders with precedential value, which affected parties had no means of knowing. Id. at 785.
within legislative mandate, agency responsibility and the like, there is every reason for the Central Hearing Agency to implement that policy in its role as an executive adjudicator.71

III. Structuring Maryland’s OAH -Statutory Requirements

A. Chief Administrative Law Judge (sometimes "CALJ")

Maryland’s Chief Administrative Law Judge was appointed effective January 1, 1990 by the Governor with the advice and consent of the Senate for a term of three years. (The term was later extended to six years.) The statute required the CALJ to be an attorney and devote full time to the office, and authorized the CALJ to employ a staff to assist in the operation of the agency in accordance with the state budget.

The CALJ was charged with:

- supervising the agency;
- establishing qualifications for administrative law judges;
- appointing and removing administrative law judges;
- assigning judges to conduct contested cases;
- establishing and implementing training programs for judges;
- providing and coordinating continuing education programs and services for judges, including research, technical assistance, technical and professional publications;
- compiling and disseminating information, and advising of changes in the law relative to their duties;
- developing model rules of procedure and other guidelines for administrative hearings;
- developing a code of professional responsibility for administrative law judges; and
- monitoring the quality of state administrative hearings.
- as empowered to:
  - serve as an ALJ in a contested case;
  - furnish ALJs on a contractual basis to other governmental entities;

71 See Arkansas v. Oklahoma, 112 S. Ct. at 1061 (1992). ("It is not our role, or the role of the Court of Appeals, to decide which policy choice is the better one.").
• accept and expend funds, grants, and gifts and accept services from any public or private source;
• enter into agreements and contracts with any public or private agencies or educational institutions; and
• adopt regulations to implement the statute.

B. Appointment of Judges – Their Qualifications

Beginning in November, 1989, weekly meetings were held among the Chief Administrative Law Judge-designate and senior hearing officers of agencies covered by the OAH statute to exchange views and get advice on the qualifications of hearing officers to be appointed as administrative law judges. This "Steering Committee" also discussed and dealt with structure and administrative issues. During December, the CALJ interviewed each hearing examiner, including several contractuals, and made decisions as to who would be offered appointment as ALJs based upon criteria developed by the Steering Committee (Appendix 2). Before the end of 1989, letters of appointment were mailed to 72 candidates.

It was not until mid-January, 1990 that the new agency was given temporary offices in one of the state's office buildings in Baltimore. Until then, the agency operated out of the CALJ's private law office and by telephone. Only the executive staff and their support personnel could be accommodated in the inadequate state office space. The newly appointed ALJs remained in their old agencies, conducting hearings under the authority of the OAH, but physically within the influence of the old hearing examiner system. It was a year before OAH was consolidated in its permanent location.

C. Governor's Council of Advisors

The OAH statute further provided that an Advisory Council on Administrative Hearings be established, consisting of representatives from both houses of the General Assembly, the Attorney General's office, two agencies served by the Office of Administrative Hearings, the State Bar Association and the general public.

The Council's mandate required that it advise the Chief Administrative Law Judge in carrying out his duties; identify issues of importance to ALJs that should be addressed by the CALJ; review issues and problems relating to administrative hearings and the
administrative process; review and comment upon policies and regulations proposed by the CALJ. Further, the Council was directed to submit an annual report to the General Assembly including a list of the agencies exempted from the statute and the reasons for the exemptions.

D. Structure of OAH -- An In-House Creation

Under the statute the CALJ was given broad authority in structuring the OAH. Using the final report of the Governor's Task Force on Administrative Hearing Officers (June 28, 1988), and the statute as the skeleton for structuring the OAH, the design and organization of the new agency began in October, 1989.

The CALJ's philosophy for a central panel of ALJs utilized the cadre of experienced hearing officers, proven to be capable of conducting proceedings in a fair and impartial manner, and cross-trained them to hear a variety of different types of cases. This philosophy allowed the new OAH to dispel loyalties and biases inappropriate to an impartial hearing process and gain the expert efficiencies.

During October and November, 1989, in order to obtain an overview of the administrative adjudicative processes, the CALJ personally visited each agency reported [by the Department of Personnel] to employ examiners who conducted contested case hearings. In most instances, meetings were held with the Chief Hearing Examiner, or in some agencies, with the agency head (cabinet secretary or top administrator). Each agency had its own set of procedural and substantive regulations although all operated under the state's Administrative Procedure Act. Moreover, one agency conducted its hearings using a panel of one hearing officer, and two lay "experts." Several agencies, whose caseloads were too small to justify full-time hearing officers, employed contractual hearing examiners on an as-needed basis.

Supervisory responsibility for the administrative adjudication function varied widely; e.g., the chief hearing officer, the agency head, a division head, or agency counsel. Accountability was loosely assigned as well.
Support staff who had served the administrative adjudication function in the agencies, and who were recommended by the senior ALJs, were invited to join the new OAH. Even though the ultimate location of the new CHA was unknown, most of those solicited agreed to accept employment with OAH. Assignment of secretaries, to the extent possible, was to those ALJs for whom they had worked before unless a request was made for different assignment. Experienced personnel who had responsibility for docketing in the agencies were offered positions in the Clerk's Office.

E. Cross-Trained Judges – Quality Assurance; Subject Matter Specialists

Cross-training was designed by the Quality Assurance ("QA") Director to utilize the experience and expertise of senior administrative law judges who had special knowledge of each agency's types of cases, regulations and statutes controlling procedural and substantive law. In addition to providing training, these specialists were charged with evaluating the readiness of ALJs to conduct hearings independently in new areas.

The utilization of Subject Matter Specialists (SMS) was recommended by the Director of QA to the Opinions and Decisions Committee in August, 1990. The Executive Committee, at its meeting that month approved the SMS program.

The SMS review process was fashioned to dispel concerns about loss of agency expertise. While maintaining impartiality, ALJs were charged with the responsibility of knowing and applying agency policy and practices.

Cross-training schedules were developed and, employing the expertise of (former) chief hearing officers as well as other hearing officers especially proficient in certain types of cases, education of administrative law judges began in earnest. Training schedules were designed by the Director of QA to assure that by July 1, 1990, all senior ALJs would have heard cases for all agencies. The cross-training proposal generated some concern among newly appointed ALJs. However, the CALJ clearly stated his expectations: that by July 1, 1990, senior ALJs would be cross-trained to hear cases in all agencies; that by January 1,
1991, 75% of all ALJs would be trained to hear the majority of cases; and, that by January 1, 1992, all ALJs would be able to hear all types of cases.

The components of cross-training included observing/conducting simple and then more complex hearings. SMSs evaluated performance and recommended certification in their individual subject matter areas. Until certification in a subject matter area was conferred by the CALJ, ALJs were required to submit written decisions to Subject Matter Specialists prior to issuance. Bench decisions were monitored and evaluated by SMSs through observation of hearings conducted independently by newly trained ALJs.

SMSs, in addition to training, identified continuing education needs in their own subject matter areas and met them; recommended seminars and other forms of training; and presented up-date sessions when regulatory, statutory and policy changes occurred. They recommended speakers and trainers and conferred with the Director of QA regarding judges' needs for remedial services; they recommended an appropriate number of SMSs and trained judges needed in their individual subject matter areas.

In addition, SMSs compiled and edited a digest of significant cases in their subject matter areas. OAH developed a computerized case retrieval project in which all cases were summarized and indexed by subject matter and other "key" words. SMSs monitored the individual caseloads of ALJs to determine that written and bench decisions were assigned equitably. They developed and maintained bench manuals; reviewed and approved all decisions in their subject matter areas for writing, legal sufficiency and timeliness. SMSs developed formats for decisions and served as consultants to the Opinions and Decisions Committee. They selected, trained and supervised secondary SMSs who assumed SMS responsibilities when necessary. Assisting the Director of QA, they developed overall plans for continuing quality assurance.

F. Committees

Early in the development of OAH, it was evident that the structure and organization could not be accomplished efficiently without the assistance and input of
professional and clerical staff. Thus, an Executive Committee was established consisting of the CALJ and Deputy CALJ, senior ALJs (team leaders), Directors of Operations, Administration and Quality Assurance, and other selected staff. The Committee agreed with the CALJ that a system of sub-committees, utilizing the experience of OAH personnel, could help in achieving each of the objectives and goals developed within the Executive Committee.

In addition to the Executive Committee, the following committees were established as ad hoc work groups at a Senior ALJ meeting held on April 17, 1990. Each committee was charged with certain limited tasks and asked to prepare statements of functions, goals and time frames for accomplishing their tasks. Selected committees were identified to continue beyond completion of their initial goals as standing committees.


2. **Code of Ethics** - To develop a code of administrative law judge ethics and professional responsibility. Standing Committee.

3. **Judge Day** - To establish a working definition of all of the various components of an ALJ's work day for the purpose, among others, of billing agencies for services performed by OAH. Assignment completed; committee discontinued.

4. **Moving Day** - To develop a methodology and schedule for moving personnel, equipment and material from agency locations to the OAH headquarters at Green Spring Station on January 1, 1991. Assignment completed; committee discontinued.

5. **Training, Staff and Judge Development** - To provide training necessary to enable judges and staff to attain and maintain optimum performance. Assignment

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72 The Rules of Procedure Committees was established prior to April 17, 1990; this activity was statutorily mandated.
73 The Ethics Committee was established prior to April 17, 1990; this activity was statutorily mandated.
completed; committee discontinued; duties transferred to Director of Quality Assurance.

6. **OAH Retreat and Picnic** - To provide an opportunity for judges and support staff to gather informally in an atmosphere conducive to team building. This Committee was subsequently renamed **Special Events** and made responsible for the planning and implementation of OAH picnics, retreats, holiday parties, etc. Standing Committee.

7. **Office Systems: Staffing and Procedures** - To make recommendations to the Chief Administrative Law Judge with respect to case tracking and staffing requirements; to develop procedures and processes to achieve these goals. Assignment completed; committee discontinued; duties transferred to the Director of Operations.

8. **Judge Performance Criteria and Evaluation** - To devise a system for evaluating judge performance; to develop criteria and procedures for evaluation. Standing committee.

9. **Building Layout and Design** - To work with the builder, space designer and interior designer of the new OAH headquarters; with Department of General Services; and with furnishings and equipment vendors to coordinate the development, design and furnishing of the Administrative Law Building. Assignment completed; committee discontinued.

10. **Opinions and Decisions** - To establish standards of decisional elements for all written and bench decisions issued by the OAH; to devise formats for written decisions and to develop quality control measures to insure that OAH decisions are generally of high quality. Standing committee.

11. **Agency Relations** - To develop mechanisms to foster the exchange of information relative to the responsibilities of the OAH in hearing and deciding contested cases.
for clients of the various agencies and departments served by the OAH. Committee discontinued. Duties assumed by Director of Operations.

12. **DEED Assimilation** - To study the operation and structure of the hearing function of the Department of Employment and Economic Development (Unemployment Compensation Division) for the purpose of recommending to the Governor that DEED be either (a) exempted for one year or more, or (b) included as an agency for which OAH conducts hearings. Assignment completed with 1993 legislation exempting DEED hearings from OAH. Committee discontinued.

13. **MVA: Transition and Integration** - To study the operation and structure of the Motor Vehicle Administration Hearings Division to facilitate the transfer of functions from MVA to OAH and to determine staffing needs in OAH for MVA hearings. Assignment completed; committee discontinued.

14. **Postponements** - This Committee was formed at the direction of the Chief Administrative Law Judge in August of 1990 to develop standardized procedures for handling postponement requests. Assignment on-going; standing committee.

**IV. Operating Maryland's OAH**

**A. Pre-1990**

The reports of the Governor's Task Force on Administrative Hearing Officers provide an overview of the administrative hearing process as it existed in Maryland prior to the creation of the OAH. As an appendix to its final report, the Task Force studied each agency utilizing hearing officers, whether State employees or contractual employees. Following is a summary of a portion of the data collected:

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74 Governor's Task Force on Administrative Hearings Officers *supra* note 56, Appendix E, *Inventory of existing staff performing Hearing Officer functions and related facilities, Outline of Administrative Adjudicatory Facility Coordination in Maryland.
B. Operating Improvements

1. Aging Cases; Reimbursement

As each agency maintained its caseload statistics in its own manner, there was no standard methodology for compiling statistical data for contested case hearings. Aging case statistics and follow-up were maintained in some agencies on a regular reporting basis; in other agencies, some cases were several years old. Postponements often were granted without regard to previous procedural delays. Postponed cases were counted twice (or more), i.e., once when they were originally received and again when they were re-scheduled.

