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Administrative Adjudications in New Jersey: Why Not Let the ALJ Decide?*

By Richard M. Hluchan

A client approaches you with a tale of woe. It seems that he purchased a beautiful bay front lot on Long Beach Island, intending to construct his dream vacation home. He since has discovered that a portion of the property consists of fresh-water wetlands, and has applied to the Department of Environmental Protection (DEP) for a permit to fill them. DEP denied the permit. The client wants you to challenge the denial.

You file your request for a “contested case” hearing, and an administrative law judge (ALJ) is assigned to the case. After extensive preparation, the hearing day arrives. You present your witnesses, and introduce expert testimony and documentation to demonstrate that your client is entitled to a permit. A deputy attorney general (DAG) representing DEP presents testimony and evidence in support of DEP’s denial.

Several weeks later, you receive the ALJ’s written decision. The ALJ found that your witnesses were credible and that your client is entitled to a permit to fill the wetlands. Your client is ecstatic, and wants to immediately begin construction.

Not so fast. Your client forgot the admonition you gave him at the outset of the case. The ALJ’s decision is not a final decision, but merely a recommendation. The final decision will subsequently be rendered by the DEP commissioner.

Your client is incredulous. “How can DEP be both prosecutor and judge in the same case? Isn’t it unfair that the boss of the people who denied the permit in the first place makes the final decision?”

Is it, indeed, fair? In this particular case,¹ the commissioner

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¹ *Zaloom v. NJDEP*, 92 NJAR2d (EPE) 50 (1992).

reversed the ALJ and found that the client was not entitled to a wetlands permit. The client was compelled to appeal to the Appellate Division to obtain the permit. Total cost: three years, substantial dollars for legal fees and costs, and a frustrated and disgruntled client who lost his remaining respect for New Jersey's administrative process.

For the average litigant in the Office of Administrative Law (OAL), it seems unfair that the ALJ who personally conducts the trial, hears the witnesses, assesses their credibility, examines the exhibits and is intimately familiar with all aspects of the case cannot definitively decide the matter in controversy. Rather, the agency head, whose employees decided to deny the license, or to prosecute an alleged regulatory violation or assess a penalty in the first place, has the exclusive right under law to render a final decision.²

While the present system may seem unfair, it is a far cry from the system it replaced. Prior to 1978, when the OAL was created,³ contested cases before state agencies were heard in the first instance by hearing examiners who were employees of the very agency that took the action that led to the case. Such hearings were often held within the cozy confines of the agency's offices. As noted by the Supreme Court:

The use of agency employees to conduct hearings and determine the evidential record in contested cases involving claims against the agency fostered an institutional bias in favor of the agency that undermines the fairness and impartiality of administrative adjudication.⁴

It was in response to such perceived unfairness that the OAL was created. As an independent corps of hearing officers known as administrative law judges, the OAL was hailed as a new system of administrative adjudication that would promote justice through uniformity and independence, bring impartiality and objectivity to agency hearings, and ultimately achieve higher levels of fairness in administrative adjudications.⁵

² N.J.S.A. 52:14B-10(c).

³ N.J.S.A. 52:14F-1 *et seq.*

⁴ *In re Uniform Administrative Procedure Rules*, 90 N.J. 85, 90 (1982).

⁵ *Id.*

While the creation of the OAL was a giant step toward efficiency, consistency, fairness and independence in the conduct of state administrative hearings, it is nonetheless clear that the Legislature never intended to alter the basic regulatory authority of state agencies. Final administrative adjudication continues to be the responsibility of the agency head. The rationale is that administrative agencies are not judicial tribunals, and thus, even in their adjudicatory role, simply are not a neutral forum whose function is solely to decide the controversy presented to it. Rather, as a part of the executive branch of government, administrative agencies are charged with faithfully executing the law through their regulatory and rulemaking functions. Administrative adjudication, according to this thesis, is simply one aspect of regulatory power. Thus, although agencies adjudicate individual disputes and determine individual rights under law, they do so as part of a regulatory, not judicial, process over which the agency head must maintain overall control.⁶

So great is the perceived need for control by the agency head that OAL practice has spawned modes of procedure that would not be tolerated within the court system. For example, unless an agency head is tainted by “actual bias,” he or she may render a final decision in any matter.⁷ “Actual bias” is an exacting standard, and will be found only in the rare circumstance when, for example, the decisionmaker has a pecuniary interest in the outcome of the matter, or has been the target of personal criticism from one seeking relief.⁸ Thus, an agency head may render a decision, and need not recuse him or herself, even if he or she has become familiar with the facts of the case through the performance of administrative duties, has announced an opinion on a disputed issue in the case, or has conducted an investigation and formulated a policy position before the ALJ has conducted the trial.⁹ The “appearance of impropriety” standard applicable to judges is inapplicable in the administrative adjudicative context.

The perceived need for administrative control also has given rise to special accommodations for the state’s lawyers, which would never be permitted to private practitioners. In the typical administrative enforcement or license action, a DAG represents both

⁶ *Id.* at 91.

⁷ *In re Carberry*, 114 N.J. 574, 585 (1989).

⁸ *Id.* at 586.

⁹ *Id.* at 585.

the prosecutor and the ultimate decisionmaker. Although an attorney representing a litigant before a superior court judge is not permitted to make *ex parte* contact with the court, different rules have been carved out in the OAL context.

