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Memorandum 90-36

Subject: Study N-102 - Administrative Adjudication (Central Panel)

OUTLINE OF MEMORANDUM

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Expansion of California Central Panel
Central Panel in Other Jurisdictions
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    Size of Central Panel
    Cost Efficiency
    Administrative Law Judge Expertise
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BACKGROUND

Professor Asimow's background study for the Commission on structural issues in administrative adjudication advises that the existing California central panel system of administrative law judges in the Office of Administrative Hearings not be expanded beyond its present scope. Rather, the professor recommends that those agencies that presently employ their own administrative law judges be allowed to continue to do so, subject to a few exceptions.

At the January 1990 meeting the Commission considered this matter but deferred decision on it. The Commission directed the staff to solicit further information concerning the central panel system from those who have volunteered it. The Commission requested that supplementary written information be presented to it at a future meeting.

The staff solicited further information from Paul Wyler, a Los Angeles administrative law judge, and from Professor Harold Levinson of Vanderbilt Law School, both advocates of an expanded central panel system. The staff wrote to Duane Harves, a Minnesota judge and a leading central panel proponent, and received information from Nahum Litt of the National Conference of Administrative Law Judges. The staff spoke with representatives of Senator Howell Heflin, author of the federal Administrative Law Judge Corps Act pending in Congress.

We have also assembled extensive material concerning the central panel system, supplementary to Professor Asimow's background study and the letters we have received commenting on it, including the following:

Abrams, Administrative Law Judge Systems: The California View, 29 Administrative Law Review 487 (1977)

California, Judicial Council, Tenth Biennial Report (1944)

Clarkson, The History of the California Administrative Procedure Act, 15 Hast. L. J. 237 (1964)

Model State Administrative Procedure Act § 4-301 (1981)

New Jersey, Governor's Committee on the Office of Administrative Law, Final Report (1984)

New York, Governor, Veto Message No. 22 (1989)

New York, Legislature, S. 03613A, Office of Administrative Hearings (1989)

New York, State Bar Association, Task Force on Administrative Adjudication, Report (1988)

Oregon, Commission on Administrative Hearings, Minutes and Report (1989)

M. Rich & W. Brucar, The Central Panel System for Administrative Law Judges: A Survey of Seven States (1983)

Thomas, Administrative Law Judges: The Corps Issue (1987)

United States Congress, H.R. 1179 and S. 594, Administrative Law Judge Corps Act (1989)

Because of the volume of this material, we have summarized it in this memorandum and have attached selected excerpts as Exhibits:

Exhibit 1--Asimow, Administrative Adjudication: Structural Issues (Independence of Administrative Law Judges) (1989)

Exhibit 2--M. Rich & W. Brucar, The Central Panel System for Administrative Law Judges: A Survey of Seven States (Selected Tables, Summary and Conclusion, Appendices, Bibliography) (1983)

Exhibit 3--Oregon, Commission on Administrative Hearings, Report of the Subcommittee on Comparable Law and Practices (1988)

Exhibit 4--Letters from Nahum Litt of National Conference of Administrative Law Judges (February 6, 1990) and Ken Cameron of Santa Monica (February 16, 1990)

HISTORY OF CENTRAL PANEL IN CALIFORNIA

California was the first jurisdiction to adopt the concept of a central panel of hearing officers who would hear administrative adjudications for a number of different agencies. The California central panel was created in 1945 as a result of recommendations of the Judicial Council for adoption of the Administrative Procedure Act. The Judicial Council recommended creation of a central panel to maintain a staff of qualified hearing officers available to all state agencies.

> Under the administrative procedure act recommended by the Council, State agencies are required to use qualified hearing officers in their adjudicatory proceedings. Many agencies have neither the volume of business nor the funds to warrant the employment of full-time hearing officers. Moreover, agencies may from time to time require the services of hearing officers in addition to those regularly employed. The Council's proposal contemplates, therefore, that the Department of Administrative Procedure shall maintain a panel of hearing officers available for use by the various State agencies.
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> Judicial Council of California, Tenth Biennial Report 11 (1944)

Although the Judicial Council's main concern was expertise and efficiency, the report recognized the additional benefits of the central panel of separation of functions and the appearance of fairness. For these reasons the report suggested that the central panel be located in an agency other than the Department of Justice:

> The Department of Justice now has the duty of prosecuting cases before many agencies and it would be difficult to achieve a separation of functions between the prosecuting deputies and hearing deputies. Even if separation was achieved in fact, the appearance of unfairness would remain if both prosecuting and hearing functions were vested in the same department.
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> Judicial Council of California, Tenth Biennial Report 11 (1944)

Thus the Judicial Council's seminal report in this area focuses on five key issues that have dominated the central panel debate ever since--(1) qualifications, (2) expertise, (3) efficiency, (4) separation of functions, and (5) appearance of fairness.

Although the Judicial Council considered the possibility that hearing officers be drawn from the central panel for all agency hearings, the report did not recommend this and the legislation that was enacted did not require use of the central panel by the larger administrative agencies. While recognizing that a complete separation of functions would be desirable in the larger agencies, "Any such requirement would have produced such a drastic alteration in the existing structure of some agencies, however, that it was thought unwise." Report at 14. The agencies have such a volume of business that a number of hearing officers are kept busy full time, and other duties are assigned when they are not engaged in hearings. The Judicial Council felt this could be countenanced so long as the State Personnel Board was satisfied that the volume of work exists and so long as the other duties assigned to the agency employees are not connected in any way with the investigation or prosecution of cases by the agency.

The central panel scheme recommended by the Judicial Council was enacted and rapidly implemented. The central panel currently resides in the Office of Administrative Hearings (OAH) in the Department of General Services, with offices in Sacramento, Los Angeles, and San Francisco. The administrative law judges are required by statute to be lawyers, and more than two dozen are employed by OAH. The agencies served by OAH are billed on the basis of the services provided.

Our consultant reports that the California experiment is generally considered a success. Although California's central panel system was not copied elsewhere until after it had been in existence for 30 years, beginning in 1974 other jurisdictions began to adopt the concept. Central panel systems are now in place in Colorado, Florida, Iowa, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Tennessee, Washington, and Wisconsin. Proposals for adoption of the central panel system have recently been or are currently being considered in three other states of which we are aware--New York, North Dakota, and Oregon. New York City recently adopted a central panel, and legislation is once again pending in Congress for a central federal panel.

There have been a number of studies of the California experience, with positive conclusions. Our consultant states:

> By general consensus, the system has worked well. The legislature has drawn on the panel to hear cases from other than licensing agencies, and they also decide personnel disputes from local school boards and community colleges. Agencies and local governments frequently draw on OAH even when not legally required to do so. While agencies sometimes grumble about ALJ decisions, the agency heads retain power to make the final decision, so that disagreement with ALJs is an annoyance rather than a serious problem.
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> Asimow, Administrative Adjudication: Structural Issues 40 (October 1989) [citations omitted]

EXPANSION OF CALIFORNIA CENTRAL PANEL

One of the major reasons for the Commission's current study of administrative law is the concept that the central panel might be expanded to cover more broadly California's administrative agencies. The major agencies are not served by administrative law judges from the central panel, but have large numbers of their own employees functioning as hearing officers. Our consultant phrases the issue as "whether some or all of these non-OAH ALJs should become independent and be formed into an ALJ corps, employed by OAH or some successor agency."

The considerations outlined by the consultant in favor of the central panel are the obvious ones--avoidance of conflicts of interest by independence, adjudicatory expertise, efficiency in employing good judges where and when needed. Arguments against the central panel include that agency judges develop expertise in their special areas and this may be critical; moreover, many hearing officers are not lawyers and would not do well in other areas, even though special knowledge may not be required.

After analyzing these considerations, the consultant's conclusion is "There should be no large-scale removal of ALJs from the agencies for which they decide cases." He notes that the best case for a separate corps can be made for licensing agencies that exercise prosecutorial functions; but these are the very agencies for which a central panel already exists. He also notes that there is no history in California of the independence of administrative law judges being

compromised by the agencies for which they work. He states that any savings that could result from a central panel may be illusory. Administrative law judges employed by agencies who responded to a questionnaire were divided on the desirability of removing them to the central panel. The consultant's report on this matter is excerpted as Exhibit 1.

When we circulated the consultant's report for review and comment by interested persons, the agencies that employ their own administrative law judges agreed with the consultant's conclusion that removal to the central panel is not called for. They emphasized the importance of having expert administrative law judges working in particular areas. The administrative law judges in the Office of Administrative Hearings who commented on the study, on the other hand, disagreed with this conclusion and urged expansion of the central panel. They pointed out that expertise can be achieved within the central panel system by specialization, where necessary, and noted that there do not appear to have been any problems in other jurisdictions that have broad central panel coverage.

The Commission decided to investigate the experience in the other central panel jurisdictions.

CENTRAL PANEL IN OTHER JURISDICTIONS

There is some material available from other jurisdictions that have adopted central panel systems. Reports of the operation of the system in those jurisdictions, as in California, are that the system works well and all concerned--agencies, administrative law judges, and public--are generally satisfied. For example, the New Jersey Governor's Committee on the Office of Administrative Law studied the operation of that central panel after it had been in existence for five years. The New Jersey system is considered to have broad jurisdiction, since it covers all contested cases except tax cases, parole cases, and public employee labor disputes. The Governor's Committee concluded that the Office of Administrative Law hearing process represented a

significant improvement over the previous agency hearing system and that cases were generally handled in a more professional and expeditious manner by the Office of Administrative Law.

Of the materials we assembled on the central panel systems of the various states, the most useful for present purposes are those that compare the operations of central panels in a number of states. These include the book by M. Rich & W. Brucar, The Central Panel System for Administrative Law Judges: A Survey of Seven States (1983) (excerpts attached as Exhibit 2), the New York State Bar Association, Report of the Task Force on Administrative Adjudication (1988), and the Oregon Commission on Administrative Hearings, Subcommittee on Comparable Practices, Minutes and Report (1988). The Oregon report is a particularly good recent summary; a copy is attached to this memorandum as Exhibit 3.

Key features of the various central panel jurisdictions compiled from these sources are indicated below. (Note: There may be some discrepancies in the information and statistics depending on their source and year, but they should suffice to give a general picture of the central panels of the various states.)

Jurisdiction

In no state does the jurisdiction of the central panel cover all administrative adjudications. The California system is not untypical, covering licensing agencies and a few others, but excluding such major areas as workers' compensation and unemployment appeals, business tax cases, public utilities hearings, driver's license suspensions, state personnel cases, welfare cases, parole determinations, and university and state college disputes.

Coverage of the central panel in other states is generally similar. Colorado, for example, excludes public utilities, state personnel, unemployment, and driver's license cases. Florida excludes unemployment, driver's license, welfare, state personnel, and student disciplinary cases. Minnesota exempts parole, unemployment, workers' compensation, state personnel, and welfare cases. New Jersey excludes taxes, parole, and state personnel cases.