75Only agencies currently served by OAH are included in this chart; exempted agencies are omitted.
With the establishment of OAH, and the need to report accurate information to the Governor, the Governor's Advisory Council, and the legislature, statistical record-keeping became much more important. In fact, during OAH's first calendar year, its budget was based upon reimbursement from client agencies for costs associated with cases received and heard.

The per-case reimbursement rate depended upon the following criteria:

(a) Classification level of ALJ
   1. Subject matter
   2. Complexity of issues
   3. Technical expertise required to address the issues

(b) Procedural requirements
   1. Length of hearing
   2. Postponements, subpoenas, locations requiring travel, pre-hearing conferences, motions and orders

(c) Support staff costs and overhead
   1. Clerk's Office
   2. Record of proceedings, e.g. court reporter, tape recording
   3. Secretarial support

2. Cost

An analysis of costs of contested case hearings prior to the establishment of OAH and those subsequent to its organization reveals what would be expected--there are economies realized by centralizing the hearing function. What are the factors that contribute to these savings?

(a) Elimination/consolidation of duplicated support services of each client agency.
(b) Cross-training for Administrative Law Judges, secretarial and clerical support staff. Elimination of contractual hearing officers. Training programs are conducted in-house at minimal or no costs, compared to:

(1) sending judges to local and distant educational facilities where tuition costs are substantial; or

(2) repeating training programs for each agency utilizing hearing officers in contested cases.

ALJs in remote areas are trained to conduct a variety of types of cases permitting full-day dockets rather than sending judges on long trips for one or two hearings.

(c) Reduced overhead costs including rent; more effective control of budget (see Budget Comparison below, especially "OAH Budget Subsequent To Cost Containment") and regulatory processes; greater control in turnover costs, legislative activities, etc. To some extent, overhead costs are difficult, if not impossible to extract from agency budgets prior to OAH since they were not specifically allocated to the hearing function. Salaries and fringe benefits were the only agency budget items which could be identified and attributed to that category.

In real dollars, the following Budget Comparison and Overview\textsuperscript{76} describe the savings realized through consolidating contested hearings in a Central Hearing Agency.

\textsuperscript{76} Prepared 10-28-92 in support of F/Y '94 Legislative budget hearings.
BUDGET COMPARISON (FY 1992)

FY 1991 Original Agency Hearing Function Budgets $6,863,003
  ADD: Commissioners-Inmate Grievance Commission 88,000
  DLR Rent To Brokerage [Office Space] 204,000
Actual Direct Cost Prior To OAH $7,155,003

Anticipated Increased Staff Due To Increased Workload:

  6 Hearing Officers 355,280
  4 Secretaries 108,331

Estimated Budget If OAH Did Not Exist $7,598,614
OAH FY 1993 Budget Prior To Cost Containment 7,770,657
Increase Over Agency Estimated Budget ($7,770,675 - 7,598,614) 172,043
Percentage Increase 2.3%
OAH Budget Subsequent To Cost Containment 6,770,657
Decrease From Original 1991 Agency Budgets ($6,863,003-6,770,657) (92,346)
Percentage Decrease 1.3%
Decrease From Est. Budget If OAH Didn't Exist ($7,598,614 - 6,770,657) (827,957)
Percentage Decrease -10.9%

OVERVIEW

<table>
<thead>
<tr>
<th>Time</th>
<th>Full-Time</th>
<th>Part-Time</th>
<th>Contractual</th>
<th>Total</th>
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<td>Number Of Hearing Officers Prior To OAH</td>
<td>85</td>
<td>5</td>
<td>90</td>
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<tr>
<td>Number of ALJS After Creation of OAH (1/1/90)</td>
<td>74</td>
<td>3</td>
<td>77</td>
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<tr>
<td>Number of ALJS After Cost Containment</td>
<td>46</td>
<td>7</td>
<td>53</td>
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Funding:

  Prior to OAH $6,863,003
  OAH Budget - FY 91 8,086,346
  OAH Budget - FY 92 7,007,519
  Original OAH Budget - FY 93 7,770,657
  Revised OAH Budget -FY 93 6,770,657
  Funding Reduction Pre-OAH to Revised FY 1993 ($92,346)
The Central Hearing Agency: Theory And Implementation In Maryland

<table>
<thead>
<tr>
<th>Workload Increases Since 1/1/90:</th>
<th>No. of Cases</th>
<th>Judge Hours*</th>
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<tbody>
<tr>
<td><strong>New Caseload:</strong></td>
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<tr>
<td>Inmate Grievance</td>
<td>864</td>
<td>2,160</td>
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<td>Forced Medication Of Mental Health Patients</td>
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<td>100</td>
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<td>Office Of Children And Youth</td>
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<td>Nursing Home Appeal Board</td>
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<td>Department Of Education</td>
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<td><strong>Increased Workload:</strong></td>
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<td>Department Of Personnel</td>
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<td>7,854</td>
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<tr>
<td>Entitlements</td>
<td>436</td>
<td>1,308</td>
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<td><strong>Reduced Caseloads:</strong></td>
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<tr>
<td>Motor Vehicle Administration</td>
<td>(5,000)</td>
<td>(2,500)</td>
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<tr>
<td>Total Equivalent Judges Required</td>
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<td>7</td>
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* NOTE: Judge hours consist of preparation, pre-hearing, hearing, travel, and writing time

At the close of the 1993 Legislative Session, OAH had "acquired" additional workload by virtue of the passage of HB-617 and SB-350. HB-617 provides for appeals from findings of child abuse or neglect, and is expected to result in approximately 5400 Department of Human Resources cases. SB-530 concerns reports to credit agencies of delinquencies in child support payments, and is expected to result in approximately 10,000 new cases in its first year.

In 1992, the Legislature approved the imposition of filing fees in several categories of appeals to OAH. This requirement served to (1) reduce the number of appeals filed, and (2) offset the fiscal impact on the agency (although fees collected are not retained by OAH but are paid over to the General Fund).

A comparison of the "Funding" section of the foregoing chart provides evidence of OAH's struggle to continue quality service to its client agencies and the public while adhering to cost containment stricture, e.g. OAH's F/Y '93 budget was reduced by $1 billion.
C. 1990 - Creation and Transition

By January 1, 1990, the day of OAHs statutory birth, the executive staff positions were identified, and candidates were employed. By the second week in January, the new Central Hearing Agency was operating out of its "headquarters"—temporary, minimal space. The search for permanent quarters to house all ALJs, support staff and hearings under one roof continued under the supervision of the CALJ and Deputy CALJ.

1. Permanent Headquarters

A short list was developed of possible sites (existing or works-in-progress) which met the priorities suggested by the Chief ALJ and administrative staff: square footage adequate to permit a private office for each ALJ and a library; hearing rooms of sufficient number and size located in "public areas" remote from staff offices and accessible to judges through private hallways and stairs; adequate free parking for the public and staff; central location permitting uncomplicated access by public transportation and private vehicles. A move date prior to the end of 1990 was imperative. By March of 1990, bids from the "finalists" were received and before the end of the month, negotiations were in progress between the Department of General Services and the successful bidder.

2. Staffing

The first draft of an organization chart was prepared and executive support staff were selected, generally from agency support staff known to each of the executives during their tenure as agency hearing officers. Names of incumbents were filled in as they were identified. The positions of Deputy CALJ, Director of Administration, Director of Operations, and Director of Quality Control were housed at "headquarters." Soon to be employed were the Assistant Director of Operations who also performed as public information officer, and the Staff Attorney who functioned as assistant to the Director of Quality Assurance for educational and training programs.

The chief hearing officers in each agency were identified as "Senior ALJs" and were responsible for the supervision of ALJs in those agencies. As part of their duties, Senior ALJs made certain that cases were heard and decisions issued in a timely manner.
They comprised the Executive Committee, along with the executive staff, and were charged with assisting the CALJ in setting and implementing policy and procedures. They acted as internal liaison and were the chief conduit of information between ALJs and the executive staff.

3. The Caseload

Preliminary to organization and operation of OAH, it was vital to analyze and classify the caseload with which the central hearing agency would have to deal. Each Senior ALJ completed a questionnaire for his/her agency cases describing the subject matter of hearings, the statutory and regulatory provisions controlling those types of hearings, the types of decisions required, mandated timelines, assessment of the complexity and time required for hearings, whether appellants were regularly represented by attorneys, procedures for appealing contested case decisions, and other pertinent information. This "matrix of cases" proved to be a valuable device in developing cross-training, docketing, scheduling, assignment of ALJs and in educating support staff as well as the Advisory Council.

4. Staff and The Executive Committee

The Executive Committee began meeting in November, 1989, sometimes as frequently as weekly, but at least biweekly. Scheduling of cases and assignment of ALJs was handled by Senior ALJs for the agency in which they were housed; for those agencies without former chief hearing examiners, docketing, scheduling and assignment were performed by the Director of Operations. It was also his responsibility to find hearing rooms which confirmed the independence of OAH from its client agencies.

Headquarters staff meetings, including the Executive Staff and selected non-professional staff, also were held, usually on a weekly basis. These meetings were for the purpose of assisting the CALJ and Deputy CALJ in structuring the new agency, advising them on operational and governmental matters.
As early as February, 1990, a general meeting for all ALJs was held at the state office building to permit an exchange of information between headquarters staff and judges, to provide ALJs with face-to-face opportunities for hearing from the executive staff and to furnish instantaneous feedback with regard to new procedures. It also gave ALJs a chance to meet each other, although many had moved around in state service as hearing examiners for a variety of agencies, and knew one another in that context.

Of greatest concern were high-volume cases (Motor Vehicle Administration, Health and Mental Hygiene Department and entitlements) which made up the bulk of OAH work. Many of the entitlement cases, federally regulated, had stringent time requirements; the state agencies were in danger of losing federal funding if timelines were not met. The refusal of federal authorities to issue waivers of their single agency requirements which would have permitted OAH to issue final decisions in entitlement cases created an additional complication for the new agency. ALJs were hearing these cases as hearing examiners of the Department of Human Resources rather than judges of OAH. In addition, other agencies covered by the statute were required to delegate their powers to OAH to conduct hearings, issue subpoenas, recommended and final decisions.

The Director of Operations immediately began monitoring cases carried over from 1989 for timeliness of decisions. He found not only a substantial backlog of cases, but also a large number of new cases which "fell out" because of postponements or no-shows. Initially, extraordinary efforts were required to address caseload problems. For example, the Department of Personnel's caseload was so heavy that hearings were scheduled for several Saturdays. This was no mean task, requiring the cooperation of the Department, the employee unions, attorneys and appellants!

Moreover, stricter policies covering postponements and failures to appear obviously were necessary.

Since OAH had not yet promulgated its own Rules of Procedure, it operated under the rules contained in the Code Of Maryland Regulations ("COMAR") and Code of Federal
Regulations ("CFR") applicable to each agency, and the Maryland Administrative Procedure Act. OAH shared the concern about loss of "agency expertise" voiced by federal regulators and some state agency heads, but the Chief Judge believed that such expertise could be retained through the cross-training program as well as utilizing Subject Matter Specialists to critique the work of all judges. He also believed that expertise should be introduced through the hearing process and agency policy matters should be strictly reserved to the agencies.

5. The Budget

The analyst who originally calculated the fiscal impact of legislation establishing the OAH assessed the total sum of $42,000 to the bill, reasoning that the only new budget item would be the Chief Judge's salary! There being no objection or modification to that amount from the Legislature, the budget appropriation for OAH as of January 1, 1990 was indeed $42,000 for the balance of FY 1991. But in order for OAH to function, it was necessary for the Governor to grant an emergency appropriation and OAH received an additional $97,500 to see it through its first days. For the balance of F/Y '90 transfers of agency adjudication budgets were made to OAH so that judges and other personnel as well as costs associated with conducting hearings could be paid by OAH.

Beginning July 1, 1990 (F/Y '91), a reimbursable budget system was initiated whereby user agencies were charged for each hearing held on their behalf by OAH. It became imperative that ALJs keep accurate time records for cases they were assigned. Between January 1 and June 30, OAH's budget paid for "new" costs not budgeted for F/Y 1990 (July 1, 1989 through June 30, 1990) e.g. new executive and support position salaries, benefits, equipment for headquarters, rent, etc.