While expressing concern that the impartiality of the agency head be maintained, the Supreme Court has nonetheless given its blessing to *ex parte* contacts between the prosecuting DAG and the client agency head in the midst of OAL proceedings.¹⁰ Perhaps acknowledging that it is thereby condoning an irregular and potentially unfair situation, the Court asks litigants to have faith that “DAGs and agency heads will be cautious and circumspect in deciding whether *ex parte* communications are necessary, and will ensure that such communications do not threaten the fairness of the proceedings.”¹¹

The Supreme Court did place some limits on such *ex parte* contacts. Once an ALJ renders the initial decision, and the agency head is thus actively reviewing the matter prior to rendering a final decision, the DAG who prosecuted the matter no longer may communicate with the agency head. However, the Court allows another DAG, from the very same office, to advise the agency head whether to accept or reject the legal arguments of his colleague. During this period, an artificial wall must be erected between the DAGs.¹²

One cannot conceive of such a situation in a judicial forum. But this is how the state’s lawyers in the administrative adjudication system are expected to routinely function. The ease with which unscrupulous individuals could engage in improper *ex parte* contacts or breach the artificial wall, undetected by the public, is apparent.

Other facets of the adjudicative process, which are vastly different from those experienced in the trial court, facilitate agency control. For example, in order to maintain the efficiency and flexibility of administrative hearings, no formal rules of evidence are utilized.¹³ Hearsay is routinely admitted into evidence as a “common practice.”¹⁴ Thus, evidence which might normally be inadmissible in court is routinely admitted in OAL proceedings, unless the ALJ finds

¹⁰ *Matter of Opinion No. 583*, 107 N.J. 230 (1987).

¹¹ *Id.* at 239.

¹² *Id.* at 239-40.

¹³ N.J.S.A. 52:14B-10(a).

¹⁴ *Matter of Toth*, 175 N.J. Super. 254, 262 (App. Div. 1980).

that its probative value is substantially outweighed by the risk that its admission will necessitate undue time or create a substantial danger of undue prejudice or confusion.

Moreover, the full panoply of discovery rights is not available to OAL litigants. Depositions, for example, are unavailable as a matter of right, and may be taken only if the ALJ permits.¹⁵ Such motions are routinely opposed by DAGs and, more often than not, are denied, even in complex cases where substantial economic interests are at stake.

The requirement that agency heads retain final decisionmaking authority in administrative adjudicative matters is often justified by the perceived need to administer complex policy in a uniform and efficient manner. Only by maintaining final adjudicative authority, it is reasoned, can an agency ensure that its statutory mission and regulatory pronouncements are uniformly applied. To this end, the experience, technical competence and specialized knowledge of the agency are utilized in evaluating evidence and rendering a decision.¹⁶ The underlying premise is, that the agency has specialized technical knowledge which only it can properly apply. In fact, such technical evidence and knowledge should be presented to the ALJ and subjected to cross-examination and rebuttal during the hearing, like any other technical evidence presented to any other neutral decisionmaker in any other forum.

Further underscoring the agency head's control over the proceedings, and contributing to the appearance that the system is unfair, is the manner in which initial decisions of an ALJ are reviewed by the agency head and turned into final decisions. The law contemplates that after the ALJ renders the initial decision, the parties have the opportunity to file exceptions, objections and replies thereto, and to present arguments to the head of the agency, either orally or in writing, after which "the head of the agency, upon a review of the record submitted by the administrative law judge, shall adopt, reject or modify the recommended report and decision" within 45 days.¹⁷ One conjures up the image of an agency head, much like a superior court judge, poring over transcripts, exhibits, briefs and exceptions,

¹⁵ N.J.A.C. 1:1-10.2(c).

¹⁶ *Matter of Silberman*, 169 N.J. Super. 243, 256 (App. Div. 1979), *aff'd*, 84 N.J. 303 (1980).

¹⁷ N.J.S.A. 52:14B-10(c).

and carefully drafting a written final decision.

The system rarely, if ever, works this way. Agency subordinates, with assistance from DAGs, review some or all of the record and prepare a draft decision for the commissioner's signature. How much time a commissioner personally spends on a given matter will vary from case to case. Seldom do agency heads hear oral argument on a matter, or otherwise take a hands-on approach. Given the demands on cabinet officers and other high officials, they simply cannot devote more than a fraction of the time necessary for a complete review. The oft-quoted administrative law maxim that "the one who decides must hear"¹⁸ has never been literally applied under New Jersey's system. Agency heads are not even required to read the entire record or transcript. They need only "consider and appraise" the record in rendering a decision.¹⁹

CONCLUSION

Administrative agencies are entrusted today with far more extensive and pervasive regulatory responsibilities than they were when the OAL was created. Regulatory requirements govern far more aspects of our personal and business lives that they did in 1978. The interests at stake also are far more valuable today. DEP, for example, has utilized the administrative adjudicatory process to assess penalties in excess of \$1 million.

When the Legislature took the first step by creating an independent corps of administrative law judges in 1978, it acted to inject a sense of fairness and propriety into an administrative adjudication system which needed it. After almost 20 years of experience with the OAL, it is time to take the next logical step to further enhance fairness and to provide needed confidence in the system, by removing final decisionmaking authority from agency heads and vesting it in ALJs. It is time to completely eliminate all vestiges of the "institutional bias in favor of the agency" and, just as importantly, eliminate the appearance of unfairness.

Agency heads might still render final decisions in cases in which they are truly impartial arbiters. Thus, for example, in a dispute between a teacher and a local school board, the commissioner of education still could render a decision perceived to be fair based upon

¹⁸ *Morgan v. US*, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936).

¹⁹ *Matter of Morrison*, 216 N.J. Super. 143 (App. Div. 1987).

an initial decision and record compiled by an administrative law judge.

In the more familiar circumstances, however, where an agency acts as both prosecutor and judge, fundamental fairness by today's standards is violated. The appearance of unfairness breeds contempt for, and a lack of confidence in, the system. There is no reason why final decision-making authority cannot be entrusted to the ALJ in such cases.