The Oregon Report observes that "No two central panel systems are alike. Jurisdiction over contested cases varies with each state central panel, and no clear rationale is discernible other than perhaps the unique politics of each state. Although Workers' Compensation and Public Utility Commission cases are generally not within the jurisdiction of a central panel, Public Utility Commission is included in Washington, Workers' Compensation is included in Colorado and Minnesota and both are included in New Jersey."

Professor Asimow's report delves into each of the major California exemptions and concludes that each is properly excluded from central panel coverage for reasons peculiar to the situation of each. He states that in the case of civil service adjudication, benefit-disbursement, and public utility regulation, the case for independence is relatively weak. Because those agencies do not themselves exercise strongly conflicting functions (such as prosecution and adjudication), the independence of their ALJs is not nearly so critical. "DSS adjudicates mostly disputes between counties and welfare recipients, so again it is largely independent of the parties (although some conflict does exist here because the state provides funds to counties for welfare benefits and it provides all the funds for Medi-Cal benefits). SPB mostly adjudicates disputes between other agencies and the civil-service employees of those agencies. PUC sometimes exercises conflicting functions when it penalizes utilities or requires reparations. Most of its work, however, is forward-looking ratemaking."

Professor Asimow notes that with regard to the Workers' Compensation Appeals Board and the Unemployment Insurance Appeals Board, the parties to disputes adjudicated by the boards are external to those agencies. Thus they possess no built-in conflicts of interest. Moreover, specialized judges appear to be particularly important in the workers' compensation area. Unemployment cases are simpler and the argument for expertise is not as strong, but the case volume is immense, requiring a quite different work style than that employed by central panel judges.

With regard to the Department of Motor Vehicles and the State Board of Equalization, Professor Asimow points out that the hearing

officers are not usually lawyers and are experts only in motor vehicle and tax law. Again, the high volume of DMV cases and the highly technical business tax cases of SBE make them inappropriate for central panel treatment.

Similarly, Professor Asimow believes that non-specialists should not be judges in Public Utilities Commission cases. "A judge who must sit for many months in a case fixing utility rates must have expertise in public utility economics. It will not do to educate the judge from scratch. The stakes are too high--both for the public and for the industry. The decision must be absolutely the best decision possible. That requires expertise and experience."

The response of central panel advocates is that expertise and experience can be achieved by specialization within the central panel. Moreover, every one of the functions excluded from California's central panel is currently being handled adequately by the central panel in another jurisdiction. The exemptions from the central panel are not based on logic, but simply on the political strength of the agencies that have managed to get themselves exempted. Those agencies fight to keep control of the administrative law judges and the administrative adjudication process. Which is precisely the reason an independent administrative law judge corps is needed for adjudications in those agencies.

Size of Central Panel

The size of the central panel in the states that have adopted it tends to be fairly small. California, for example, has a central panel consisting of just over two dozen judges, handling 300 to 400 filings a month; this is a small fraction of the total number of state administrative law judges and filings in California. The operating budget of the Office of Administrative Law is about $3.5 million.

The California office is on the larger side, as central panels go. New Jersey is the largest, at about twice the size of California's central panel. Some are quite small. Tennessee, for example, has only 5 judges on its panel and receives only 30 to 40 cases monthly. In Tennessee, use of the central panel is voluntary.

One of the criticisms of the central panel system is that it is not geared to a high volume case load. Administrative law judge specialists employed by the various agencies are necessary to dispose of cases quickly and efficiently and keep up with the heavy work load. The volume of motor vehicle cases, workers' compensation cases, etc., would swamp the central panel. See, e.g., New York State Bar Association, Report of the Task Force on Administrative Adjudication (1988).

The few available statistics do not bear out this criticism, however. The average monthly case load per administrative law judge in the central panel states is 23.3. This covers a wide range, from 7.2 in Minnesota to 52.1 in Colorado. New Jersey, the most comprehensive central panel state, has an average monthly case load of 28.0 per administrative law judge. California, the next largest central panel, has 18.8.

We do not have comparative statistics for non-central panel states, but New Jersey reports that in the 10 years since centralization, 45 administrative law judges are disposing of twice the number of hearings handled by 130 hearing officers before centralization. The Oregon subcommittee, after surveying the experience in the central panel states, concluded that "What information was received indicates, generally, more rapid disposition of cases and fewer instances of significant backlogs, but some new central panels, such as Minnesota in the late 1970s, experienced some caseload management problems in the first couple years."

Cost Efficiency

More efficient disposition of cases by central panel administrative law judges, together with pooling of support staff, equipment, and offices that results in organizational efficiency, would seem to argue for cost savings in central panel jurisdictions. In fact, this is one of the arguments made in favor of adoption of a broad-based central panel. The experience in the central panel states is not so clear, however.

The Judicial Council felt in its 1944 recommendation for a California central panel that the transition could be made "with a minimum of expense." On the other hand, the New York State Bar concluded that the cost of implementing a central panel program was likely to be significant. "If nothing else, hearing officers in the individual agencies have varying Civil Service classifications. Civil service reclassification would be required, with attendant increases in salaries and with attendant litigation over the appropriateness of various classifications. Of course, costs are likely to be reduced after one-time, start-up expenses are incurred and paid."

There are relatively few statistics, and those don't show much either way. Professor Abrams points out that, subject to a few qualifications, "there should be no significant difference between the costs of a staff and a central panel hearing officer system." The Oregon subcommittee gathered what data it could from a number of central panel jurisdictions, but finally concluded, "Most of the central panel states assert that centralization has lowered costs. However, documentation is not abundant, although almost any measure of savings could be questioned. All of the states studied by the subcommittee have documented handling of an increased workload with less personnel than were required prior to centralization. ... In any case, the subcommittee found no evidence of increased costs resulting from centralization, and Washington, in particular, documented that start-up costs for its Office of Administrative Hearings were nominal."

Administrative Law Judge Expertise

A more significant factor than cost in evaluating the central panel experience is the potential loss of specialization and expertise in the central panel setting. An argument in favor of retaining administrative law judges in their own agencies is that they are expert in their own areas, some of which are quite complex and require special knowledge; this could be lost in a central panel setting.

This claim is somewhat difficult to evaluate, since the common specialty areas such as workers' compensation, public utilities rate cases, public employee disputes, etc., are typically excluded from the jurisdiction of the central panels.

The California experience offers some guidance. There was a period of time under the California central panel scheme when certain agencies had an option either to use their own staff administrative law judges or the central panel judges, and in fact some of the agencies used both, depending on their needs. Testimony by agency representatives at legislative hearings on this matter indicates that some agencies saw little or no difference in how the two types of judges handled the cases, whereas other agencies found that the central panel hearing officers sometimes lacked familiarity with precedents and the kinds of issues being handled within the agency, thereby slowing down the handling of cases. See The Use of Independent Hearing Officers for Administrative Adjudications, Cal. Leg. Senate Interim Rep. on Ad. Regulations and Adjudications (1957).

A study prepared by tenBroek, Operations Partially Subject to the APA: Public Welfare Administration, 44 Cal. L. Rev. 242 (1956), concludes that, "On the questions of the desirability of having hearing officers with legal training and experience, and having them independent of the agency or integrated into it, the weight of the evidence arising out of the years of experience of California's welfare administration with both types is on the side of social workers and integration."

Professor Abrams analyzes the information from the hearings and from tenBroek's study and concludes that the weightiness of the expertise-specialization claim varies markedly from agency to agency, even within an agency, depending on the types of issues involved in the cases. He believes that in California there are some agencies that sometimes deal with issues best handled by specialists. He notes that expertise and specialization could be achieved under the central panel system by calling expert witnesses or obtaining assistance of agency staff at hearings, but this of course may involve additional time and expense. Alternatively, a central panel judge may already have the necessary expertise and may be assigned to the case, or the central panel may be structured in a way that assigns particular hearing officers to particular agencies for extended periods of time so that the central panel judge will become a specialist while still remaining independent from the agency.

At least one advocate has argued that the importance of expertise is overrated, since the time needed to obtain expertise is overestimated. "Workers compensation is a case in point. Where the California judges suggest a two year learning course, the [federal Department of Labor] experience with the Longshore and Harbor Workers' Act is that judges can work at a journeyperson level in less than three months." Nahum Litt, National Conference of Administrative Law Judges (Exhibit 4).

In the other central panel states, the experience has been that special expertise is necessary in some but not all cases. A survey of central panel administrative law judges indicates an even split between those who believe administrative law judges should have specific expertise and those who do not. The survey results vary widely from state to state, leading the survey authors to conclude that the need for expertise probably depends on the type of case (a rate-making proceeding may require more technical expertise than a case involving eligibility benefits) and on individual experiences. M. Rich & W. Brucar, The Central Panel System for Administrative Law Judges: A Survey of Seven States (1983).

The Commission's consultant, Professor Asimow, also surveyed California public utilities and workers' compensation administrative law judges. Those administrative law judges were split on the desirability of being removed from their agencies to the central panel. Interviews with unemployment insurance and social services administrative law judges likewise yielded divided sentiment. Professor Asimow remarks, "Workers comp judges repeatedly cited the problem of expertise and specialization; they thought that cases should never be heard by inexperienced judges. [That was the unanimous view also of lawyers who work on both sides of compensation disputes.] ... PUC judges also mentioned the need for specialization and expertise and some mentioned the importance of having readily available PUC staff members to assist them and of being available to assist the commissioners in writing final decisions."

Central panel advocates suggest that the problem of specialization is not insurmountable. Areas of expertise would be developed within the central panel. Proposed federal administrative law judge central

panel legislation, for example, would create the following divisions of administrative law judges who would be assigned to cases within their specialty area (1) Division of Communications, Public Utility, and Transport Regulation; (2) Division of Safety and Environmental Regulation; (3) Division of Labor; (4) Division of Labor Relations; (5) Division of Health and Benefits Programs; (6) Division of Securities, Commodities, and Trade Regulation; (7) Division of General Programs and Grants.

This sort of specialization within the central panel has also occurred in the central panel states, on a less formal basis. Minnesota actually has three divisions--(1) utilities and transportation law, (2) environmental law, and (3) all other areas. Washington has two--(1) benefits, and (2) regulatory/special assignments. Some of the states assign administrative law judges to hear cases for specific agencies for extended time periods. Most central panel states assign judges to cases with the expertise of the judge in mind.