Time sheets divided into 6-minute segments were distributed to all ALJs with instructions as to how they were to be completed. Whether management did not adequately explain the need for the time sheets or whether ALJs simply resented all new procedures, there was considerable grumbling among judges. Furthermore, such record keeping required
precise definitions of time and knowledge elements required to conduct hearings and render
written or bench decisions. ALJs were classified as ALJ I through ALJ V; cases were
classified as well depending upon their complexities, and assignments were made so that
higher classifications of judges were hearing the most complex cases. Costs were weighted
depending upon the expertise of the presiding officer and type of decision to be rendered.
The Judge Day Committee was charged with determining the elements contained in a judge
day and those which differentiated classifications of judges. Simultaneous with conducting
hearings in on-going cases, ALJs were required to "wade into" the backlog of cases
inherited from the old system, as well as cross train in approximately 22 different types of
cases from the agencies.

By F/Y 1992, OAH was receiving its funding as did most other agencies--from the
general funds. Cost allocation was (and still is) used only for agencies not covered by the
OAH statute which asked OAH to hear their cases.

6. Public Education Program

The State Advisory Council on Administrative Hearings recommended that OAH
implement a program to educate the public about the purposes of the new agency so that
petitioners and attorneys appearing before Administrative Law Judges would be fully
prepared for hearings on contested cases. An informational brochure was developed and
distributed by mail to user agencies, the media and the public. Executive staff initiated and
responded to invitations for public presentations on radio, television and before professional
groups.

7. Office Systems and Automation

The task of designing OAH operations and deploying its wealth of judge and
support personnel was assigned to the Office Systems Committee. This assembly included
ALJs and OAH clerical staff representatives gathered from most of the agencies. Their
objective was set to achieve the charge of the CALJ to establish the systems by which cases
would be received, docketed, scheduled, assigned to judges, heard and decided, tracked and
archived; in essence, deployment of personnel to get the work done. The Committee's representatives brought their former agencies' experience and practices to the table for discussion, debate and comparison. This process allowed the Committee to select the best, most efficient practices and procedures for the new agency.

The Office Systems Committee members demonstrated extraordinary cooperation in working through their myriad of tasks. Among their more notable achievements were:

- development of docket keys for each type of case (this was a prerequisite to designing and utilizing an automated case tracking system);
- establishment of a clerk's office and staffing plan;
- development of procedures for intake of cases;
- preparation of boilerplate for automated case tracking system;
- distribution of decisions;
- identification of CADRE personnel for training on the automated case tracking system;
- composition of ALJ teams
- determination of case assignment and scheduling procedures.

In September of 1990, a hiring freeze was ordered by the Governor with a request to agency heads to reduce their budgets. This was the beginning of a series of budget and staff-cutting efforts by OAH instituted before the staffing plan was fully effectuated.

8. The State Advisory Council on Administrative Hearings

The Council, acting as a board of directors, concerned itself with policy issues of the OAH. In January, 1991, the advisors sent their first annual report to the Governor with several recommendations to improve the infant agency. Among the important suggestions, the Council urged the Governor to fund OAH directly from the State's General Fund, reasoning that the reimbursable budget system was not working to benefit the citizenry of the State nor the agencies for which OAH was conducting contested case hearings.

The Council also recommended that OAH discontinue its practice of conducting public hearings for agencies proposing changes in agency regulations.
Both of these proposals, as well as others contained in the annual report, were accepted by the Governor.

9. The Library

The CALJ saw OAH as a repository for administrative law resources with a library in its new building as the core of these assets. First, an experienced law librarian was employed (on a contractual basis for the first year) and charged with securing research volumes of general interest. In addition, opinions and decisions for all types of cases handled by the OAH would be archived. Calling on contacts both within and outside of state agencies, the librarian was able to secure contributions of codes, regulations, and encyclopedias in addition to second-hand sets of books for which OAH had only to pay for up-dated supplements. By the time the agency moved into its new headquarters, it was well on its way toward realizing the CALJ's expectations.

V. Problems and Objections -- Juridical, Political and Polemical

By "juridical" I mean those problems which pertain either to law or to the courts. Under this heading I discuss, on a practical level, the legal effect of a CHA on the total legal process. I also will discuss the perceived difference between administrative law judges and a constitutional judiciary under the federal or state constitutions.

By "political" I mean the relationship between a CHA and the non-judicial instruments of state government, including other executive agencies. I discuss the practical problems of a modus operandi and a modus vivendi with other agencies. I am concerned about political relationships with the legislature, the governor, and the budget office.

By "polemical" I refer to expressed and unexpressed attitudes existing in political circles about "hearing examiners" and the need to revise these attitudes to create acceptance of a central hearing agency. The polemical concern relates to acceptance, to the recognition of the "quasi-judicial" aspects of a CHA, and to matters of ingrained historical assumptions.

The discussion is not under the headings of "juridical," "political" and "polemical," however, the reader will make these distinctions.
A. Will the CHA Become a Bureaucratic Nightmare?

The "bureaucratic nightmare" is an umbrella concern. Most objections, even loss of agency "expertise," are subsumed within the fear of a new, gigantic bureaucracy, a semi-judicial replacement of the independent, expert agency. The main obstacle, sometimes an unspoken obstacle, has been the fear that this new agency will be a kind of new governmental empire. As a practical matter the chief task is to provide assurance that the CHA has a job to do, that the job is to serve client-agencies and the public, and that transfer of functions from the agency constitutes an improvement, a more efficient way of achieving the goals of government.

The "nightmare" concerns fall under three categories of alarm:

1. The CHA will be a new, independent judiciary not responsible to anyone; independent of the executive and not part of the judiciary. Legislators and Executives already suspect and resent judges--why increase their power and number?

2. Government always gets bigger. A new agency will have a new cost center, its own executive and administrative staff, its own ambitions for growth and empire. The nature of a new agency implies expansion--expense, red tape, bureaucracy.

3. Existing agencies may lose control of their expertise and their policies; agencies will be subverted, intimidated or ignored by independent law judges.77

77 This was the California experience according to George R. Coan, who served as a hearing officer and as the Presiding Officer in the California Office of Administrative Procedure over a 14-year period. He observed, "[a]n independent Office of Administrative Hearings necessarily creates another difficulty. By its very nature, it takes away power from the administrative agency and thereby causes an atmosphere of antagonism. No administrator likes to have his power curtailed - especially not by lawyers." George R. Coan, "Operational Aspects of a Central Hearing Examiners Pool: California's Experience," 3 U. Fla. L.Rev 86, 89 (1975).
B. The CHA as a "Team Player"

Alarms can be dispelled partly by recognizing the CHA as a "team player." A CHA exists within the executive branch; consequently, it must maintain a working relationship with its sister agencies. This relationship must be informally structured so that executive/agency policies, objectives, programs, and goals are known to the CHA, and to the affected public. These policies must be brought into the hearing process subject, of course, to due process protections and constraints.

There cannot be "secret" policies, nor can any agency policy be introduced at the hearing which was not actually promulgated and available to the affected citizen prior to the citizen's relevant conduct. Whether all such policies must be subjected to a hearing and comment procedure and duly published in a state code of regulations is a matter which must be decided by each state.\(^7\) Interpretive rules, agency statements, that explain or construe legislative guidelines or statutes, generally do not have to be officially published but may be expressed in brochures, informational pamphlets, agency bulletins, and the like.\(^8\) In Maryland, unlike most states, and unlike the federal system, even interpretive statements promulgated without official publication can be used for agency internal purposes only.\(^9\) Policy statements designed, not to inform, but to control the public, or third parties, must be


\(^8\) See Yavelberg, supra note 68. "An interpretive rule is not binding on the courts, courts may freely substitute their judgment for that of the agency in determining how a statute or regulation is to be implemented." Id. at 168.


Unlike the federal APA, which exempts interpretative rules, general statements of policy, and rules of agency organization, procedure or practice from its notice and comment requirements, the State APA and the State Documents Law make no distinction between legislative and interpretative rules. Rather, under Maryland's APA, a regulation can take any form, including a 'statement of interpretation,' [and must be published]. The prudence of this exceedingly broad definition certainly is debatable. Id. (citations omitted).
properly published or enunciated as required by statute, or common law, in any given state. 81

The "team player" concept is subject to one ironclad, non-negotiable caveat:

An on-going case shall not be discussed by any CHA employee, or ALJ, with any agency employee, or, any member of the executive or legislative branch, directly or indirectly, at any time. 82

However, law, policy, objectives, and legislative intent, not case specific, may be discussed or programmed at any time. Where practicable, members of the bar and of the legislature, as well as citizen groups are invited to attend and participate in discussions, programs and seminars. Interpretive or explanatory memoranda, agendas, bulletins and texts emanating from discussions, programs and seminars, will be on file at the agency and also maintained at the CHA as public documents. Where these informative materials are believed to be of general or widespread interest, they should be published.

The CALJ or members of his staff may visit regularly with commissions and agency heads on a "how are we doing" basis. Delay, promptness, technique, quality, postponement and the like can be regularly addressed at these meetings. Training programs

81 Anthony, supra note 77, at 1379-80.
  
In short, if an agency wants to bind the public, it should do it right. It should not try to do it on the cheap or on the sly. It should observe the authorities and procedures laid down by Congress, and it should make use of some simple procedures to tell the public in a helpful way what it is doing.
  
Id. at 1379. See also Robert A. Anthony, "Which Agency Interpretations Should Bind Citizens and the Courts?," 7 Yale J. on Reg. (1990). "No such presumption should be tolerated for interpretive rules or policy statements, or similar formats. Their precisely relevant quality is that they lack the force of law - that is, they cannot bind the courts even if they are consistent with statute and reasonable." Id. at 55.

82 Coan, supra note 76, at 91.

Our hearing officers are absolutely independent in the decisional process. No control is exerted by anyone over their decisions. We argue among ourselves about what should be done in a particular case but, in the last analysis, the hearing officer makes his decision alone. Our hearing officers are fiercely independent, which makes the job of director very interesting indeed. Id.
may be undertaken involving CHA personnel and agency personnel. Seminars may be
given for developing instructions to agencies on how to prepare and present a case, how to
use expert witnesses, and for judges on holding pretrial hearings and hearings. The
agencies may hold training sessions including key personnel (those involved in the hearing
process) and ALJs. Goals, objectives and policies may be developed and discussed at these
sessions. Members of the bar and the public should know of these sessions and have the
opportunity to attend.83

The CALJ and members of his staff may meet occasionally with the Governor or
his staff to develop an on-going relationship and liaison in the Governor's office. High
profile cases which will receive media attention may be ear-marked and reported to the
Governor after the time of finality within the CHA. The CALJ or his staff sometimes may
attend cabinet meetings to discuss goals and objectives of the CHA and to evaluate
criticisms or complaints.

If there is a "team player problem" the problem arises through the possibility of
interference with the CHA by its sister agencies or by other members of the executive
branch. It would be sad and ironic indeed if executive manipulation and control of the
hearing decision process were exercised through a CHA rather than through an agency
employed hearing examiner.84 However, it is equally important that the CHA not interfere

83 See Id. at 89.

Each of the licensing agencies communicates to our director its policies
in regard to the appropriate discipline and the types of orders which it prefers.
These memoranda are placed in a manual available to every hearing officer, with
the understanding that these are only guidelines to the thinking of the agency and in
no way binding upon the hearing officer. We also, from time to time, have
meetings with the heads of agencies and with the boards and commissions in which
we exchange views on mutual problems. Id.

84 See Id. at 91.

In the nearly 30 years we have been in existence, I know of no case
where anyone has ever attempted, directly or indirectly, to influence the decision of
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with established policy within the domain of the agency; this balanced approach is assured by openness and by established rules and guidelines. The team player approach engenders an institutional respect for separateness if contained within well-defined limits of cooperation subject to a high sensitivity for honesty and ethics.

C. Rationalization of the Agency Relation — Maryland's New Administrative Procedure Act

At the request of the Maryland State Bar Association, the OAH, and the Maryland House of Delegates' Committee on Constitutional and Administrative Law, the Governor on August 21, 1991, appointed a Commission to Revise the Administrative Procedure Act ("APA") with a duty to make its report by September 1, 1992. Maryland's APA, adopted in 1957, was fashioned after the original Model Act promulgated at the time of the federal Administrative Procedure Act in 1946. No significant changes were made following proposed model state APAs in 1961 and 1981.

|Footnotes|


86 For a full analysis of Maryland's 1993 APA, the reader should consult the Commission to Revise the Administrative Procedure Act, Report (September 1, 1992) [hereinafter Report]. This Report can be obtained from the Office of Administrative Hearings, Administrative Law Building, Green Spring Station, 10753 Falls Road, Lutherville, Maryland 21093, (410)321-2043. A complete set of the minutes of the Commission's meetings and the documents submitted to the Commission are available for public inspection at the Maryland State Archives, Hall of Records Building, 350 Rowe Blvd., Annapolis, MD. 21401.