There is also an argument that lack of specialization and expertise in the central panel is a benefit rather than a detriment. A white paper prepared for the National Conference of Administrative Law Judges notes that there are significant drawbacks to highly repetitive decision making:

> One of those drawbacks is that judges often grow bored. Judges who have participated in the loan program have enthusiastically embraced the new-found variety in their caseload compared to the normal cases which had grown monotonous. One commentator reported that, "In ... numerous interviews [with hearing examiners] the hearing examiners without exception expressed enthusiasm for the loan program, *principally because of the variety which it provides.*" [Scalia, *The Hearing Examiner Loan Program*, 1971 Duke L. J. 319, 343. Emphasis added.] Judge Paul N. Pfeiffer's first-person account of his experience as a judge who worked at several agencies concludes:
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> > There is no question that the cross-fertilization of experience at a variety of agencies sharpens the judge's intellect and reduces any tendency to staleness and stagnation which inevitably derives from repeated exposure to similar case types.
> > Pfeiffer, *Hearing Cases Before Several Agencies--Odyssey of an Administrative Law Judge*, 27 Admin. L. Rev. 217, 230 (1975).

> The corps concept allows for a varied caseload which combats boredom and perhaps has the added benefit of attracting more members of the bar to pursue the career of administrative law judge.
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> Thomas, Administrative Law Judges: The Corps Issue (1987)

This factor was also noted by administrative law judges in Professor Asimow's survey of public utilities and workers' compensation judges. Commonly cited reasons of administrative law judges who believe removal to a central panel would be desirable include their desire to hear different sorts of cases occasionally.

Fairness and Perception of Fairness

A major reason for the central panel system is to achieve a situation where administrative law judges are not employed by the agencies for which they hear cases, in order that the hearings will be fair and will be perceived as fair by the public.

> The main argument in favor of [the central panel] is again based on the criterion of acceptability: there is an appearance of bias when an ALJ works for the agency that makes the ultimate decision. People suspect that an ALJ cannot make an independent decision when the ALJ's career path may theoretically be affected by that decision. Lay people like the model of the criminal court judge who is totally independent of the district attorney. They think that model should apply in administrative law too.
>
> Asimow, Administrative Adjudication: Structural Issues 41-42 (1989)

> An administrative law judge in a regulatory agency is akin to a trial judge with expertise, and the appellate body cannot have an on-going relationship in individual cases with trial judges without negating any concept of fairness. The vice, of course, is evident. The public's perceptions of the reality of fairness hinges on acceptance that an independent trier of fact, in an on-the-record hearing, will not be influenced by either side at a time or level different from any other party.
>
> Nahum Litt, for National Conference of Administrative Law Judges (Exhibit 4)

> The most serious problem and the one with which this monograph and the Heflin bill are most concerned, is the belief that administrative law judges, because they are agency employees, are not impartial, unbiased judges. This attitude is the direct result of the present structure of the administrative hearing system.
>
> Thomas, Administrative Law Judges: The Corps Issue 5 (1987)

> The central challenge now facing the Commission in this study is to determine that the person who decides the case shall be independent of the person who brings the charges.
> Ken Cameron of Santa Monica (Exhibit 4)

Have the central panel states achieved the objectives of fairness and the perception of fairness? How does one measure these things?

To begin with, there appears to be little concrete evidence either of actual unfairness or a public perception of unfairness in administrative hearings generally. There is some anecdotal evidence of the perception of unfairness in the white paper of the National Conference of Administrative Law Judges. The author quotes a litigant before the federal Department of Labor, who wonders "How can I expect to win this case when the Department of Labor is my accuser, prosecutor and judge?", and a Minnesota business leader who states that "Business simply does not believe that those hearings are independent and objective today." But the author of the white paper is forced to conclude that "Whether agencies actually interfere with the decisional independence of the judges is a matter of debate." Thomas, Administrative Law Judges: The Corps Issue 6 (1987)

The Oregon Commission on Administrative Hearings looked specifically for evidence on this point both in the literature and in its hearings on the matter. Its Subcommittee on Comparable Law and Practices concluded:

> Without exception, the concern for the "appearance of fairness" was a primary consideration in the adoption of the central panel system in all of the states with such a system. However, the subcommittee was unable to uncover any reports or specific information documenting such a perception in any of those states. However, the recent report of the New York Task Force specifically found that there is a perception that at least many of the hearings are not fair.
> Report, at p. 4 (1988)

The New York State Bar Association's Task Force on Administrative Adjudication, referred to in the Oregon report, 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. Report, at pp. i-ii (1988)

We do not know whether the New York experience is duplicated elsewhere. There are certainly occasions where agency pressure on administrative law judges has been documented, particularly within the Social Security Administration, which employs the vast majority of administrative law judges (about 700--twice as many as the rest of the federal administrative law judges combined). But this appears to be the exception rather than the rule.

Given the fact that we do not know whether state administrative hearings are actually unfair or even whether there is a general impression of unfairness, it is not surprising that we do not know whether central panel jurisdictions have in fact overcome these problems. It is interesting to note, however, that the Minnesota business leader quoted above who stated that business does not believe administrative hearings are independent and objective, made his remarks in 1983, seven years after the Minnesota central panel began its operations.

In California, which has the central panel for some agencies but not for others, we have not been directed to any disparity in the fairness or the perception of fairness between central panel hearings and agency hearings.

The Oregon subcommittee, after concluding that unfairness is simply not documented, observes that "On the other hand, the current central panel states do not presently have a concern for the perception of fairness. Colorado, for instance, has an evaluation system that includes input from petitioners, attorneys, assistant attorneys general and the agencies, and the acceptance level and satisfaction with the process and the administrative law judges is reportedly very high."

Loss of Agency Control of Administrative Process

Whereas the critical argument in favor of the central panel system is the achievement of independence of the adjudicator from agency control, the critical argument against the central panel system is that it does just that!

In every jurisdiction where the central panel has been proposed or adopted, it has been opposed by the administrative agencies, and those with the most political power have either been able to prevent its adoption or get themselves exempted from it. Why this hostility to what seems to be a purely organizational matter?

As Professor Abrams points out, there is an oddity about the notion that hearing officers should be independent of the responsible agency. "When the task of regulating a particular area has been delegated to an administrative agency, it is understandable that the agency will want to see its policies implemented by hearing officers adjudicating its cases." Abrams, Administrative Law Judge Systems: The California View, 29 Admin. L. Rev. 487, 490 (1977).

Rich and Brucar summarize the political battles in the various central panel jurisdictions thus:

> Each of the panels was created through the action of the state legislature, which established the broad duties and limits of the central panel. The legislative battles associated with this process often helped shape the organizational structures as well as define the central panels' jurisdiction.
>
> These legislative debates spawned a competition among special interests that are critical to the conflict surrounding the central panel notion. That is to say, some agency officials saw in the legislative debates an attempt to replace their administrative authority with the inflexible rule of law, thereby reducing the effectiveness of the system. Proponents of the legislation saw separating ALJs from agencies as a way to improve the administration of justice and to enhance the job status of ALJs. The conflict between law and administrative authority had an impact on personal interests that resulted in fierce agency opposition in the majority of central panel states.
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> The Central Panel System for Administrative Law Judges: A Survey of Seven States 83 (1983)

Has adoption of the central panel in fact resulted in undesirable impairment of the regulatory functions of the administrative agencies? That is extremely unlikely. To begin with, in every central panel jurisdiction the decision of the administrative law judge is a recommended decision, not a final decision, just as in the non-central panel jurisdictions. The agency head has authority to review and reverse the administrative law judge's decision.

One measure of the extent to which the agency's regulatory control is threatened by the central panel judge is the incidence of the agency's overturning the judge's recommended decision. All central panel jurisdictions report that the overwhelming majority of initial decisions made by central panel administrative law judges are accepted by the agencies that retain final decision-making authority over contested cases. California, for example, reports a 95% acceptance rate. New Jersey, the broadest-based central panel, reports a 92% acceptance rate. The lowest acceptance rate is reported by Florida, and event there 50 to 60 percent of the decisions are accepted as written and another 20 to 30 percent are accepted with modifications.

There is also the anecdotal evidence, of course. In the Oregon hearings, David La Rose of the Washington Office of Administrative Hearings testified that when that agency was created, Washington's Director of Retirement Systems had been unaware of the pendency of the legislation and when he found out about its enactment he became very agitated and worried that unqualified hearing officers would be making determinations in benefit cases against his department. Mr. La Rose assured the director that care would be taken to assign an experienced lawyer who would be a good hearing examiner and could listen to evidence and make good findings and conclusions after hearing the case and studying the law. The director was not at all reassured, but as the central hearing panel law was already enacted he could do nothing about it, at least until the next legislative session. The central panel heard 10 to 15 of the director's cases that year. When Mr. La Rose encountered the director the next spring, Mr. La Rose asked how things were going. The director was amazed and said that things were just wonderful and a lot cheaper.

In the Oregon hearings also, Peter Traun of the New Jersey Office of Administrative Law reported that when the New Jersey statute was enacted, every agency head testified to the legislature that the central panel was a wonderful idea, but that particular agency should not be included because it had special needs. The legislature passed a broad-based central panel statute anyway, and five years later when the

Governor's Commission reviewed the operation of the statute, every agency head came in and said they like the system the way it is now and would not want to change it.

These anecdotes are consistent with the observation that despite agency desire for full control of the regulatory process, agencies required to use the central panel system are generally not unhappy with it. As Professor Levinson has pointed out, no state that adopted a central panel has later repealed it, and in fact most have expanded it over time, including California. On the other hand, except for California's, no state's central panel is more than 15 or 16 years old.

Other Considerations

The debate over loss of administrative agency control of the regulatory process versus impartiality of the administrative decision-maker illuminates fundamental inconsistencies in the system. Administrative adjudication should provide a means of applying administrative regulations by the regulatory agency without burdening the court system; judicial review should remain as a check on the system. But for most people caught in the regulatory process, civil litigation is not a realistic alternative; the administrative decision will be the only access to justice. This places a burden on administrative adjudication that is at odds with the concept of a high-volume, expeditious administrative process. The conflict over agency control or independence of the administrative law judge can be seen as the roiling of the water where the cross-currents of administrative expediency and administrative justice collide.

This is a charitable view of the conflict. A more cynical view would suggest that the heat and emotion generated by this issue indicate more personal and political concerns than merely the quality of administrative justice and the interrelation of administrative and civil court systems. Specifically, the conflict can be viewed as a struggle between the desire of agency heads to maintain their empires and the desire of administrative law judges for higher status.

As Professor Asimow's study points out, the impetus for central panels comes primarily from administrative law judges. In California it is the administrative law judges who are already on the central

panel who have been the strongest advocates for an expansion of the central panel. This was evident in the letters the Commission received from central panel judges responding to Professor Asimow's recommendation against expansion of the California central panel.

A broad central panel is seen as increasing the opportunity for professionalization within the administrative law judge corps and improving the qualifications, standards, collective action by, and salaries of administrative law judges.

> If a jurisdiction were to choose to adopt a total central panel approach, additional political consequences would flow from the creation of the new agency. However one designs the total central panel approach, bringing *all* of the state administrative agencies under the same hearing officer umbrella would cause a quantum difference in the nature of the central panel operation, and would create a sizable agency with a large staff. The hearing officer operation would no longer be a small, weak stepchild of the administrative process. It would gain visibility and, probably, significant political strength as a lobby for hearing officers' interests.
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> Abrams, Administrative Law Judge Systems: The California View, 29 Admin. L. Rev. 487, 513 (1977)

This impetus is typified by the recent name change from "hearing examiners" or "hearing officers" to "administrative law judges". Professor Abrams remarks:

> The change in title is designed to upgrade the status of the position, but otherwise appears to effect no changes. Whether, as a long-term proposition, it will have an effect on salaries and raise them to the level paid judges remains to be seen. One consequence of the use of a central panel system is that it makes the hearing officer system resemble a separate court system. The change in title furthers that impression. Professor Davis opposes changes that would raise the level of hearing officers to that of judges and suggests that "To make the examiners independent of the agencies would transfer power from the agencies to the examiners." [citation] In a California study, the observation was made that the responsibilities of such administrative hearing officers "approaches those of municipal court judges." [citation]
>
> On one level, this name change is a rather empty act without much impact. Status, however, is an imponderable which in a system like that of administrative adjudication may be significant, particularly to affected parties. It is clear that administrative adjudicators are performing a

quasi-judicial function and merit the title. Whether it presages a possible further judicializing of their function remains to be seen. [citation]

Abrams, Administrative Law Judge Systems: The California View, 29 Admin. L. Rev. 487, 488 n. 3 (1977)

The professionalization of the administrative law judge corps can be seen in the standards for administrative law judges adopted in the central panel states. Typically the central panel judge must be a lawyer, although exceptions are made for other experts in order to grandfather in existing nonlawyer administrative law judges. The loss of jobs by nonlawyer hearing officers, and the increase in salaries for lawyer hearing officers, have been sticking points in the political battles involving adoption of central panel systems.

Other potential improvements of the administrative judge corps through expansion of the central panel include improved working conditions and greater variety in the administrative law judge's work. Both these considerations were mentioned by non-central panel judges as inducements for a central panel in Professor Asimow's survey of the public utilities and workers' compensation judges.

The enhanced opportunity for formal training of administrative law judges has also been mentioned as a benefit of the central panel. The Oregon subcommittee that investigated this aspect could not verify it for lack of sufficient comparative information. "Suffice it to say, that there is growing awareness and concern among central panel states for formal training programs on an ongoing basis."

CONCLUSION:

THE ISSUE OF CENTRALIZATION OF HEARING OFFICERS

Professor Abrams puts the issue nicely--The traditional role of the administrative law judge is to sit as a fact finder who hears a matter, makes an initial determination, and recommends a decision to the agency, which has final responsibility. We ascribe to persons performing this function the qualities of a judge--one independent of the agency and uninfluenced by it in the individual proceeding. We also have an expectation that such persons will exhibit the qualifications of an "expert"--one who brings specialized knowledge and

agency policy to bear on a problem. However, the assignment of both these roles to one individual creates a conflict. How can the administrative law judge remain independent and yet be sufficiently steeped in the agency's experience and policies?

We have attempted in this memorandum to give the Commission a feel for the debate on these issues and the experience in other central panel jurisdictions. In our review of the available sources and literature, it appears to us that the best recent analysis has been done by the Oregon Commission on Administrative Hearings in its Report, published in 1989. The Oregon Commission in the course of its study received a great deal of information regarding the issue of the creation of a central panel of hearing officers for administrative hearings. A subcommittee conducted a study of the conditions that prevail in several other states that have adopted a central panel system. The Commission observed that "This subject, perhaps more than any other addressed by the Commission, produced the largest number of comments from witnesses, and was clearly a matter of considerable controversy." The Commission's report then engages in a thoughtful weighing of the issues. We have adapted this portion of the Oregon report as the conclusion of this memorandum.

Rationale for a Central Panel System

Under a central panel system, the state would create a single administrative agency which would be responsible for employing all or a significant number of the hearing officers who conduct administrative hearings in the state. The legislature would designate the agencies which would be required to utilize the services of hearing officers employed by the central agency. In most states which use a central panel system, one or more government agencies are exempt from the coverage of the central panel.

The rationale most commonly identified for the creation of a central panel system is the need to avoid the appearance of bias in the conduct of administrative hearings. Those promoting a central system indicate that an administrative hearing which is conducted by a hearing officer who is employed by the administrative agency which ultimately judges the case is an inherently biased system. These proponents

indicate that the hearing officer in this situation is necessarily cloaked with an appearance of unfairness which results from the fact that the hearing officer is employed by the administrative agency which administers the hearing and decides the case.

Proponents of the central panel system identify a number of benefits flowing from the central panel system, including increased actual and apparent impartiality of the hearing officer, independence of the hearing officer in hearing and deciding cases, greater standardization of contested case procedures, reduced risk of improper ex parte contacts between the hearing officer and agency employees, increased efficiency, a cost savings due to enhanced efficiency, and an enhancement of the prestige of hearing officers with resultant benefits to the state in recruiting and maintaining the services of highly skilled professional hearing officers. States which have adopted a central panel system have realized some or all of these benefits. For example, a committee appointed by the Governor of New Jersey to study the progress of that state's central panel system concluded that the Office of Administrative Law was an efficient well-run organization that represented a significant improvement over the former hearing system in terms of quality and productivity.

Criticisms of a Central Panel System

A number of opponents have criticized the concept of a central panel system. Administrative agency heads are the most vociferous critics of the concept, stressing that a central panel system would deprive agencies of needed hearing officer expertise, and would jeopardize the public's interest in holding agencies accountable for their decisions. Many agency representatives indicate that their agencies are highly dependent on the specialized knowledge of hearing officers regarding such matters as specific administrative rules and regulations, medical terminology, regulatory schemes and substantive legal knowledge, such as a knowledge of labor law. These agency representatives believe agency hearings would be far less efficient without the benefit of the expertise of hearing officers employed by each agency.

In addition, there is a strong belief that an agency and its governing board or commission, if any, have the responsibility to ensure that hearings are conducted and decided in an impartial manner and that the hearing officers faithfully carry out law in the interest of justice. If hearing officers are not a part of the agency, the agency's direct responsibility to manage the hearing process to those ends will be diluted and its accountability diminished.

Other critics of the central panel concept point out the lack of extensive evidence of interference with hearing officer decision making by agency officials. According to these critics, a state should not embark on a central panel system in the absence of clear evidence that the state's hearing officers lack impartiality or that hearings are afflicted by ex parte contact problems to a significant degree, especially since minimal information is available regarding the fiscal impact of such a change.

Hearing Officer "Impartiality"

Proponents of the central panel argue that hearing officer impartiality should be a critical element in a state's system of administrative contested case proceedings. They assert that hearing officers should not be influenced by off-the-record contacts when rendering decisions in contested cases. They are particularly concerned that agency personnel should not dictate to the hearing officer the outcome of the case. They also insist that, to the public, there is the appearance of impropriety when the hearing officer is the employee of the agency which is also a party to the dispute.

Opponents respond that a principal need in the contested case process is for hearing officers to render decisions consistent with legally adopted agency policy. The opponents, many of them agency heads, express concern that hearing officers, free of agency control, would render decisions undercutting their prerogatives to set agency priorities and decide agency policies. Their view is that politically appointed administrators, not hearing officers, are accountable for the direction of the agency.

Both views should be considered in addressing the issues related to hearing officer impartiality. Agency heads charged with administering a program or policy are responsible for insuring that the agency's orders correctly implement their policies. On the other hand, an administrative hearing litigant is entitled to a decision in which the facts, established in an unbiased proceeding, are applied to the policy and law in a consistent manner.

These diverse views underscore the complexity of the administrative law decision-making process. Depending on the nature of a case, the agency and the hearing officer must consider numerous sources of information in resolving a contested case, including:

1. Evidence of historical fact.
2. Evidence predicting future events.
3. Agency expertise.
4. Officially noticed facts.
5. Agency administrative rules.
6. Prior expressions of agency policy in contested case orders.
7. State and federal statutes and case law.

The concept of impartiality must be addressed with an appreciation of the complexity of the administrative process. The evidence, consisting of the testimony and exhibits submitted by the parties into the record, can consist of either historical facts or predictions about the future.

When a hearing officer issues an order, the findings of historical facts must be the hearing officer's own findings. To protect the integrity of the system, the findings of historical fact must not be subject to outside interference by the agency or any other party. In fairness, parties should be able to present their cases to the person who is rendering the initial judgment on those facts.

Further, when the agency issues its final order, it must accord the hearing officer's findings on credibility great deference. In most contested cases, the hearing officer must find, often on conflicting evidence, the events which happened in the past. The hearing officer, as the person seeing the witnesses or listening to the testimony, is in the best position to evaluate the credibility of a witness. Agencies should give considerable deference to the hearing officer's findings of

facts, especially on credibility issues. If the agency overturns or revises the hearing officer's findings of historical fact, the agency should explain in its order the source of disagreement with the hearing officer and should have convincing reasons for rejecting a credibility assessment.

Occasionally, the impartiality of one or more hearing officers for a state agency may be compromised by directives from agency supervisors. Especially with respect to historical facts, some adjustments in the present system are appropriate to ensure that the decision of the hearing officer is free of undue influence and unnecessary pressure by an agency.

Except with respect to credibility matters, the agency, when it issues its final decision, is free to make an independent evaluation of the facts which are supported by the evidence. Ultimately, the agency decides the case. Hearing officers should be free to make their recommended findings of historical facts free from the influence of outside parties, including agency administrators. Finally, the public will be best served if, in the final order, the agency explains why it has departed from the hearing officer's recommended findings of historical fact.

The importance of directly observing the witness is far less important for predictive evidence. For example, in a rate case before the Public Utility Commission, credibility of an expert witness predicting future weather patterns is rarely an issue. Here, the agency can certainly reverse the hearing officer's view into the crystal ball with little adverse impact on the perception of fairness of the proceeding. Even here, the agency should not dictate to the hearing officer issuing a recommendation the contents of the proposed order. But, the agency need not explain its disagreements with the hearing officer's findings of predictive facts.

Agency Policy and Law

It is necessary to be even more circumspect regarding the hearing officer's conclusions on agency policy. Agencies must be able to interpret, modify, and create their own policies. Turning that

authority over to the hearing officer would abdicate responsibility which has been delegated through the political process.

If a hearing officer applies clearly established policy to a particular set of facts, little policy judgment is required by the hearing officer. If the agency wishes to change a policy during the course of a proceeding, it may instruct the hearing officer on the proper policy to apply. The new policy, however, should be articulated in the order with an explanation of the reasons for the change. The proposal that hearing officers disclose in their proposed orders any agency directives will avoid abuse of this procedure.