87 A copy of the letter of appointment of the Commission can be obtained from the Office of Administrative Hearings (see address, note 85). The date of September 1, 1992 was later extended to December 1, 1992. The Revisions recommended by the Commission encompassed Subtitle 2 ("contested cases") and Subtitle 4 ("Licensing"). Separate recommendations to amend Subtitle 1 ("Regulations") were submitted to the Governor and to the General Assembly, but failed to pass.
The Commission met in biweekly sessions over a period of approximately twelve months commencing in December 1991. It heard testimony from a vast array of witnesses, including the public, the state bar association, state agencies, the chamber of commerce and various special interest groups. In addition, the Commission held a special meeting at the University of Maryland Law School to receive presentations from Professor Arthur Bonfield of the University of Iowa College of Law (and the drafter of the 1981 Model Act) and Professor Abraham Dash of the University of Maryland Law School. Professor Dash acted as an informal advisor to the Commission. Its unanimous recommendation was accepted by the Governor and passed into law by the General Assembly with only minor modification, without a dissenting vote in either house. It became law effective June 1, 1993.88

The Commission had no budget so all staffing was provided by the OAH from its existing personnel without additional cost to the state. Designated team leaders and members of the OAH staff presented "white papers" to the Commission on salient questions of procedure and jurisprudence. These papers are available in the archives.

One of the chief objectives of the Commission was to fit the OAH into the state administrative process. Appropriate balancing of the respective agency viewpoint and that of the OAH was provided by the make up of the Commission.89 We discuss briefly those provisions of Maryland's APA which strive to rationalize the relationship of executive agencies to the OAH.

1. The statute that created the OAH90 failed expressly to delegate any hearing function from the agencies to the OAH; delegation was required by negative inference, that is, the agencies were forbidden to employ hearing examiners to hear their cases. Of course,  

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89 Two of the Commission's eleven members were Secretaries of Executive Branch departments who actively participated along with members of their respective legal staffs. The Chief Administrative Law Judge was also a member.
if the agency head or Commission wanted to hear a case or cases he or they were free to do so.

The new APA establishes a procedure for delegation of hearings to the OAH. Section 10-205 provides for a "menu" pursuant to which a Board, Commission or Agency Head can personally conduct the hearing or delegate to the OAH authority to conduct the hearing. The delegation can be in full, or in part, that is, to render proposed or final decisions, proposed or final conclusions of law, or proposed or final findings of fact. The delegation can be of a single case, part of a case, or of a class of cases.

The agency, having delegated a case or a class of cases to the OAH may revoke its delegation for any case prior to (a) the issuance of a ruling on a substantive issue, or (b) the taking of testimony from the first witness, so long as the agency had adopted regulations governing revocation. The delegation "menu" and the revocation rights are important to the rationalization of the agency relation since the agencies are given flexibility to decide the extent of their usage of the OAH. As the OAH proves itself and successfully concludes hearings, agencies can achieve greater comfort levels in coexisting with the OAH, particularly with respect to the maintenance of control over its policy functions.91

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91 Throughout this paper, we emphasize the need to protect the agency's control over policy. The report of the APA Commission emphasizes this point in connection with the menu and the right of agency to withdraw its delegation of a case:

A major consideration in selecting these particular points as the "bright line" was the need to permit agencies to retain cases that may have a significant policy impact or are likely to have substantial precedential value. Agencies have a legitimate concern that they retain the opportunity to set policy through contested cases. Since the OAH was not established to serve as a policy-making agency, if an agency is not a party to a case, it might not have the opportunity to find out about significant policy issues in the case prior to the initiation of the matter. Report, supra note 85, at 20.
2. At the suggestion of the Deputy Attorney General and with concurrence of the OAH a further, explicit provision was inserted to protect the agency policy function through the hearing process. This Section, 10-214(B) provides:

"In a contested case, the office is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case." 92

This section is a further rationalization of agency control over policies, not only in final decision-making but also in argument of cases. 93 Attorneys and citizens as well as the agency, may present policy matters during the course of hearings. They also argue prior rulings, both those of the OAH, and of the agencies. They may present manuals, brochures and other documentary proof of pre-existing practice and established policy.

3. Section 10-213(ii) provides that the agency or the OAH may take official notice of a fact that is "general, technical, or scientific and within the specialized knowledge of the agency" 94 provided that the parties to the case are given notice before or during the hearing and each party has an opportunity to contest the fact. This section further provides that the OAH may use its "experience, technical competence, and specialized knowledge in the evaluation of evidence." 95

This provision helps to preserve agency expertise. It also provides an instrument for asserting expertise into the context of the hearing placing the expertise of the agency where it belongs, on the table at the hearing.

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93 See Robert J. Pierce, Jr., "Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta," 47 U. Chi. L. Rev. 481 (1990) ("Our government is designed so that policy decisions will be made by politically accountable officials.") Neither the courts nor a quasi-judicial body in the executive branch can compromise this principle.
95 Id.
4. During its first year, the OAH adopted Rules of Procedure, which were, of course, duly published and subjected to hearing as required by law. The new APA provides that OAH's Rules will govern practice in all hearings unless federal or state law mandates that a federal or state procedure be observed. The effect of this provision is to permit the agency, by statute or regulation (law), to adopt special provisions for special concerns such as time frames or discovery.

5. A further rationalization of the agency relationship is the requirement that an agency's modification of a proposed OAH decision be identified explained and justified. This provision is embedded in the common law decisions of many states. If an agency modifies the proposed decision the modification must be explained and rationalized. Agency policy is protected, and at the same time, the integrity of the hearing process is preserved. Since the OAH is obligated to follow agency decisions, policies and practices, it is logical that the agency will make explicit the bases of any disagreement. This articulation of these bases requires an openness not only for development of the record, but also clarifies the agency position for future cases.

6. Prior to the existence of the OAH, agencies did not specifically "age" their cases, nor did they file reports showing an accumulated backlog of work not completed. Maryland's new APA contains a provision (Section 205(D)(II)) which requires that the OAH render its decision within 90 days after the end of the hearing. The 90 day provision may be extended with the express permission of the Chief Administrative Law Judge. Presently, OAH has an in-house goal of 60 days for rendering of the decision after the hearing. OAH considers that the 60 day time frame is consistent with the rhythm of its

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96 Id. at § 10-216(B).
97 See, e.g., Clowes v. Terminix Int'I, Inc., 109 N.J. 575, 538 A.2d 794, 800 (1988) ("A reviewing court need give no deference to the agency head on the credibility issue" if he did not hear the case).
work. Of course, many statutes and regulations require decisions in a number of hours after the hearing or in a number of days.98

7. Maryland's new APA states that its purpose is to:

   (1) Ensure the right to all persons to be treated in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings governed by this subtitle; and

   (2) Promote prompt, effective and efficient government.99

These two purposes express in a direct way the goal of the hearing function, fairness and impartiality, alongside the goal of agency action, promptness and effectiveness. In a larger sense this duality of purpose, fairness coupled with effectiveness, underlies the larger goal and purpose of all government.

I recognize that Maryland's new APA may, indeed, serve as a model. It is the first enacted APA to establish the terms under which an independent hearing agency can function effectively alongside other executive agencies. However, it does not attempt to bring within its sweep agencies which have been exempted nor does it attempt to resolve every procedural nicety.100

98 COMAR 06.01.01.65B (requiring a decision within five days of a personnel hearing to determine if any employee may be suspended without pay pending charges for removal); MD. HEALTH-GEN. CODE ANN. § 12-115(a)(1a) (requiring that the hearing officer shall prepare a report of recommendations to the court within ten days of a hearing to determine if an individual committed to a mental institution is eligible for release); COMAR 13A.11.07.03 O (requiring that the decision be rendered within fourteen days after the conclusion of a hearing to determine if the recipient of or applicant for vocational rehabilitation services is eligible); COMAR 13A.05.01.15 L (requiring a written decision be issued fifteen calendar days after a hearing to determine if a special education student is receiving a free and appropriate public education).


100 The Report of the APA Commission summarizes:

In light of this unique body of law against which Maryland administrative proceedings are conducted, the Commission found that most of the provisions of the 1981 Model Act should not be adopted for inclusion in the APA. Many of those provisions are already addressed in case law or in the B Rules or the
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Whether a state about to embark upon the creation of a CHA should, at the same time, review its APA, may be a political question, as well as a question of basic jurisprudence. If the climate is right for the creation of a CHA, the will required to lay the necessary groundwork also may be present. Of course, as in Maryland, an operating OAH may be a useful tool in the recasting of an APA.

D. Agency Expertise - Does it Survive the CHA?

The answer to this question is an emphatic "yes;" however, it is the thorniest of the theoretical questions. I believe that a workable solution depends upon a definition of expertise which separates the policy aspects of expertise from its scientific or technical features.

The on-going evolution of the judicial concept of agency expertise is well reflected in the following comment by Justice Scalia in a Duke University forum in 1989. The opinions we federal judges read, and the cases we cite are full of references to the old criteria of 'agency expertise,' the technical and complex nature of the question presented, 'the consistent and long-standing agency position' - and it will take some time to understand that those concepts are no longer relevant, or no longer relevant in the same way. 101

OAH Rules. Unlike the Model Act, which includes a provision addressing every conceivable procedural issue, Maryland's APA should create a statutory framework for the administrative process, addressing only the most important and fundamental policy issues. The procedural fine points of administrative practice are more appropriately addressed in rules or regulations which can be changed more easily and frequently than can a statute. Report, supra note 85, at 3-4.

101 Scalia, supra note 15 at 129. The appropriate force of agency expertise was questioned over forty years ago by Judge Learned Hand. In an appearance before the Senate Committee on Labor and Public Welfare on June 28, 1951 he stated:

The Supreme Court has been very severe with us if we do not give [the regulatory commissions] almost complete autonomy. They are not quite as severe as they used to be four or five years ago, while we were held on a very close rein. There was attributed to them a specialized acquaintance with the subject matter which gave them -- to put it in logical form -- major premises that we did not possess; and in deference to which we ought to yield.
True agency expertise, that is to say matters of science and technology, can be put into the record through appropriate expert testimony in the course of the hearing, and where such expert conclusions are debatable, contrary scientific evidence may be considered and decided as a factual matter by an ALJ. Assuming that the ALJ has no more claim to scientific expertise than a state circuit judge or a federal district judge, an ALJ's findings of fact in the scientific arena should be given only that deference accorded to other factual matters brought by the record to the constitutional courts.

In perspective, the "due process explosion" heralded by Goldberg v. Kelly has resulted in a shift from expertise to fairness and impartiality; agency gains are reflected in such decisions as Chevron in great control over policy. The true governmental process, however, should no longer be protected by the "mystique" of expertise.

It will be objected that the agency's "expertise" should not be challenged judicially, that agencies, not judges, are experts. It is supposed "expertise" which poses the greatest hazard of creating an unreviewable presumption of correctness, while, at the same


See Christopher F. Edley, Jr., Administrative Law, Rethinking Judicial Control of Bureaucracy (1990). Edley would encourage expert debate: "Indeed, I would go so far as to urge a rule of presumptive desirability of quasi-adversarial processes, including staged battles of the experts." Id. at 211.

Keith Werhan, "The Neoclassical Revival in Administrative Law," 44 Admin. L. Rev. 567 (1992). "The shift from a technocratic to a more political conception of administration also undercut legal process assumptions about the constraints of enabling acts on agency behavior." Id. at 584.
time, producing a result which may be inherently unfair, abusive and unresponsive. "Expertise all too often means narrow-mindedness"\textsuperscript{106}, although it is the "strength of modern government, "it may become "alienated, lacking in compassion, and self absorbed"\textsuperscript{107}, it has been called "a monster which rules with no practical limit on its discretion"\textsuperscript{108}, and that "those who have it may fall into the grooves created by their own expertness."	extsuperscript{109} They "may have stronger preconceptions about certain problems that they will not be able to evaluate evidence or arguments before them fairly or accurately."\textsuperscript{110}

\textsuperscript{106} Robinson, supra note 101, at 520.

Intensive work in an agency may reward a member with an accumulation of knowledge and experience about particular problems with which the agency deals. But the same processes by which an agency member acquires intensive knowledge and experience about a particular industry, program, or set of problems tends as well to isolate him from other considerations and broader concerns. Expertise all too often means narrowmindedness. \textit{Id.}

\textsuperscript{107} Edley, supra note 102, at 22-23. "Bureaucratic expertise is associated with the positive attributes of science and rationality, but it is also criticized as \textit{alienated, lacking in compassion, and self absorbed} as in some harsh caricature of automatons in a welfare office or the Internal Revenue Service." \textit{Id.} (emphasis provided).