The hearing officer's expertise regarding factual matters subject to the agency's jurisdiction and the agency's rules and practices renders the hearing officer's judgments of the agency operation particularly valuable. Hearing officers conduct dozens or hundreds of hearings within a particular agency. They acquire a high degree of familiarity with the subject matter within the agency's jurisdiction. When a hearing officer viewing the agency's operation from this vantage point determines that an agency rule, policy, or procedure violates existing law or conflicts with another agency policy, the public has a strong interest in protecting the hearing officer's freedom to express such sentiments.

Although it is not the hearing officer's prerogative to modify the agency's policy, the agency can benefit from the hearing officer's comments on whether the policy has rendered unjust results in a particular case. The comments may assist the agency in reevaluating the policy. Where ambiguities exist in agency policy and in legal interpretations, hearing officers should be free to offer their own interpretations of the policy and law as it applies to the particular case.

Suppression of the hearing officer's views, directly or indirectly by agency officials, deprives the public of any benefit which might flow from the hearing officer's constructive comments. However, the agency does have an interest in requiring hearing officers to issue temperate, reasoned opinions which do not undercut agency authority. The state's public employee statutes provide protections for the agency and employees in balancing these interests.

The Commission needs to decide whether these objectives can best be accomplished by structural devices within the agencies or by removing hearing officers generally to the central panel.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

III. Independence of Administrative Law Judges

Our APA pioneered the independent ALJ corps, an idea now adopted in nine other states[78] and repeatedly proposed (but

[76]See note 55.

[77]However, there is a strong argument for constraining the ability of agencies to overturn findings of fact made by ALJs, particularly on issues of credibility. I will turn to this question in the next phase of my report.

[78]Colorado, Florida, Iowa, Massachusetts, Minnesota, New Jersey, North Carolina, Tennessee, Washington. New York City also recently adopted a central panel.

never adopted) at the federal level.[79] In California, a panel of ALJs is employed by the Office of Administrative Hearings (OAH)[80] and panelists are supplied to agencies that wish to hold hearings.

By general consensus, the system has worked well. The legislature has drawn on the panel to hear cases from other than licensing agencies[81], and they also decide personnel disputes from local school boards and community colleges.[82] Agencies and local governments frequently draw on OAH even when not legally required to do so.[83] While agencies sometimes grumble about ALJ decisions, the agency heads retain power to make the final decision, so that disagreement with ALJs is an annoyance rather than a serious problem.

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[79]1981 MSAPA allows the states to choose between a mandatory and a voluntary central panel approach. §§4-301, 4-202(a). Under the voluntary approach, an agency could choose to utilize a central panelist or designate any other person as a presiding officer. Between 1945 and 1961, California agencies had a similar choice. This "hybrid central panel" system was ineffective because it provided a perverse incentive for central panel ALJs to make pro-agency decisions in order to get business. Abrams, "Administrative Law Judge Systems: The California View," 29 Admin. L. Rev. 487, 496-97 (1977) (hereinafter "Abrams").

[80]GC §§11,370 to 11,370.4. The general acceptance of the concept is evidenced by legislative provision for independent county hearing officers. GC §27,720 et.seq.

[81]For example, panel ALJs hear cases from FEHC and FPPC and some disputes relating to corporate securities. GC §11,501.

[82]Educ.C. §§44,944(b), 87678, 87740(c)(3).

[83]GC §11,370.3. For example, the Superintendent of Banks uses OAH ALJs to decide cases about licensing financial transmitters, although not required to do so.

However, only about two dozen ALJs work for OAH. The vast majority of hearing officers (mostly referred to as ALJs) work for the agency whose cases they hear. These are the judges who decide workers' compensation and unemployment appeals, business tax cases, drivers' license suspensions, state personnel cases, welfare cases, university and state college disputes.

The issue is whether some or all of these non-OAH ALJs should become independent and be formed into an ALJ corps, employed by OAH or some successor agency. It seems clear that an ALJ corps would have to consist of specialized panels, because much of the work of non-OAH agencies is extremely specialized and technical. Thus workers compensation judges, for example, would continue to hear workers comp cases, but they would be hired, controlled by, and assigned to WCAB by some independent agency.

The main argument in favor of doing so is again based on the criterion of acceptability: there is an appearance of bias when an ALJ works for the agency that makes the ultimate decision.[84] People suspect that an ALJ cannot make an independent decision when the ALJ's career path may theoretically be affected by that decision. Lay people like the model of the criminal court judge who is totally independent of the district

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[84]ALJs who work for an agency are generally placed in an organizationally independent status. See Abrams, 29 Admin. L. Rev. at 492-93. A new APA should probably provide that ALJs cannot be supervised by persons engaged in prosecution or advocacy. See Federal Act §554(d)(2). This issue will be discussed in the next phase of my report.

attorney. They think that model should apply in administrative law too.

A compelling case for independent ALJs can be made in the case of licensing agencies that play prosecutorial roles, but the panel already exists for those cases.[85] In the case of civil service adjudication, benefit-disbursement, and public utility regulation, the case for independence is relatively weak. Because those agencies do not themselves exercise strongly conflicting functions (such as prosecution and adjudication), the independence of their ALJs is not nearly so critical.[86]

ALJs themselves are sometimes fearful that their independence may be compromised when they work for the agency whose cases they decide. At the federal level, the Social Security Administration recently tried to increase the productivity of its ALJs and, in the opinion of some observers, tried to increase the number of anti-applicant decisions.[87] At the state

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[85]Central panelists also adjudicate cases before FEHC and FPPC which are prosecutorial in nature.

[86]The parties to disputes adjudicated by WCAB and UIAB are external to those agencies. Thus WCAB and UIAB possess no built-in conflict of interest. DSS adjudicates mostly disputes between counties and welfare recipients, so again it is largely independent of the parties (although some conflict does exist here because the state provides funds to counties for welfare benefits and it provides all the funds for Medi-Cal benefits). SPB mostly adjudicates disputes between other agencies and the civil-services employees of those agencies. PUC sometimes exercises conflicting functions when it penalizes utilities or requires reparations. Most of its work, however, is forward-looking ratemaking.

[87]But see Nash v. Bowen, 869 F.2d 675 (2d Cir. 1989) (no showing that decisional independence of Social Security ALJs had been interfered with).

level, no instances of objectionable interference with ALJ independence have come to my attention, but some judges felt intimidated in expressing substantive views on pending legislation or on the qualifications of persons nominated to be agency heads. Seldom. however, have these fears been based on anything concrete.[88]

A final argument suggests that independent judges may be more acceptable to the public. Often cases before non-ALJ agencies are quite technical. The staff and the judge share the same technical vocabulary and non-experts may feel frozen out. If the case were heard by a generalist judge, the staff would have to present the case in non-technical terms and spell out difficult concepts. As a result, the process might be demystified to the benefit of interested members of the public and regulated parties.

There are several efficiency arguments in favor of establishing a corps. It might be possible to achieve budgetary savings and cut delays if ALJs can be deployed where they are most needed. However, these savings are probably illusory[89] since the non-OAH agencies are extremely busy and it is unlikely they can spare personnel to help other agencies. Assuming that judges in the panel will have to specialize, it is doubtful whether non-specialized judges can be very helpful in alleviating the crunch at non-OAH agencies.

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[88]One ALJ told me that he thought he was subjected to disciplinary sanctions because of a public position he took in opposition to an appointment to his agency.

[89]Abrams, 29 Admin. L. Rev. at 514-16.

Another possible efficiency advantage is relief of the burnout that judges sometimes experience from hearing the same sorts of cases every day. They might welcome some variation. Again, however, if specialization is required, it is difficult to see how there can be much switching around. ALJs cannot be spared from hearing the cases they hear currently and unspecialized ALJs are not an adequate substitute. Moreover, there are some serious practical disadvantages of switching to independent ALJs.[90]

The fundamental argument against an ALJ corps is based on the criterion of accuracy and arises out of specialization and expertise. In the case of workers compensation, for example, the judges hear a high volume of cases and must approve every settlement. Everyone whom I interviewed--judges, WCAB staff, attorneys for applicants and defense--agreed that it takes years to become a competent judge. The compensation bar is intensely specialized and it expects its judges to be equally knowledgeable. Everyone feared inexperienced judges who could not correctly evaluate settlements or the testimony of physicians, who took too long to decide cases or who rendered

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[90]A few of these difficulties: it is unlikely that non-lawyers could be used as corps ALJs, but the non-lawyer PUC ALJs are said to be quite valuable in certain kinds of cases. The Department of Labor might object to any change in UIAB procedure that might cause a failure to meet the strict DOL time limits for disposal of cases. If the ALJs were housed separately from the agencies, there would be difficulties in docketing cases, finding files, etc.--problems that already exist in high-volume agencies even under unified administration. In the case of WCAB and UIAB, the judges are dispersed throughout the state so that new office space might have to be obtained.

decisions that were out of line. So, if the independence argument is unpersuasive in the case of a benefit-dispensing agency like WCAB that is already independent of the parties who litigate before it, and if only specialized judges can hear workers comp cases, there is little to argue for changing the status quo.

Unemployment cases are simpler and the arguments for expertise are not as strong as in the case of workers comp. But the volume of UIAB cases is immense. OAH judges are accustomed to taking far more time on each case and would have difficulty accommodating to the quite different work style required at UIAB.

The arguments for placing DMV and SBE hearing officers into an independent agency seem weak. DMV and SBE hearing officers are usually not lawyers and are experts only in motor vehicle or tax law. In the case of the DMV, they hear relatively simple cases in very high volume that other ALJs might not be much interested in deciding. Nor could generalized ALJs do a good job of deciding the highly technical business tax cases handled by SBE. By the same token, DMV and SBE hearing officers are not qualified by training or experience to hear cases from other agencies. Thus the case for independence for DMV and SBE hearing officers is not compelling.

Similarly, non-specialists should not be judges in PUC cases. A judge who must sit for many months in a case fixing utility rates must have expertise in public utility economics. It will not do to educate the judge from scratch. The stakes

are too high--both for the public and for the industry. The decision must be absolutely the best decision possible. That requires expertise and experience.[91]

I was also impressed by the PUC's custom of involving ALJs in the final agency decision. ALJs often negotiate the changes that the Commission will make in their proposed decision. In light of the great complexity and public importance of PUC cases, that system makes sense, but would be hard to maintain if the PUC ALJs worked for a separate agency.[92]

Because ALJs have been in the forefront of the movement for a corps, I expected to find that they would strongly support the idea. I sent a questionnaire to all of the PUC and workers' compensation judges and got an excellent response.[93] The results did not confirm my assumptions. The only question was whether the respondent strongly supported, supported, was

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[91]Prop. 103 allows the Insurance Commissioner to use central panel ALJs or to hire her own. Ins. C. §1861.08. Unsurprisingly, the Commissioner has taken the latter option. In light of the exceptional difficulty of regulating the price of almost all lines of insurance, on a company by company basis, the use of expert and specialized ALJs is clearly justified.

[92]Ideally, ALJs should not be involved in the ultimate decision because an ALJ has a stake in favor of sustaining the initial decision. In a world of second-best, however, it is better to involve the ALJ. The ALJ may know the huge record better than anyone else. Moreover, the PUC final decisionmaking process often seems overtly political and ex parte contacts are tolerated. The participation of an ALJ who is intimately familiar with the hearing record might well be helpful in drafting a final decision supported by that record.

[93]Of 128 workers' comp judges, 76 responded (59%). Of 29 PUC judges, 20 responded (69%).

neutral, opposed, or strongly opposed the idea of an ALJ corps: Of the workers' comp judges, 15 strongly supported the idea and 12 supported it; 11 were neutral; 14 opposed and 25 strongly opposed. Thus those who opposed outnumbered those in support by 39 to 27. Of the PUC judges, 7 strongly supported the idea and 3 supported it; 2 were neutral; 2 opposed it and 6 strongly opposed. Thus the PUC judges supported the idea by the rather narrow margin of 10 to 8.

The results seem surprising because the recent lot of the workers' compensation judges has not been happy. Because of political struggles relating to substantive compensation issues, the governor has refused to allow funding increases for staff. The backlog of cases per judge has sharply increased and the judges complain of inadequate support staff and services.[94] Although the PUC has not suffered similar difficulties, many PUC judges resent the PUC's system of assigning commissioners to the judges with whom the judges must consult and negotiate in deciding their cases.

Most responses contained detailed comments on the corps proposal. Workers comp judges repeatedly cited the problem of expertise and specialization; they thought that cases should never be heard by inexperienced judges.[95] Those who supported the corps idea cited the need for independence, the possibility

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[94]At some WCAB offices, there is a huge backlog of unopened mail because of extreme staff shortages.

[95]That was the unanimous view also of lawyers who work on both sides of compensation disputes.

that a change would improve their working conditions, and their desire to hear different sorts of cases occasionally.

PUC judges also mentioned the need for specialization and expertise and some mentioned the importance of having readily available PUC staff members to assist them and of being available to assist the commissioners in writing final decisions. PUC judges who supported the proposal also said they would like to hear different cases sometimes and thought that separation would give them more protection from ex parte contacts both by outsiders and from the staff.

I did not systematically poll judges at other agencies, but I did interview judges at both UIAB and DSS and again the sentiment on the subject of an independent corps was divided.

While I believe that the legislature should continue to transfer appropriate sorts of cases to the existing central panel,[96] I did not find that the case was persuasive for transferring judges from the benefit-dispensing agencies, or from the PUC, DMV, SPB, Insurance Commissioner, or SBE to a central panel. The criterion of accuracy suggests that the transfer should not occur (at least not if it would diminish specializa-

[96]One example may involve prosecutorial disputes in the horse racing industry that are not presently heard by central panelists. These involve exclusion from racetracks and suspension of licenses. See Aroney v. HRB, 145 CA3d 928, 193 CR 708 (1983); Morrison v. HRB, --CA3d--, 252 CR 293 (1988); Jones v. Superior Court, 114 CA3d 725, 170 CR 837 (1981). Another candidate might be the Insurance Commissioner's power to issue a cease and desist order. Ins. C. §1065.1-1065.7. I hope that responses to this study will identify additional functions appropriate for transfer to the panel.

tion), efficiency would probably not be served by a transfer, and acceptability points rather weakly in favor of a transfer.[97] This is not a strong enough case for making such a fundamental change.

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[97]In my interviewing, I found practitioners strongly in favor of independent ALJs only in the case of SPB, not in the case of the other agencies that employ their own ALJs. Most of the impetus for an ALJ corps comes from the ALJs themselves.

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February 6, 1990

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Gentlemen:

By your letter of November 1, 1989, you solicited views on a draft report submitted to your commission by Professor Asimow. By letter dated January 12, 1990, the National Conference of Administrative Law Judges responded, indicating that this more detailed additional response would also be submitted. We request that this letter be added to our original response and be made a part of the record.

We certainly support the draft report's conclusions that ex parte communications should be prohibited at all levels of any administrative procedure. Not one Federal agency permits such activity in adjudicative proceedings, including rulemaking or licensing, and it is difficult to understand why they are tolerated at the California Public Utilities Commission.

The draft report also supports greater independence for the Administrative Law Judges, but the understanding of both the legal and practical requirements of the concept of separation of function is flawed. It leads to the untenable supposition that Judges can be independent and at the same time both work for the agency and be the amanuensis of the political appointees charged with policy making. The draft study not only approves, but supports, a policy where Judges' decisions are circulated and reviewed by agency personnel prior to issuance, and where there is participation by the judge at the appeal level to "work out" settlements and rewrite the decision at the direction of the P.U.C. The minimal administrative efficiency gained by the judge's involvement in that process is out-weighed by the simple unfairness to the parties. An administrative law judge in a regulatory agency is akin to a trial judge with expertise, and the appellate body cannot have an on-going relationship in individual cases with trial judges without negating any concept of fairness. 1/

1/ In the early 1980's the Administrative Conference of the United States tabled a proposal to facilitate agency efforts to "consult" Judges after the decision was issued.

The vice, of course, is evident. The public's perceptions of the reality of fairness hinges on acceptance that an independent trier of fact, in an on-the-record hearing, will not be influenced by either side at a time or level different from any other party. But agency attorneys participate in cases, frequently in an enforcement capacity, and remain advisers to the agency at every level. They have input both before the judge and on appeal. The political appointees, just as frequently, control the position of agency personnel appearing before the judges and participate at the appellate level as the final level of administrative decision-making. Where a judge is involved in daily participation as an adviser to the agency in settlement matters, or as a scrivener rewriting a decision on appeal, the judge becomes just another agency employee. That practice basically is prohibited at Federal agencies and should be prohibited at the California P.U.C. See also the New Jersey report, discussed infra, attached to the January 12 submission.

The so-called "advantage" of using the judge's expertise in a case which the draft report advances is small. If the decision clearly sets out the facts upon which the judge relies, and marshals the evidence, which is what the judge is required to do, there is no great effort at the agency level for agency staff to make revisions and changes. What occurs where the judge is used at the appellate level is that the parties understand quickly that the judge is closely tied to the agency's political decision, and that they are not getting a decision, whether an initial or a recommended one, that is, free from the almost employment relationship that such use mandates. No party nor the public would accept such arrangement as fair.

It is also clear that the current procedure at the P.U.C. is unfair. Judges are on probation for two years before becoming permanent employees. What party would possibly conclude that a probationary "judge" was truly independent! Judges at the P.U.C. are currently required to submit draft decisions to management judges and the P.U.C. for internal comments before serving on the public. What party could possibly conclude that a

judge who cannot freely publish his or her own decision is independent! Judges at the P.U.C. may be appointed by the P.U.C. To one of four management positions, obviously an arrangement which holds out a reward for favorable rulings. What party could possibly review such a reward system, even if its abuse is denied, as consistent with judicial independence! The simple answer is that the current system is unfair.

Additionally, the level of contact which is countenanced as acceptable by the draft report leads to a familiarity with the judges by the staff which is denied to outside parties. As Senator Howell Heflin has stated in supporting the Federal Administrative Law Judge Corps bill, "The time has long passed where it is considered fair for one side to bring his own umpire!" 2/ Recently, the Federal Energy Bar Association, whose practicing lawyers are active before the Federal Energy Regulatory Commission (which is the equivalent to the P.U.C. In its functions in utility ratemaking) supported Senator Heflin's proposal of an independent corps of judges totally independent of the agency. It joins, among many others, the American Bar Association, Federal Bar Association, National Bar Association, American Medical Association, and American Association of Retired People.

The draft report also states frequently, that removing the trial and adjudicative question from an agency like the P.U.C. Is confusing. That is simply not true, and while what is essentially a literature search by the author has turned up what may have been early misconceptions on the part of various reviewing courts in the early years, the law is exceedingly clear. In Potomac Electric Power Co. v. Director, 449 U.S. 268 (1980) the court found:

2/ Senator Howell Heflin's bill, S. 950, has been reported out of the Senate Sub-Committee on the judiciary and is expected to come before the full committee this spring.

> [T]he Benefits Review Board is not a policy making agency; its interpretation of the [Longshore Act] thus is not entitled to any special deference from the courts. (278, n 18).

The Benefits Review Board is an independent statutory board having solely appellate authority, whereas the Office of Workers' Compensation at the Department of Labor is vested with administrative, rule making, interpretive, and enforcement authority. 3/

The fact of the matter is that there are currently a large number of separate adjudicative bodies acting independently of the administrative agencies charged with regulating, interpretation, and enforcement functions. Last year several thousand cases were processed by the Department of Labor alone where the trial and appellate capacity lay outside the control of the administrators of the programs. There certainly is no confusion today as to which body makes policy, which handles appeals from the administration, and how the courts view each if there is a conflict. The entire system in New Jersey is that the judges are removed from the agency.

There is a practical aspect which the draft report also overlooks. These independent review authorities were established because the United States Congress concluded it was unfair to the parties, whether claimants or employers in Longshore cases, or alleged violators of the Occupational Safety and Health

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3/ Appellate authority in two other major administrative areas at the Department of Labor have also been vested statutorily in independent agencies: (1) The Occupational Benefits and Health Review Commission processes complaint brought by the DOL's Occupational Health and Benefits Commission and (2) The Federal Mine Safety and Health Review Commission processes complaints from DOL's Mine Safety and Health Administration.

laws to be forced to litigate their cause before the same persons who initiated the complaint, enforced the statute, or rendered the administrative decision. Simple fairness demanded otherwise, particularly in enforcement cases. But, at the same time, the administration remains in control of rulemaking, as well as the authority to seek corrective legislation where decisions by independent review authorities which have been sustained by courts are the wrong policy.

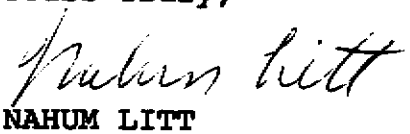
The proposal here, however, before this commission is quite limited. Taking the administrative law judges out of the agency so that the trial is independent and the record that is made is not tainted by the closeness of the judge to the agency, is limited compared to the separation of the administration side from both the trial and appellate functions. The administration of the various acts enforced by the P.U.C. would remain as well as the appellate review after the judge issued a decision. As will be shown below, this is neither novel nor unusual in that a number of states have not only adopted this method of a unified corps, but, as in New Jersey, has been in effect successfully for over 10 years and has achieved fairness as well as efficiency.

There are several others matters which must be discussed. Whether judges uniformly believe separation from the agency is a good idea is not necessarily useful. Judges at agencies are frequently influenced by unknown factors, such as veteran's preference or whether they are agency oriented. Their perceptions are frequently colored by fear of change, particularly where the judge is in a management position and fears losing his or her station or position. There is also, a misplaced reliance on judges' statements about the value of expertise. Expertise on the part of a judge is valuable, particularly both in high volume adjudication or highly specialized work such as handled by the P.U.C.. It saves time and is efficient. But, the Department of Labor's experience has been that judges greatly overestimate the need for expertise and, even more importantly, inflate the time necessary to learn a particularly body of substantive law. Workers compensation is a case in point. Where the California judges suggest a two year learning course, the DOL experience with the Longshore and Harbor Workers' Act is that judges can work at a journeyperson level in less than three months.