\textsuperscript{108} \textit{Id.} at 23. "Justice White has written that '[e]xpert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, \textit{expertise}, the strength of modern government, can become a monster which rules with no practical limits on its discretion." \textit{Id.}

\textsuperscript{109} \textit{Id.} at 23. "As Judge Wyzanski put it, 'One of the dangers of extraordinary expertise is that those who have it may fall into the grooves created by their own expertness''. \textit{Id.}

\textsuperscript{110} F. Davis, supra note 21, at 402.

In addition to the fact that the ALJ position was not designed with an eye toward special expertise, specialization may put a presiding officer at a distinct disadvantage in the discharge of his function as a fact-finder. As an eminent jurist observed, 'One of the dangers of extraordinary experience is that those who have it may fall into the grooves created by their own expertness.' Fact-finders with great expertise in a particular area may have strong preconceptions about certain problems that they will not be able to evaluate evidence or arguments before them fairly or accurately. \textit{Id.} (emphasis provided).
Experience, however, demonstrates that expertise, in the sense of scientific or technical learning, may not be a controlling factor either in agency fact finding or in the application of law to facts. According to Edley, so-called expertise in the same hand as agency administration is, more often than not, intermeshed with agency policy or agency political directive.\textsuperscript{111} Edley argues persuasively that agency expertise is sometimes a matter of political reality dictated by an executive administrator whose appointing authority has won an election.\textsuperscript{112} If this is true, if what is frequently called "expertise" actually is policy applied to arcane and specialized facts or circumstances, agency policy as a political directive should be reflected as such, and should be treated separately from the specialized facts and circumstances, in the record.\textsuperscript{113} Policy should be stated separately from fact finding and expertise, and reflected in rules and regulations adopted by the agency, as an

\textsuperscript{111} Edley, \textit{supra} note 102, at 55.

As the judgments are passed up the line, distilled and summarized at each level, the possibilities for probing review and deep comprehension of the problem as a whole diminish. Ultimately, even the best administrator may spend less than an hour reviewing a brief cover memorandum on a regulatory package that took tens of thousands of hours to prepare. \textit{Id.}

\textsuperscript{112} Edley, \textit{supra} note 102, at 54. "The administrator's decision would probably be considered legitimate even if the administrator lacked all expertise and just happened to stumble on an 'objectively reasonable decision or rubber stamp the recommendation of a subordinate.'" \textit{Id.}


[The principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'] \textit{Id.} at 844.
appropriate recognition of the proper function of democratic government through agency action. 114

Strangely enough, there is little or no case law defining agency expertise. However, it seems implicit in relevant decisions that the courts have in mind scientific or technical sophistication. 115 This concept of sophistication is not justified in view of the fact that agencies and commissions generally are not selected solely on the basis of their technical knowledge or scientific skill but also, and sometimes more importantly, on the basis of their ability to represent large blocks of citizens or to provide leadership for policy goals and objectives within the executive portion of the governmental framework.

Maryland courts have indicated that they give great deference (perhaps "greater" deference) to the "expertise" of Maryland's Public Service Commission 116 or to Maryland's State Board of Education. 117 Are these Boards chosen because of their expertise, technical or scientific skills? The answer, of course, is that they are not. The Public Service Commission is mandated to be "broadly representative of the public interest... composed of

114 Pierce supra note 92, at 481. "Our government is designed so that policy decisions will be made by politically accountable officials."
116 People's Council v. Public Serv. Comm., 52 Md. App. 715, 451 A.2d 945 (1982)("A great deal of discretion is necessarily vested in the Commission in order that it may properly discharge its important and complex duties) See also, Myers v. Montgomery County Police Dep't, 96 Md. App. 668, 692, 626 A.2d 1010, 1022 (1993)("the Commission's decisions are given such [great] deference by the courts of this State").
117 Resetar v. State Bd. of Educ., 284 Md. 537, 556, 399 A.2d 225, 235 (1979)("that the totality of the various statutory provisions concerning the State Board 'quite plainly... invests the State Board with the last word on any matter concerning educational policy or the administration of the system of public education.") See also the discussion in Board of Sch. Comm'rs v. James, 96 Md. App. 401, 417, 625 A.2d 361, 369 (1993).
persons with diverse training and experience. '118 The qualifications for the State Board of Education are that the Governor "shall consider representation from: (i) all parts of this state; (ii) areas of this state with concentrations of population or unique needs." '119 Indeed, the statute requires that the Board consist of eleven members and one student member. Prior to 1992 this student member did not have a vote; however, the student member was made a voting member by the legislature in 1993. '120

Since the term "agency expertise" may include something other than scientific or technical knowledge I suggest that the concept be examined from several different angles:

a) "expertise" as having an encyclopedic knowledge of a vast array of technical or scientific facts; and

b) "expertise" as having a practiced and demonstrated ability to draw inferences from technical or scientific facts; and

c) "expertise" as having marshaled relevant facts and inferences to develop a sound, coherent and cohesive policy, designed to further certain agreed upon social, economic and political goals.

I suggest that the combination (a) and (b) represents the traditional concept of expertise. It is this expertise which resides in an expert witness, one who, for example, is to "assist the trier of fact to understand the evidence or to determine a fact in issue." '121

120 MD. EDUC. CODE ANN. §§2-202(a) (1993 Supp.).
121 Fed. R. Evid. 702. "Expertise" in the technical or scientific sense has never intimidated the constitutional courts. Since the recent (June, 1993) Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) federal judges must focus more on scientific reasoning or methodology behind scientific testimony than on the old standard of "general acceptance" as a single criterion imposed by the Court's decision in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). See the discussions in the following two articles, "The Use and Misuse of Expert Evidence in the Courts," 77 Judicature, 2, 68 (Sept.-Oct. 1993); Sheila Jasanoff, "What Judges Should Know About the Sociology of Science," 77 Judicature, 2, 77 (Sept.-Oct. 1993).
If this last definition describes agency expertise, science and technical skill are given a more subordinate role in the evaluation of the agency's judgment and in the discretion to be accorded the agency decision. In fact, expertise is policy driven, and as such is derived from a much broader range of knowledge, interest and skill. It also is demystified. Koch uses an alternative word - "specialization": a word more descriptive of the policy source of judicial deference to which the agency is entitled.¹²²

It is possible that deference to agency expertise (or specialization) is defined by a continuum rather than by categories such as "fact" or "law." Factual issues outside the agency's special competence should be at the low end of deference whereas issues involving the agency's specialized knowledge or within a technical area entrusted to it exclusively by legislation should receive more deference. Questions centering upon policy positions should receive the broadest, perhaps absolute, deference.¹²³

¹²² In a 1986 article Koch explains agency "expertise" within these different contexts as follows:

In some sense, expertise is merely the acquisition of superior knowledge, and the agency can surpass judges in this regard. However, expertise includes another asset: superior ability to synthesize information into a judgment. Even assuming that courts could accumulate particular information, they cannot make the same use of the information as the expert agencies. Administrative policymaking often represents this second asset of expertise. Courts cannot, even with all of the necessary information acquire the requisite expert judgment as to accomplishment of societal goals; an agency is assigned or occasionally created to bring this kind of expert judgment to a particular problem. This ability justifies the exercise of policy-making discretion by agencies. It is a major reason why the legislature assigned the task to the agency and why courts should meticulously avoid circumventing that choice.


¹²³ This continuum is recognized in a number of federal cases. For example, in Lile v. University of Iowa Hosp. and Clinics, 886 F.2d 157, 160 (8th Cir. 1989) the Court recognized a "lesser level of deference" if the factual issue falls outside the agency's "special competence", but a "broader
The separation of technical and scientific expertise from policy driven specialization is important in the establishment of a CHA. Agency policy may be promulgated through the rule making process, and, as policy, is an aspect of the law governing the case. As policy, it is the source of greatest deference to the agency when its adjudicating function is separated from its administrative functions. Certainly, matters of policy and specialization are brought into the adjudicatory process through rule making procedures or through public pronouncements of policy in accordance with due process and subject to statutory law.

Whether policy should be adopted or modified by rule making or by adjudication has been the subject of much comment in court decisions and treatises. Although the leading case on the subject, SEC v. Chenery Corp., suggests that rules should be promulgated "as much as possible" through formal procedures, it also is recognized that policy can be adopted through adjudication. Maryland has held, however, "that when a policy of general application, embodied in or represented by a rule, is changed to a different policy of general application, the change must be accomplished by rule making." deference" if the agency's expertise is involved, and a "broader deference" if the question centers on policymaking. Robinson, supra note 101, at 515. "There is little, if any, dissent from the general proposition that an agency should make every effort when formulating administrative policies to see that the full spectrum of views is represented before it." Id.


[W]e are mindful of the Commission's responsibility for reexamining its rules and policies in light of changed circumstances. Thus, the Commission may reject long-standing policies, interpretations and guidelines so long as its action is rationally based and consistent with the Commission's statute. . . .
On the other hand, the most juridically acceptable method of assimilating agency technical or scientific expertise is through the hearing process. While this method will limit the opportunity of the commission or agency head to change the recommended result, it nevertheless will put on the table all factors considered in arriving at a fair and impartial decision. If agency expertise is confined to the hearing process, the agency head, in reviewing the ALJ's decision, is limited to the articulation of goals and objectives of agency policy and the application of that policy to the case at hand. Expertise should come into play through the hearing process; opportunity for rebuttal by the litigants is logically handled through contrary testimony of other experts.\textsuperscript{127}

E. Dealing with the Legislature

Legislative approval is required for both the creation and continuation of a CHA. Constant communication with legislative committees and key legislators is required for any successful governmental function, particularly for a CHA.

General, on-going legislation may permit or provide for governmental action which requires hearing protections for affected citizens. The cost and expenses associated with hearings must be documented when newly created hearings are assigned to a CHA. In

\textsuperscript{127} In \textit{Northern Spotted Owl v. Hodel}, 716 F. Supp 479, 482 (W.D. Wash. 1988) the court, in finding that the Fish and Wildlife Service had ignored the unanimous opinions of its own experts in concluding that the spotted owl was not an endangered species, stated: "Judicial deference to agency expertise is proper, but the Court will not do so blindly. The Court finds that the Service has not set forth the grounds for its decision against listing the owl." I believe that expertise, enlisted through the adjudicatory process, minimizes the possibility of such arbitrary and capricious decisions. Moreover, the agency cannot easily adopt an illegal policy under the guise of "expertise" if the "expertise" is subjected to adjudicatory examination and inquiry. See comment at note 101, \textit{supra}. 

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the present system hearing costs sometimes are not identified, separately stated, or accounted for, and may be overlooked or minimized.

There is a tendency of legislators to over-burden a CHA with non-administrative hearings, hearings which properly belong to the constitutional judiciary. In the minds of many lawmakers, a CHA can relieve the overburdened court system by hearing traffic cases or parking ticket cases, housing or juvenile problems, or a myriad of other judicial matters. The CHA must operate within the confines of administrative law, it is an executive hearing agency, dealing with citizens within the confines of agency policy and enforcement procedures. If other duties are required of it, or if it is given regular judicial functions, or functions ex contractu or ex delicto, it will step out of character as a CHA. The bureaucratic nightmare may indeed be realized by such overreaching. The existence and viability of a true administrative hearing agency is best assured by careful lawmaking and by a well conceived philosophical basis for the CHA function.

F. Separateness from Constitutional Courts – When is a Judge not a Judge?

Where adjudicative decision makers do not possess life tenure and a permanent salary, they are 'incapable of exercising any portion of the judicial power.'

They [the Tax Court] still lack life tenure; their salaries may still be diminished; they are still removable by the President for 'inefficiency, neglect of duty, or malfeasance in office.' (we held that these latter terms are 'very broad' and 'could sustain removal for any number of actual or perceived transgressions.') How anyone with these characteristics can exercise judicial power 'independent of the . . . Executive Branch['] is a complete mystery.

Courts . . . have an aura of dignity that derives from their constitutional stature. In addition, judges enjoy the independence of a constitutionally fixed tenure in office. Most importantly, courts are considered the ultimate upholders of


129 Id. (citations omitted).
law and guardians of legality. Agencies and administrators do not enjoy any of these attributes. 130

1. Separateness from Constitutional Courts

Administrative Law Judges perform specialized tasks. As part of the executive branch, after fairness and impartiality, they are concerned with governmental goals and objectives embodied within policy. Removal of the adjudicatory function from executive agencies does not transmogrify the agency hearing into a constitutional judicial function. The adjudicatory function is an adjunct of agency responsibility. The transfer is for the sole purpose of elevating the obligation of fairness and impartiality to the highest pinnacle, a pinnacle that it does not enjoy within the agency. 131

131 Id. at 442.
However, Administrative Law Judges are not part of the judiciary even though they are adjudicators:

1. They have no constitutional status;
2. They exercise a vicarious authority—a hearing authority previously exercised by the agency;
3. They are subject to executive control;
4. They have a narrow mandate: fairness, objectivity and promptness;
5. They have no aura of excessive authority;
6. They do not have the power of enforcement except to the extent that they are assigned the agency's power of enforcement;
7. They have limited discretion;

The majority of the Court in Freytag seem to disagree. In that case, the United States Tax Court was held to be a court of law because "[i]t has authority to punish contempts by fine..., to grant certain injunctive relief, to order the Secretary of the Treasury to refund an overpayment, and to subpoena and examine witnesses, order production of documents and administer oaths. All these powers are quintessentially judicial in nature." Freytag, 111 S. Ct. at 2645. But note the well reasoned contrary view of Scalia (joined in by O'Connor and Souter) "[i]t is no doubt true that all such bodies "adjudicate," i.e., they determine facts, apply rule of law to those facts, and thus arrive at a decision. But there is nothing 'inherently judicial' about 'adjudication.' To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power." Id. at 2655.

In Commission on Medical Discipline v. Stillman, 291 Md. 390, 400, 435 A.2d 747, 753 (1981) the Court of Appeals (per Murphy, C.J.) stated:

'[T]he judiciary has certain implied or inherent powers under the Maryland Constitution. . . . 'From time immemorial, certain powers have been conceded to courts, because they are courts. Such powers have been conceded, because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. These powers are called inherent powers.'

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8. Their decisions are subject to ratification or acceptance by the agency or by the courts.\textsuperscript{135}

While the federal constitution and most state constitutions do not address the separation of the legislative, judicial and executive powers of government, the Maryland constitution contains a hortatory, but firm statement that the powers ought to be forever separate.\textsuperscript{136} This statement, coupled with a requirement that the judicial power be vested in certain named courts\textsuperscript{137} creates what might appear, at first glance, to be an insurmountable obstacle to the creation of a central hearing agency. However, the Maryland Court of Appeals dealt with the constitutional problem in \textit{County Council of Montgomery County v. Investor's Funding}, and held that neither of these state constitutional provisions prohibits a legislative delegation of adjudicatory powers to an agency of a local jurisdiction.\textsuperscript{138} The basic rationale of the holding is that such "quasi-judicial" powers are necessarily incidental to the agency's administrative duties and, notwithstanding the strong language of the constitution, a delegation of such adjudicatory


\textsuperscript{136} Art. 8 of the Maryland Constitution states:

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other, and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other. \textit{MD. CONST. CODE ANN. Art. 8 (1981).}

\textsuperscript{137} Art. IV of the Maryland Constitution states:

The Judicial power of this State is vested in a Court of Appeals, such intermediate courts of appeal as the General Assembly may create by law, Circuit Courts, Orphans' Courts, and a District Court. These Courts shall be Courts of Record. \textit{MD. CONST. CODE ANN. Art. IV, §1 (1981).}

\textsuperscript{138} 270 Md. 403, 312 A.2d 225 (1973).
In a strongly worded dissent, Judge Barnes argued that the prefix "quasi" is meaningless and does not transform an essentially judicial function into an acceptable non-judicial executive function.

Apparently, one other state, New Mexico, has strong constitutional language comparable to that of Maryland's. In striking down adjudicatory functions for the state Workers' Compensation Commission, the New Mexico Supreme Court cited its

139 County Council v. Investors Funding, 270 Md. 403, 441, 312 A.2d 225, 245 (1973).

As to the granting of these powers, we are in full agreement with the Council's observation that 'the pivotal point in determining the permissible extent of delegable adjudicatory functions is not merely their inherent nature but the context of the regulatory scheme and the enforcement procedure provided by the administrative process.' We think it plain that the function of the Commission is primarily administrative and the power vested in it to hear and determine controversies involving landlords and tenants is granted only as an incident to its administrative duty; in other words, the Commission's function is not primarily to decide questions of legal rights between private parties, but is merely incidental, although reasonably necessary, to its regulatory powers.

140 See Id. at 451.

The device for the 'tempering' [of the Maryland Constitution] has been the addition of the prefix 'quasi' to the word 'judicial,' connected by a hyphen, and behold, two mandatory and unambiguous provisions in the Maryland Constitution, as well as the holding in Dal Maso are 'tempered' or, as I would put it 'gravely impaired.' (Judge Barnes dissenting). Tomlinson, supra note 129 contains a thorough review of the state's constitutional questions, including an analysis of the Investor's Funding case. See also Heaps v. Cobb, 185 Md. 372, 378-79, 45 A.2d 73 (1945); Department of Natural Resources v. Linchester, 274 Md. 211, 222, 334 A.2d 514, 522 (1975). See also the note on this provision in Maryland's 1776 Constitution in Federalist #47 by Madison: "Maryland has adopted the [separation] maxim in the most unqualified terms." However, the express prohibition, "no person exercising the functions of one of said Departments shall assume or discharge the duties of any other" was added to the original in the Constitution of 1851.
constitution, and "possibly" that of Maryland, as sufficiently broad as to prohibit the delegation of any judicial function whether incidental to administrative duties or not.\textsuperscript{141}

We already have discussed the "team player" approach of the OAH within the executive branch of state government. One Maryland case in discussing the separation of powers doctrine enshrined in the Maryland Constitution recognizes that government is a team effort: "both the agencies and the courts are governmental ministries created to promote public purposes, and in this sense they are collaborative instrumentalities, rather than rivals or competitors, in the paramount task of safeguarding the interests of our citizens.\textsuperscript{142}

It is fair to conclude, therefore, that while agency adjudication is separate and distinct from judicial adjudication, the branches of government are engaged in a common undertaking, all collaborating for the common good.

2. \textbf{When is a Judge not a Judge?}

It is clear that an Administrative Law Judge does not rise in rank, dignity or deference equal to that of a constitutional judge.\textsuperscript{143} This is plain from the very flexibility required in his/her rendering of due process.

Administrative Law Judges hold hearings in conference rooms, cafeterias, prisons, mental institutions and in formal court rooms. They hold hearings by telephone and electronic media. There may be few, if any, trappings of judicial authority.\textsuperscript{144}

\textsuperscript{142} \textit{Department of Natural Resources v. Linchester}, 274 Md. 211, 221, 334 A.2d 514, 521 (1974).
\textsuperscript{143} However, they are expected to conform to the same ethical standards as constitutional judges. Note California ALJs discussion in Edley, \textit{supra} note 102. "We must seek hearing officers who have all the qualities of our finest judges." \textit{Id.} at 90. "A hearing officer is expected to comport himself, in all respects, as does a judge of a court of record." \textit{Id.} at 91.
\textsuperscript{144} Indeed, the "hearing" may not even be a "hearing", but an \textit{in camera} review of a record. See Friendly, \textit{supra} note 1, at 1270. "Although the term "hearing" has an oral connotation, I see no reason why in some circumstances a "hearing" may not be had on written materials only." \textit{Id.}
Due process may be accorded to a citizen by a non-judge, a layman, an administrator, or any authority figure. The due process mandated by the Supreme Court in Goss v. Lopez, supra, did not contemplate that a judge/adjudicator would sit in judgment on the process required to suspend a high school student for fourteen days.

(a) The Robe Question

Central Hearing Agencies sometimes are faced with the question "To robe or not to robe?" In Maryland, an early decision was made that ALJs employed by the OAH would be robed when holding hearings in a formal court room. The idea of robing was abandoned when some members of the legislature objected, believing that the agency should function informally with no judicial accouterment. Trappings of judicial authority may be automatically accorded Administrative Law Judges by lawyer practitioners and by the public but genuflection should not be demanded. The adjudicatory function automatically receives sufficient respect when it is performed with dignity, fairness and impartiality.

(b) The Unjudgelike "Inquisitorial" Responsibility

The foregoing indicates that the trappings of the Administrative Law Judge may be significantly fewer than those of a constitutional judge. However, this diminished dignity may have a number of salutary results. One such result is the opportunity of the

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145 Judge Scalia argues that the nature of adjudication is not the critical factor, but the identity of the adjudicator.

It is no doubt true that all such bodies 'adjudicate', i.e., they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing 'inherently judicial' about 'adjudication'. To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power. . . .

In short, given the performance of adjudicatory functions by a federal officer, it is the identity of the officer-not something intrinsic about the mode of decisionmaking or type of decision-that tells us whether the judicial power is being exercised. Freytag v. CIR, 111 S. Ct. 2631, 2655 (1991).
Administrative Law Judge to participate more directly in proceedings, even to the point of diligently seeking the truth.\textsuperscript{146}

As a recent editorial in \textit{Judicature} stated, "the adversary system serves to resolve conflict, the inquisitorial system serves to enforce state goals."\textsuperscript{147} In other words, because of policy goals, Administrative Law Judges are ideally suited to shed the role of passive neutrality and participate more directly and aggressively in the adjudicatory process.

Following is an outline of those features of administrative hearings which are well suited to "inquisitorial" techniques (this outline tracks the reasoning of the \textit{Judicature} editorial):

1. Frequently administrative hearings are held without the benefit of attorneys. In this setting, the traditional adversary system has no relevance, since the judge cannot act as counsel for both sides he must act as counsel for neither; his goal is to discover the truth.

2. The rules of evidence are far more relaxed in an administrative setting permitting the Administrative Law Judge to cut through the formalities and judicial reticence required in traditional evidentiary hearings.

3. The Administrative Law Judge tends to admit virtually all relevant information in order to develop a full record.\textsuperscript{148}

4. The inquisitorial system allows witnesses to begin their testimony with an uninterrupted narrative. This procedure is frequently necessary for the \textit{pro se} litigant.

\textsuperscript{146} As to a better blend of the "inquisitorial" system with the American "adversarial" mode, see generally Judge Marvin E. Frankel, "The Search for Truth, an Umpireal View," 123 \textit{U. Pa. L. Rev.} 1031 (1975).

\textsuperscript{147} Franklin Strier, "What Can the American Adversary System Learn From an Inquisitorial System Of Justice?", 76 \textit{Judicature} 109 (Oct.-Nov. 1992).

\textsuperscript{148} \textit{Id.} at 110. "Under the [inquisitorial] rule of "free proof" the court must admit virtually all relevant information until satisfied of the truth or falsity of a propounded position."
(5) The inquisitorial system permits the judge to call expert witnesses who may be more valuable since they are neutral.

(6) The Administrative Law Judge generally is not tied down by sanitized discovery but must use any information, expertise and data available.

(7) The informal status of the Administrative Law Judge permits him to participate in the proceedings without overpowering or confusing the outcome, or intimidating the parties.

G. Should the Administrative Law Judges Decision Be a Recommended Decision or a Final Decision?

It is not our role, or that of the Court of Appeals to decide which policy choice is a better one, for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency.\footnote{Arkansas v. Oklahoma, 112 S. Ct. 1046, 1061 (1992).}

It is abundantly clear that agencies must retain control over their policies; however, some believe that agencies are "infected with a mission."\footnote{Tomlinson, supra note 129, at 442 (discussing the negative aspects of agency responsibility for adjudication in Maryland).} We do not question the ability of an agency to adjudicate fairly; the problem lies in the confusion of its mission with its obligation of fairness. The cause I advocate is separating the adjudicatory function from the agency but leaving it in control of policy making.

Experience teaches us that the making of a final decision versus a recommended decision makes little difference to the integrity of CHA adjudication. Protections accorded the validity of the hearing process through a properly drafted Administrative Procedure Act are sufficient for all relevant purposes. However, the agency must be comfortable that its policies are enforced. It also must be comfortable that it can, if it chooses, select or review cases intrinsically involving its policies.

There is good reason for the agency to retain political control of its policy goals through the hearing process. We recognize for example that the Social Security
Administration ("SSA") has been criticized both by the judiciary and by commentators for its effort to increase productivity of Administrative Law Judges, to improve their consistency and to change their reversal rate.151

I have substantial doubt that SSA's techniques in its attempt to exercise control over political results, that is, by use of mandatory output through statistically mandated reversal rates and the like, are appropriate. These techniques, even if proper for limited purposes, are subject to abuse and are unnecessary. In the view I take of the matter, political control can be exerted through education, discussion, seminars and all of the various team player techniques discussed above.

OAH's subject matter specialists have successfully made individual administrative law judges aware of the larger goals and functions of constituent agencies. I believe that educational techniques are sufficient to achieve appropriate influence and give appropriate guidance.