Last, it is difficult to understand how the draft report managed to so completely overlook the fact that California is a Johnny-come-lately to the concept of a unified corps, that more than 10 other states have unified corps of various capacities, and that New Jersey's corps is not only the most extensive, but has also been reviewed most favorably by a Blue Ribbon Commission five years after it was established. 4/ See State of New Jersey Governor's Committee on the Office of Administrative Law, (1980). Not one negative argument made by the draft report was unanswered in the New Jersey Governor's report. Not only was the system observed fair, and it governs the type of cases handled by the California P.U.C., but it also is efficient and saves a lot of money.

Thank you for the opportunity to comment.

Yours Truly,



NAHUM LITT
National Conference of
Administrative Law Judges

4/ The states which have adopted unified corps are referred to in a footnote at p.34 of the draft report.

cc: Honorable Donald B. Jarvis
Professor Michael R. Asimow

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February 16, 1990

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Administrative Law Study

Dear Mr. Sterling:

The Commission should reconsider the decision expressed in its Minutes of January 11-12, 1990, as follows:

> "(2) The Commission decided that there should not be a separation of adjudication from other agency functions as a general rule. There may be exceptions to this rule where there is a demonstrated problem, such as, perhaps, a separate tax court or a medical quality appeals board..."

The general rule should be to separate adjudication from other functions, with exceptions for particular subjects, upon demonstrated need for the exception.

The central challenge now facing the Commission in this study is to determine that the person who decides the case shall be independent of the person who brings the charges.

The challenge can be met only by a general rule of separation. Let those who want to avoid the rule present a request to the Commission and argue their case before it.

The present California Administrative Procedure Act (APA) does not require separation. In a professional discipline case, the decision of the Administrative Law Judge on an accusation is legally nothing unless it is

accepted by the administrative agency which filed the accusation. The agency may ignore the Judge's findings of fact and conclusions of law subject only to a requirement that a transcript be prepared and read if the penalty is to be made heavier. Even if the agency adopts the Judge's findings of fact, it may reach a different legal conclusion. The independence of the judge, or trier of fact, seemingly created by the APA in Government Code §11517(c), is a sham.

Of the several ways to reform the law in this respect, the best is to separate the charging agency completely from the judge. This can be accomplished by creating a 'unified corps' or single body of judges, organized and administered separately from the various licensing, law enforcement and benefit agencies.

The findings of fact of the judge could then be changed only by a court or other judicial entity, upon a review of the record.

Necessary specialization can be accomplished administratively and need not affect the legislatively created structure.

The Commission is urged to consider and to adopt this proposed solution which, despite the likelihood of objections from administrative agency personnel, will, in the long run, prove to be the most practical and jurisprudentially the wisest course of action.

Respectfully,

KEN CAMERON

KC:lk

cc: Michael R. Asimow

The Central Panel System for Administrative Law Judges:

A Survey of Seven States

Malcolm C. Rich
Wayne E. Brucar

American Judicature Society
Chicago
University Publications of America, Inc.
Frederick, Maryland

Table 4-1
Summary of Key Features of Central Panel Systems

State	Panel began operations	Official title of central panel	Statutory mandate
California	1945	Office of Administrative Hearings	Cal. Gov't Code §§11370.2, 11502
Colorado	1976	Division of Hearing Officers	Colo. Rev. Stat. §24-30-1001
Florida	1974	Division of Administrative Hearings	Fla. Stat. Ann. §120.65
Massachusetts	Began: 1974 Expanded: 1975	Division of Hearing Officers	Mass. Ann. Laws Ch. 7 §4H
Minnesota	1976	Office of Administrative Hearings	Minn. Stat. Ann. §15.052
New Jersey	1979	Office of Administrative Law	N.J. Stat. Ann. §52:14F-1, §52:14B-1
Tennessee	1974	Administrative Procedures Division	Tenn. Code Ann. §§4-5-321

Table 4-2

Jurisdiction of Seven Central Panel Systems

Blanket Administrative Procedure Act Coverage—All agencies utilize central panel services (Exceptions noted)	Specifically Enumerated Agencies Must Use Central Panel Services (Specific agencies noted)	Use of Central Panel Services Voluntary (Exceptions noted)
Colorado (Col. Rev. Stat. §24-30-1003—Public Utility Comm'n)	California (Cal. Gov't Code §11501) See Note 3	Massachusetts (State Rate Setting Comm'n; Civil Service Comm'n; State Contrib. Retirement Appeal Bd.)
Florida (Fla. Stat. Ann. §120.57) See Note 1		Tennessee (Bds. under Dept. of Insurance and Dept. of Public Health; any agency without statutory authority to use its own ALJs.)
Minnesota (Minn. Stat. Ann. §15.041 (Subd. 3)) See Note 2		
New Jersey (N.J. Stat. Ann. §52:14F-8—State Board of Parole; Public Employees Relations Comm'n; Division of Workers' Comp.; Division of Tax Appeals)		

Note 1. Florida Statutes Annotated §120.57 (in relevant part)

The provisions of this section shall apply in all proceedings in which the substantial interests of a party are determined by an agency. Unless waived by all parties, subsection (1) shall apply whenever the proceeding involves a disputed issue of material fact....

(1) Formal proceedings.—

(a) A hearing officer assigned by the division shall conduct all hearings under this subsection, except for:

1. Hearings before agency heads or a member thereof other than an agency head or a member of an agency head within the Department of Professional and Occupational Regulation;

2. Hearings before the Unemployment Appeals Commission in unemployment compensation appeals, unemployment compensation appeals referees, special deputies pursuant to §443.15;

3. Hearings regarding drivers' licensing pursuant to chapter 322;

4. Hearings conducted within the Department of Health and Rehabilitative Services in the execution of those social and economic programs administered by the former Division of Family Services of said department prior to the reorganization effected by chapter 75-48, Laws of Florida;

5. Hearings in which the division is a party, in which case an attorney assigned by the Administration Commission shall be the hearing officer;
6. Hearings which involve student disciplinary suspensions or expulsions and which are conducted by educational units;
7. Hearings of the Public Employees Relations Commission[1] in which a determination is made of the appropriateness of the bargaining unit, as provided in §447.307; and
8. Hearings held by the Department of Agriculture and Consumer Services pursuant to chapter 601.

Note 2. Exempt from contested case provisions: Minnesota Municipal Board, Corrections Board, Unemployment Insurance Program in Department of Economic Security, Director of Mediation Services, Worker's Compensation Divison of Department of Labor & Industry (except for contested workers' compensation hearings), Worker's Compensation Court of Appeals, Board of Pardons, Public Employee's Relations Board, State Board of Investments, and certain welfare appeals.

Note 3. California Government Code §11501 (in relevant part)

(b) The enumerated agencies referred to in Section 11500 are:
Accountancy, State Board of
Aging, State Department of
Air Resources Board, State
Alcohol and Drug Abuse, State Department of
Alcoholic Beverage Control, Department of
Architectural Examiners, California State Board of
Attorney General
Automotive Repair, Bureau of
Barbers Examiners, State Board of
Behavioral Science Examiners, Board of
Cancer Advisory Council
Cemetary Board
Chiropractic Examiners, Board of
Collection and Investigative Services, Bureau of
Community Colleges, Board of Governors of the California
Conservation, Department of
Consumer Affairs, Director of
Contractors, Registrar of
Corporations, Commissioner of
Cosmetology, State Board of
Dental Examiners of California, Board of
Developmental Services, State Department of
Education, State Board of
Employment Agencies, Bureau of
Engineers, State Board of Registration for Professional
Fabric Care, State Board of
Fair Employment and Housing Commission
Fair Political Practices Commission
Fire Marshall, State
Fire Services, State Board of
Fish and Game Commission
Food and Agriculture, Director of
Forestry, Department of
Funeral Directors and Embalmers, State Board of
Geologists and Geophysicists, State Board of Registration for
Guide Dogs for the Blind, State Board of
Health Services, State Department of
Home Furnishings, Bureau of
Horse Racing Board, California
Insurance Commissioner
Labor Commissioner

Landscape Architects, State Board of
Medical Quality Assurance, Board of,
Medical Quality Review Committees and Examining Committees
Mental Health, State Department of
Motor Vehicles, Department of
Navigation and Ocean Development, Department of
Nursing, Board of Registered
Nursing Home Administrators, Board of Examiners of
Optometry, State Board of
Osteopathic Examiners of the State of California, Board of
Pharmacy, California State Board of
Public Employees' Retirement System, Board of Administration of the
Real Estate, Department of
Electronic and Appliance Repair, Bureau of
Resources Agency, Secretary of the
San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for the Bays of
Savings and Loan Commissioner
School Districts
Shorthand Reporters Board, Certified
Social Services, State Department of
Statewide Health Planning and Development, Office of
Structural Pest Control Board
Tax Preparer Program, Administrator
Teacher Preparation and Licensing, Commission for
Teachers' Retirement System, State
Transportation, Department of, acting pursuant to the State Aeronautics Act
Veterinary Medicine, Board of Examiners in
Vocational Nurse and Psychiatric Technician Examiners of the State of California, Board of
Water Resources, Department of

Table 4-3
Central Panel Operations: Reported Number of Contested Cases Filed and Number of ALJs

	Total contested cases filed per month in 1980	Number of ALJs
California	333	24 plus 1 deputy director
Colorado	833	14[3]
Florida	233[1]	18 plus 1 assistant director
Massachusetts	83-100	11
Minnesota	83[2]	13 ALJs[4] 19 compensation judges (added in 1981)[5]
New Jersey	750	45 plus 2 deputy directors
Tennessee	33	5

NOTES
Source: Interviews with directors, September-October, 1980.
1. Approximately 5% of the filings involve determining the validity of agency rules.
2. Approximately 16% of the filings involve rulemaking proceedings. With the 1981 addition of 19 compensation judges, the monthly caseload increased by 500 cases per month.
3. One ALJ is employed strictly for hearing cases where there is a conflict of interest involving the Division of Hearing Officers.
4. Ten attorneys are under contract to serve as ALJs as needed if the workload cannot be handled by current staff.
5. Compensation judges preside exclusively over contested workers' compensation cases.