If a central hearing agency is to become the order of the day in most state governments and in the federal government, assuming that ultimately Senator Heflin will have his way, a model statute should be developed whereby the agency can retain flexible control over its policies while delegating the adjudicatory function to a CHA.152

In addition, each state planning to adopt a CHA should decide what statutory provisions respecting policy versus expertise should be inserted in the implementing statute or what modifications to the state Administrative Procedure Act should be made.

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151 But see Pierce, supra note 92, at 501 whose thesis is that "the SSA's method of controlling ALJ decisionmaking was valid if its only effect was to enhance consistency." "Forcing ALJs to adopt consistent reversal rates does not jeopardize due process values. Rather, it significantly furthers consistency and accuracy, two important due process values."

152 One possibility is to be found in the Texas statute creating a CHA whereby it is provided that the agency cannot modify the ALJs opinion except for matters concerning policy. TEX. REV. CIV STAT. ANN. art. 6252-13a, §13j (West 1992).
H. Development of the Record.

1. Development of the Record

The absolute supremacy of the judicial branch to declare the law ultimately protects the integrity of the judicial process in any system permitting a CHA within the executive branch. Judicial review without superintendence is the methodology long established and adhered to. Adequate review requires an unimpeded and *pellucid* record so that the adjudicatory process is laid bare for scrutiny by the reviewing court.

Second only to the duty to hold a fair hearing, an administrative law judge must develop a record sensitive to the requirements of an adequate review. 153 This duty includes:

(a) To protect reviewability, the ALJ must develop a full record; error should be on the side of inclusion in the record rather than exclusion.

(b) Findings of fact must be specific, keyed into testimony or other evidence adduced at the hearing and identified in the record.

(c) Inferences drawn from findings of fact must be clearly stated.

(d) Conclusions of law should be identified as such and the source of law identified.

(e) Every issue raised by the parties should be addressed in the decision. 154

(f) Conclusions of law must be applied to specific findings of fact. Although the decision is based upon the "whole record," a reviewing court does not search the record for factual pegs upon which to hang acceptable conclusions. In this

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153 Unless the record is clear, a reviewing court has nothing to review. "Without findings of fact on all material issues, and without a clear statement of the rationale behind the ALJ's action, a reviewing court cannot properly perform its function." *Forman v. Motor Vehicle Admin.*, 332 Md. 201, 221, 630 A.2d 753 (1993).

154 *Commission on Human Relations v. Malakoff*, 273 Md. 214, 229, 329 A.2d 8, 17 (1974) ("it is appropriate to point out, as we have in previous opinions, not only the importance but the necessity that administrative agencies resolve all significant conflicts in the evidence and then chronicle, in the record, full, complete and detailed findings of fact and conclusions of law.").
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sense, judicial review of administrative decisions differs radically from
appellate review of constitutional court decisions.\textsuperscript{155}

2. Deference

Greater deference should be accorded decisions of adjudicators who are under the
structural control of a CHA rather than adjudicators within an agency. This stricter review
of agency adjudication is, of course, balanced by greater deference to agency policy within
the framework of \textit{Chevron}\textsuperscript{156} and \textit{Skidmore v. Swift}\textsuperscript{157}.

Trained adjudicators are not required for the satisfaction of due process. Maryland's OAH statute\textsuperscript{158} and APA\textsuperscript{159} require that (except for exempted agencies and the
OAH) only an agency head or Commission may hear contested cases which are not referred
to the CHA. This requirement is necessary to prevent an agency from circumventing the
CHA by appointing its own hearing officers or administrative judges and thus maintaining
control of the adjudicatory process. Such circumvention may render the CHA impotent and
useless.

I propose that administrative judges or hearing examiners remaining in agencies,
subject agency control, lose any deference accorded fair and impartial hearings not under
agency control. An appeal taken from the decision of such an employee or other functionary
to the CHA should provide for a CHA review of the record in-camera or for a \textit{de novo}
hearing if the CHA requires such a hearing after a record review. Following an \textit{in camera}
review, or \textit{de novo} hearing, an appeal could be taken, based upon the record, to a

\textsuperscript{155}This principle is well settled; see, for example, the discussion in United Steelworkers of
\textsuperscript{157}323 U.S. 134 (1944).
\textsuperscript{158}MD. ST. GOV'T CODE ANN. §9-1601 \textit{et seq.} (1993).
\textsuperscript{159}MD. ST. GOV'T CODE ANN. §10-201 \textit{et seq.}
constitutional court. Such a procedure would maintain the independence and integrity of the CHA without undermining the agency.

VI. Clear Advantages of a Central Hearing Agency

A. CHA Fairness - Real and Perceived

It generally is conceded that the present system of agency-employed hearing examiners creates a "perception" of bias. The New York study confirmed actual bias and agency leverage over the hearing function; the Maryland study found no actual proof of interference but documented the wide-spread perception of agency control and manipulation.

Four years of experience with the central hearing agency in Maryland proves that the new system provides both perceived and real impartiality. The Bar Association, individual practitioners, agencies, union representatives appearing on behalf of state employees, legislators, the courts, and, above all, citizens, express satisfaction with this new system of administrative justice.

In calendar year 1991 one hundred thirty-two complaints were received, of which six had merit; fifty-three in 1992, were received, two had merit; and as of the date of this writing, September, 1993, thirty-one complaints have been received, of which we believe two had merit.

The "how are we doing visits" to the agencies have reflected continued improvement in agency relations. At the time of adoption of OAHT's implementing legislation, nearly every agency appeared before the legislature urging the defeat of the proposal. When the legislation passed, nearly every agency petitioned the Governor to veto the bill. When the Governor signed the legislation, nearly every agency sought an exemption. Rounds of visits to agencies in the summer of 1993 confirmed approval of the process, approval of the quality of decision, and approval of the promptness of results. Agencies which formerly were most critical now have few suggestions for improvement; none presses for statutory exemption.
The impartiality of the OAH is both real and perceived.

B. **Better Government**

A CHA provides a better balance of government action. Within the executive branch the hearing function is more professional and conscientious; there is no confusion of fairness with implementation of policy. The entire executive branch is better "tuned up" to citizen response.

C. **Better Agency Function**

Agencies function more efficiently and effectively when preparing their cases for independent adjudicators rather than for fellow employees. This improved function applies not only to a better organized presentation; the investigation and enforcement procedures are more scrupulously implemented.

D. **Better Use of the Constitutional Courts**

Courts have more confidence in the fairness and impartiality of adjudicators dedicated solely to the principle of fairness. Courts are presented with a clearer and better developed record prepared in conformity with law and due process of law.

E. **Legislative Streamlining**

The legislature is more aware of the actual costs and requirements for administrative hearings. Where the administrative function requires it, hearing procedures are statutorily recognized, established, and provided for.

F. **Efficiencies**

The separation of adjudication from investigation and prosecution renders each process more efficient, more direct and more accountable.

G. **Economies**

Economies have been discussed herein at length and are demonstrable. States considering a CHA have financial models to look to in many states.
H. Better Administrative Law Judges - New Wine in Old Bottles

Discussions with Maryland ALJs working for its OAH establish that "burn out," "fatigue" and "disinterest" are minimized if not non-existent. Judges who, as hearing examiners, did not feel challenged welcome a varied caseload. They have mastered multifaceted statutes and regulatory laws. Former hearing examiners have cross-trained into many different types of hearings. The result is satisfying and challenging employment, an accomplishment second only to that of holding of proper hearings.

VII. The Future - One Step Forward in Rediscovering Government

Discussion with the approximately seventeen states making the transition to a CHA system as of the day of this writing\(^\text{160}\) indicates that generally the old system has been abandoned because of dissatisfaction with one or more agency. This dissatisfaction resulted in removing examiners from affected agencies and placing them in a "central panel."

 Ideally, a CHA should be structured for many agencies, not so much in response to abuses or problems, but, theoretically, as a matter of good government. However, government seldom operates in the abstract nor are improvements often effectuated in furtherance of political theory. Maryland's transition to a CHA was accomplished, not because of scandal, but by a confluence of interest of the State Bar Association, labor unions representing employees, the State Chamber of Commerce and citizens concerned with a fair administrative process. These consolidated forces found friendly and knowledgeable legislators who championed their cause and overwhelmingly adopted a generalized and flexible statute. The State's Attorney General and his assistants were, without exception, genuinely supportive. Finally, the Chief Executive, the Governor, gave his full support to the project.

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\(^{160}\) South Dakota adopted a CHA effective 7/1/93; S.D. CODIFIED LAWS ANN. § 1-23 (1993).
Any improvement in government requires the collective goodwill of the officials involved. Without that goodwill, very little will be accomplished. If the theory is sound and if goodwill exists, government can move forward, economically and effectively.
APPENDIX 1, Table 1

Central Panel Jurisdiction

State central panels were surveyed on jurisdiction and its derivation. Texas and Wisconsin reported that central panel use is mandatory for agencies within their respective jurisdictions. In Colorado, Florida, Maryland, New Jersey, North Dakota and Washington, use of the central panel by agencies within the central panel's jurisdiction is mandatory unless the agency heads personally conduct the hearing. In the other states, use of the central panel is governed by individual agency statutes or discretion.

CALIFORNIA
39 Administrative Law Judges

<table>
<thead>
<tr>
<th>Client Agency</th>
<th>Type of Hearing</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Services</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>Alcoholic Beverage</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>Contractor</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>Licensing Board</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>Dept. Fair Employment &amp;</td>
<td>Enforcement</td>
<td>Proposed</td>
</tr>
<tr>
<td>Housing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>Medical Bd.</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>DMV</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>Registered Nurses</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>Pharmacy</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>Real Estate</td>
<td>Licensing</td>
<td>Proposed</td>
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<td>Voc Nurses</td>
<td>Licensing</td>
<td>Proposed</td>
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<tr>
<td>Psych Techs</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>SMOG Check</td>
<td>Citations/Penalty</td>
<td>Proposed</td>
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<td>PERS/SF Retirement</td>
<td>Disability retirement</td>
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</tr>
<tr>
<td>Teacher Layoff</td>
<td>Due to reduction or</td>
<td>Proposed</td>
</tr>
<tr>
<td></td>
<td>discontinuation of</td>
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</tr>
<tr>
<td></td>
<td>services</td>
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</tr>
<tr>
<td>Stull School</td>
<td>Tenured teacher</td>
<td>Final</td>
</tr>
<tr>
<td></td>
<td>dismissal</td>
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<tr>
<td>State</td>
<td>Number of ALJs</td>
<td>Client Agencies</td>
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<tr>
<td>COLORADO</td>
<td>10 Full Time, 7 Part Time</td>
<td>Workers Comp, Regulatory Agencies, Social Services</td>
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<td>30 ALJs</td>
<td>Health &amp; Rehab Serv., Professional Reg, Environmental Reg</td>
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<td>Motor Vehicles, Health &amp; Mental Hygiene, Human Resources, Licensing &amp; Reg., Personnel, Natural Resources, Human Relations, Environment, Education</td>
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### MASSACHUSETTS

**7 ALJs**

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<th>Type of Hearing</th>
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<td>Civil Service Comm.</td>
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<td>Benefits</td>
<td>Final</td>
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<tr>
<td>Capital Planning &amp; Oper.</td>
<td>Contract disputes</td>
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### MINNESOTA

**11 Full Time; 25 Part Time; 27 Workers Comp. ALJs**

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<th>Type of Hearing</th>
<th>Decision</th>
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</thead>
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<td>Rates</td>
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<td>Human Rights</td>
<td>Civil penalty</td>
<td>Final</td>
</tr>
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<td>Child Support</td>
<td>Support, paternity</td>
<td>Final</td>
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<tr>
<td>Commerce</td>
<td>Licensing</td>
<td>Final</td>
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<tr>
<td>Veterans</td>
<td>Personnel</td>
<td>Proposed</td>
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<td>Rule making</td>
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### MISSOURI

**2 ALJs**

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<th>Type of Hearing</th>
<th>Decision</th>
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<td>Revenue</td>
<td>Tax Issues &amp; Licenses</td>
<td>Final</td>
</tr>
<tr>
<td>Social Services</td>
<td>Entitlement, Licensing</td>
<td>Final</td>
</tr>
<tr>
<td>Consumer Affairs and Licensing</td>
<td>Professions &amp; Insurance</td>
<td>Final</td>
</tr>
<tr>
<td>Insurance</td>
<td>Agency Licensing</td>
<td>Final</td>
</tr>
<tr>
<td>Public Safety</td>
<td>Agent Licensing</td>
<td>Final</td>
</tr>
<tr>
<td>Natural Resources</td>
<td>Liquor, Fireworks Licensing</td>
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<td>Solid Waste Licensing</td>
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<tr>
<td>Health</td>
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<td>Final</td>
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<td>Ambulance District Licensing</td>
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### NEW JERSEY
45 ALJs

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<td>Consumer Affairs</td>
<td>Lemon law, penalty</td>
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<tr>
<td>Education</td>
<td>Personnel</td>
<td>Proposed</td>
</tr>
<tr>
<td>Environment</td>
<td>Licensing, penalty</td>
<td>Proposed</td>
</tr>
<tr>
<td>Human Services</td>
<td>Benefits</td>
<td>Proposed</td>
</tr>
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<td>Benefits</td>
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<td>Discipline, layoff</td>
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### NEW YORK CITY
7 ALJs

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</thead>
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<tr>
<td>Corrections</td>
<td>Discipline/Disability</td>
<td>Proposed</td>
</tr>
<tr>
<td>Police Department</td>
<td>Discipline/Disability</td>
<td>Proposed</td>
</tr>
<tr>
<td>Taxi &amp; Limousine</td>
<td>Discipline/Disability</td>
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<tr>
<td>Transit Authority</td>
<td>Licensing</td>
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### NORTH CAROLINA
8 ALJs

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<tr>
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<th>Type of Hearing</th>
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<tbody>
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<td>Dept. of Adm.</td>
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<tr>
<td>Agriculture</td>
<td>Permits, inspection</td>
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</tr>
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<td>Alcoholic Beverages</td>
<td>Licensing</td>
<td>Proposed</td>
</tr>
<tr>
<td>Auditor</td>
<td>Firemen's &amp; Rescue Squad</td>
<td>Proposed</td>
</tr>
<tr>
<td>Community Colleges</td>
<td>Pension Fund</td>
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<td>Grievances</td>
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<td>Crime Victims' Comp</td>
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<td>Type of Hearing</td>
<td>Decision</td>
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<td>Vendor/contractor; permits; Nat'l Reg. of Historical Places</td>
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<td>Economic &amp; Community Dev.</td>
<td>Grievances</td>
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<td>Education</td>
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<td>Environment, Health &amp; Natural Resources</td>
<td>Permits/civil penalties</td>
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<td>Human Resources</td>
<td>Compliance/penalties</td>
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<td>Appeals from civil penalties</td>
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<td>Disputes; discipline</td>
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<td>Certification</td>
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<td>Retirement</td>
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<td><strong>NORTH DAKOTA</strong></td>
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<tr>
<td></td>
<td>3 Full Time; 3 Part-Time, Temporary ALJs</td>
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<tr>
<td>Human Services</td>
<td>Benefits, rates, licensing</td>
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<tr>
<td>Attorney General</td>
<td>Licensing, penalty</td>
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<td>Personnel Board</td>
<td>Discipline</td>
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<td><strong>TENNESSEE</strong></td>
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<tr>
<td>Environment</td>
<td>License/civil penalty</td>
<td>Proposed/Final</td>
</tr>
<tr>
<td>Commerce &amp; Insurance</td>
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### TEXAS

**5 Full Time; 2 Part-Time ALJs**

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<tr>
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<tr>
<td>Employees Retirement</td>
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<td>Consumer Credit</td>
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### WASHINGTON

**59 Full Time; 1 Part-Time ALJs**

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<td>Social &amp; Health</td>
<td>Benefits, licensing, child</td>
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<td>Liquor Control</td>
<td>Licensing</td>
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<tr>
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### WISCONSIN

**14 ALJs**

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<tr>
<th>Client Agency</th>
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<tbody>
<tr>
<td>Natural Resources</td>
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</tr>
<tr>
<td>Corrections</td>
<td>Probation/parole review</td>
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<td>Health &amp; Soc. Serv.</td>
<td>Cease &amp; desist, forfeiture,</td>
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### WYOMING

**12 Full and Part-Time ALJs**

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<tr>
<td>Drivers License</td>
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Prepared by David LaRose, Chief Administrative Law Judge, State of Washington, for presentation at the Ninth Annual Central Panel States Directors' Conference, November 4 - 7, 1992, Baltimore, Maryland. Revised by John W. Hardwicke November 28, 1993
<table>
<thead>
<tr>
<th>STATE</th>
<th>PLACE IN GOVERNMENT</th>
<th>LOCATION</th>
<th>NO. OF HEARING OFFICERS</th>
<th>AVG. ANNUAL CASELOAD</th>
<th>FUNDING SOURCES</th>
<th>ANNUAL BUDGET</th>
<th>RULES OF PROCEDURE</th>
<th>CODE OF ETHICS</th>
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<tbody>
<tr>
<td>California</td>
<td>Executive Branch</td>
<td>Regional Offices</td>
<td>39 full time</td>
<td>6,000</td>
<td>User Fees</td>
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<td>APA</td>
<td>Canons of Ethics for Attorneys</td>
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<td>10 full time</td>
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<td>Own</td>
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<td>Florida</td>
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<td>Central Office</td>
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<td>APA</td>
<td>Judicial Code of Ethics</td>
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<td>Maryland</td>
<td>Executive Branch</td>
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<td>Chief &amp; Deputy Chief ALJs plus</td>
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<td>Own</td>
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<td>Executive Branch</td>
<td>Central Office</td>
<td>7 full time</td>
<td>1,300</td>
<td>General Fund</td>
<td>$ 473,000 (FY 92)</td>
<td>APA</td>
<td>Canons of Ethics for Attorneys</td>
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<td>Minnesota</td>
<td>Executive Branch</td>
<td>Central Office</td>
<td>11 full time + 25 part time</td>
<td>10,500</td>
<td>User Fees &amp; Workers' Comp. Appropriations</td>
<td>$ 5 million</td>
<td>APA</td>
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<td>Executive Branch</td>
<td>Central Office</td>
<td>2 full time</td>
<td>2,000</td>
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<td>APA</td>
<td>Own and Judicial Code of Ethics</td>
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<td>Executive Branch</td>
<td>Regional Offices</td>
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<td>11,000</td>
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<td>APA and Own</td>
<td>Own and Judicial Code of Ethics</td>
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<td>State</td>
<td>Type</td>
<td>Level</td>
<td>Position and Schedule</td>
<td>Full-time Equivalents</td>
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<td>Budget</td>
<td>Funding Source</td>
<td>Code of Conduct</td>
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<td>New York City</td>
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<td>Central Office</td>
<td>Chief &amp; Deputy plus 6 full time 1 vacancy</td>
<td>1,300</td>
<td>Budget Appropriation</td>
<td>$1.5 Million</td>
<td>CAPA &amp; Own</td>
<td>Code of Judicial Conduct &amp; City Conflicts of Interest Law</td>
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<td>North Carolina</td>
<td>Executive Branch</td>
<td>Central Office</td>
<td>Chief ALJ plus 8 full time ALJs</td>
<td>1,400</td>
<td>General Fund</td>
<td>$ 2.13 million</td>
<td>APA</td>
<td>Attorneys' Code of Ethics</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Executive Branch</td>
<td>Central Office</td>
<td>Director plus 2 full time ALJS 1 vacancy (F/T) 3 temporary (P/T)</td>
<td>575</td>
<td>General Fund and User Fees</td>
<td>$ 611,000</td>
<td>APA &amp; Own</td>
<td>Attorneys' Code of Ethics</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Secretary of State</td>
<td>Central Office</td>
<td>Chief ALJ plus 8 full time</td>
<td>1,068</td>
<td>General Fund and User Fees</td>
<td>$ 622,574</td>
<td>APA &amp; Own</td>
<td>Canons of Judicial</td>
</tr>
<tr>
<td>Texas</td>
<td>Executive Branch</td>
<td>Central Office</td>
<td>Chief ALJ plus 5 full time 2 part-time</td>
<td></td>
<td>User Fees</td>
<td>$660,000</td>
<td>Own/APTRA*</td>
<td>Code of Conduct for ALJs</td>
</tr>
<tr>
<td>Washington</td>
<td>Executive Branch</td>
<td>Regional Offices</td>
<td>59 full time 1 part time</td>
<td>42,000</td>
<td>User Fees</td>
<td>$6 million</td>
<td>APA</td>
<td>Own</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Dept. of Administration</td>
<td>Central Office with satellite</td>
<td>14 full time</td>
<td>4,164</td>
<td>General Funds</td>
<td>$ 1.60 million</td>
<td>APA &amp; own</td>
<td>Canons of Ethics for attorneys; Code of Ethics for State Employees</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Independent Agency in Executive Branch</td>
<td>Regional Offices</td>
<td>12 full and part time</td>
<td>6,500</td>
<td>Reimbursed General and Highway Funds Workmen's Comp.</td>
<td>$ 600,000</td>
<td>In Process</td>
<td>Not yet.</td>
</tr>
</tbody>
</table>

*APTRA - Administrative Practice & Texas Register Act
The purpose of the Office of Administrative Hearings is to promote administrative justice and to serve the public interest. An Administrative Law Judge shall be distinguished for his or her integrity, wisdom and sound legal knowledge, and shall inspire confidence in his or her personal honesty, fairness and moral courage.

A candidate or incumbent shall possess, at a minimum, the following qualifications in order to obtain an appointment to, or retain the position of, Administrative Law Judge.

**Integrity**

An Administrative Law Judge shall possess a high degree of personal integrity, and shall deal with his or her appointments as a public trust. An Administrative Law Judge shall be honest, sincere, upright and principled, and shall exhibit compassion, humility and moral courage. An Administrative Law Judge shall be indifferent to private political or partisan influence. An Administrative Law Judge shall not administer the office for the purpose of advancing his or her personal ambitions, and shall not allow other affairs or private interests to interfere with the proper performance of official duties.

**Impartiality**

An Administrative Law Judge shall adhere to a high standard of justice and lawfulness, and shall treat all parties impartially and fairly without reference to his or her own feelings or interests. An Administrative Law Judge shall have the ability to preside justly and without bias. An Administrative Law Judge shall exhibit a willingness to hear and consider what is put forth on all sides of a debatable proposition, and shall have the ability to give genuine consideration to views with which he or she does not personally agree.
Dedication

An Administrative Law Judge shall conduct his or her duties with industry and application and shall be conscientious, studious, thorough and punctual. An Administrative Law Judge shall not allow other affairs or private interests to interfere with the prompt performance of official duties.

Ability

An Administrative Law Judge shall possess superior self-discipline and shall exercise sound judgment in presiding, ruling on evidence, making decisions, and writing opinions. An Administrative Law Judge shall have the bearing and personality to allow him or her to deal with parties or counsel with sensitivity and without giving offense. An Administrative Law Judge shall be patient, courteous, attentive, yet shall also be firm and decisive. An Administrative Law Judge shall be mentally fit and alert and capable of performing the duties of office.

Ability to Preside:

An Administrative Law Judge shall conduct hearings with dignity and decorum and without interference which might detract from the proper atmosphere. An Administrative Law Judge shall so conduct himself or herself during hearings that his or her attitude, manner or tone toward attorneys or witnesses will not prevent the proper presentation of the cause or the ascertainment of truth. He or she shall not make an unnecessary display of learning, express a premature judgment, or add to the embarrassment or timidity of witnesses or attorneys. An Administrative Law Judge shall listen readily to others and be detached, even-handed and decisive.

Ability to Rule on Evidence:

An Administrative Law Judge shall be able to rule on evidence in accordance with applicable laws, rules, procedural regulations and legal precedent.

Ability to Make a Decision

An Administrative Law Judge shall possess the ability to decide causes before him or her in a fair, unbiased and impartial manner.
Ability to Write a Decision

An Administrative Law Judge shall be able to organize facts and legal opinion in a clear and concise manner.

Knowledge of Law

An Administrative Law Judge shall administer justice in accordance with the law and regulations governing the cause before him or her.

Timeliness

An Administrative Law Judge shall perform his or her duties in a timely manner as may be required in the particular cause.

Minimum Experience and Education

An Administrative Law Judge shall, at minimum, possess a Juris Doctor or equivalent degree from an accredited college or university, and be a member in good standing of the bar of any jurisdiction.

In conjunction with the initial formation of the Office of Administrative Hearings, and in order to grandfather into the Office those Hearing Examiners who performed their prior duties in an exemplary manner, individuals may be appointed to the position of Administrative Law Judge prior to February 1, 1990, without regard to this minimum experience and education requirement.161

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161 The Office of Administrative Hearings Administrative Law Judge Qualification Standards went into effect January 1, 1990. A copy of the signed document is on file with the author.