Table 4-4
Central Panel Systems: Budgets

	Approx. 1980 operating budget	Salary range of directors in 1980	Salary range of ALJs in 1980
California	$3,500,000	$3,992 per month	Hearing Officer I: $3284-3973 per mo. Hearing Officer II:[3] $3443-4165 per mo.
Colorado	$510,000[1]	$2,584 per month	$1929-$2984 per month
Florida	$1,200,000	Figure not available	$2083-$3083 per month
Massachusetts	$320,000[2]	$2167-$2750 per month	Junior Hearing Officers:[4] $1073-$1289 per mo. Hearing Officers $1516-$1873 per mo.
Minnesota	$866,000	$3,333 per month	Hearing Examiner I:[5] $1707-$2109 per mo. Hearing Examiner II: $2109-$2814 per mo. Hearing Examiner III: $2434-$3010 per mo. Compensation Judge (since 1981): $3000 per month
New Jersey	$4,100,000	$4,000 per month	$2500-$3625 per month (entry level salaries—increases are based on performance evaluation results).
Tennessee	Figure not available	$1700-$2300 per month	$1540-$2200 per month

NOTES
1. Some expenses are the responsibility of personnel and labor departments which house some ALS.
2. 1979 figure.
3. The Hearing Officer II position involves more administrative responsibilities than Hearing Officer I.
4. Hired without trial experience. May be promoted to Hearing Officer.
5. Hearing Examiner I is a trainee position and may be promoted to Hearing Examiner II. Hearing Examiner III is required to spend 2/3 time hearing cases and to spend 1/3 time in supervisory duties.

Table 4-5
Central Panels: Responsibilities

California	Provide ALJs for contested hearings. Investigate various aspects of the administrative process. Publish the Administrative Law Bulletin—a digest of appellate court cases on administrative law and other articles. Provide ALJs to sit with agency personnel during formal peer review panels (ALJs serve to conduct the hearing, inform the agency of the law and how to apply it; agency executives render the decision and the ALJ writes the opinion).
Colorado	Provide ALJs for contested hearings.
Florida	Provide ALJs for contested hearings and for determining the validity of agency rules.
Massachusetts	Provide ALJs for contested hearings.
Minnesota	Provide ALJs for contested hearings and for rulemaking proceedings. Adopt procedural rules for rulemaking hearings, power plant siting and high voltage transmission line routing, and procedures for expedited hearings under the Revenue Recapture Act.
New Jersey	Provide ALJs for contested hearings. Office of Administrative Law develops rules for the process, and oversees filing and promulgating rules and regulations.
Tennessee	Provide ALJs for contested hearings. Hear agency rules disputes. Administrative Procedures Division staffs two legislative committees dealing with sunset and legislative oversight of rules review. Administrative Procedures Division is responsible for rules filings.

Table 4-6
How Cases Reach the Central Panels for Hearing

California	Process is initiated by the agency (the citizen does not have standing). A request for hearing is made of the Office of Administrative Hearings and, upon approval, the panel office sets a date for hearing.
Colorado	In social service cases, litigants request a hearing directly from the Department of Hearing Officers. The agency requests a hearing in other types of cases.
Florida	The process varies by type of case: *Majority of hearings:* person affected by agency action petitions that agency for a hearing. Upon deciding a hearing is warranted, the agency requests a hearing date from the DAH. *Rules challenges:* petition is filed directly with the Dept. of Administrative Hearings by any person substantially affected by a rule. *Involuntary commitment of persons to mental institutions:* Circuit Court initially commits patients for period of six months. At the expiration of that period, hospital may petition the DAH directly for hearing to determine if commitment order should continue.
Massachusetts	Agency petitions the Division of Hearing Officers for hearing. Exception: Rate Setting appeals are filed directly with the DHO by the provider of services. (The average litigant does not have standing to initiate a case.)
Minnesota	Agencies must request hearing. Exception: State employees may appeal directly to the Office of Administrative Hearings from disciplinary action.
New Jersey	The agency, upon determining that a claim represents a contested case, petitions the Office of Administrative Law for a hearing. (A litigant may not approach the DAL.)
Tennessee	The agency will call the Administrative Procedures Division to schedule a hearing date (notice of hearing will later by submitted to APD in writing). Litigants do not have jurisdiction to schedule a case.

Table 4-7
Directors' Profiles: A Sampling of Duties

Initially organized the central panel
Develop budget
Develop rules of procedure
Develop performance standards for ALJs
Develop library resources
Involved with hiring of ALJs
Evaluate ALJs
Review ALJ decisions
Oversee training of new ALJs
Oversee continuing education of ALJs
Assign cases to ALJs
Docket cases
Manage the office
Hire support staff
Consult with administrative agencies
Consult with the legislature
Hear cases

Table 4-8
Directors' Profile: Official Title

California	Director (California Gov't Code §11370.1)
Colorado	Director
Florida	Director (Florida Stat. Ann. §120.65 (1))
Massachusetts	Chief Hearings Officer (Mass. Ann. Laws Ch. 7 §4H)
Minnesota	Chief Hearing Examiner (Minn. Stat. Ann. §15.052 (subd. 1)).
New Jersey	Director (N. J. Stat. Ann. §52:14F-3)
Tennessee	Director

Table 4-9
Directors' Profile: Qualifications

California	Member of California Bar for 5 years; 2 years administrative experience as either a hearing officer or as a lawyer. "The director shall have the same qualifications as hearing officers...." (Cal. Gov't Code §11370.2 (b)).
Colorado	Attorney at law; if hiring within civil service system, 5 years experience. If hiring from outside system, 7 years experience. Experience must include management and litigation.
Florida	Member of Florida Bar for 5 years. (Fla. Stat. Ann. §120.65 (2)).
Massachusetts	Member of Massachusetts Bar; Massachusetts resident; substantial trial experience. (Mass. Ann. Laws Ch. 7 §4H).
Minnesota	"Learned in the Law." (attorney or legally educated) (Minn. Stat. Ann. §15.052 (subd. 1)).
New Jersey	Attorney at law. (N. J. Stat. Ann. §52:14F-3).
Tennessee	Member of Tennessee Bar.

Table 4-10
Directors' Profile: Appointment

California	By governor with confirmation of senate. (Cal. Gov't Code §11370.2 (b)).
Colorado	By civil service system. (Competitive examination followed by a written test. Oral board is then given and the top three candidates are interviewed by director of the Dept. of Administration. If selection from outside Civil Service, there is one year probationary appointment leading to Civil Service status. (Source: Interview with director, September, 1980).
Florida	By majority vote of the governor and his cabinet of six sitting as the Administrative Commission; confirmation of the senate. (Fla. Stat.Ann. §120.65 (1)).
Massachusetts	By Secretary of Administration and Finance with the approval of the governor. (Mass. Ann. Laws Ch. 7 §4II).
Minnesota	By the governor with the advice and consent of the senate. (Minn. Stat. Ann. §15.052 (subd. 1)).
New Jersey	By the governor with the advice and consent of the senate. (N.J. Stat. Ann. §52:14F-3).
Tennessee	By the Secretary of State.

Table 4-11
Directors' Profile: Term of Office

California	At the discretion of the Governor
Colorado	No set term—Civil Service status (can be removed only "for cause")
Florida	At the discretion of the Administrative Commission
Massachusetts	At the discretion of the Secretary of Administration and Finance
Minnesota	Term ends June 30th of sixth calendar year after appointment (Minn. Stat. Ann. §15.052 (subd. 1))
New Jersey	Six years (N. J. Stat. Ann. §52:14F-3)
Tennessee	At the discretion of the Secretary of State

Table 4-12
Directors's Profile: Formal Methods of Evaluation and Removal

	Evaluation	Removal
California	None	At the discretion of the governor
Colorado	By the deputy director of the Department of Administration	Civil Service protection
Florida	None	At the discretion of the Administrative Commission
Massachusetts	None	At the discretion of the Secretary of Administration and Finance
Minnesota	None	Removal for cause (Minn. Stat. Ann. §15.052 (subd. 1)).
New Jersey	None	Removal for cause
Tennessee	None	None

Table 5-1
Administrative Law Judges' Profile: Official Title

California	Hearing Officer (Cal. Gov't. Code §11502 (Administratively changed to Administrative Law Judge in 1975)
Colorado	Hearing Officer (Colo. Rev. Stat. §24-30-1001)
Florida	Hearing Officer (Fla. Stat. Ann. §120.65(2))
Massachusetts	Hearing Officer (Mass. Ann. Laws Ch. 7 §4H)
Minnesota	Hearing Examiner (Minn. Stat. Ann. §15.052(1)); Compensation Judge (for those hearing contested workers' compensation cases exclusively. Minn. Stat. Ann. §15.052(subd. 1))
New Jersey	Administrative Law Judge (N.J. Stat. Ann. §52:14F-4)
Tennessee	Administrative Judge (Tenn. Code Ann. §4-5-321)

Table 5-2
Administrative Law Judges' Profile: Qualifications

California	Member of California Bar for 5 years; 2 years administrative experience (Cal. Gov't. Code §11502).
Colorado	Attorney at law; Member of Colorado Bar (Colo. Rev. Stat. §24-30-1003(2)); 5 years experience if hired from outside civil service system.
Florida	Attorney at Law and Member of Florida Bar for 5 years (Fla. Stat. Ann. §120.65(2)).
Massachusetts	Attorney at law; 2 years trial experience (Mass. Ann. Laws Ch. 7 §4H).
Minnesota	"Learned in the law" (interpreted by the Chief Hearing Examiner as meaning an attorney) Minn. Stat. Ann. §15.052(3). "Demonstrated knowledge administrative procedure and free of any political or economic association that would impair their ability to function officially in a fair and objective manner" Minn. Stat. Ann. §15.052(subd. 1). Compensation judges must be "learned in the law and free of any political or economic association that would impair their ability to function officially in a fair and objective manner and must have demonstrated knowledge of workers' compensation laws." Minn. Stat. Ann. §15.052(1).
New Jersey	Attorney at law in New Jersey or any persons who are not attorneys at law, but who, in the opinion of the Governor or the Director are qualified in the field of administrative law, administrative hearings, and proceedings in subject matter relating to the hearing functions of a particular state agency. A full time ALJ shall not hold other employment. (N.J. Stat. Ann §52:14F-5(1)).
Tennessee	Learned in the law as evidenced by being licensed to practice by the courts of Tennessee (Tenn. Code Ann. §4-5-321(2)).

Table 5-3
Administrative Law Judges' Profile: How ALJs Said They Were Recruited

	General newspaper advertisement	Legal publication	State employment bulletin	Informal means
California (N=18)	0%	38.9%	16.7%	44.4%
Colorado (N=9)	22.2%	0%	22.2%	55.6%
Florida (N=8)	12.5%	50.0%	0%	37.5%
Massachusetts (N=8)	0%	25.0%	0%	75.0%
Minnesota (N=11)	0%	18.2%	9.1%	72.7%
New Jersey (N=14)	7.1%	35.7%	0%	57.1%
Tennessee (N=2)	0%	0%	0%	100%
All States (N=70)	5.7%	28.6%	8.6%	57.1%

Table 5-4
Administrative Law Judges' Profile: Selection Process

California

Each applicant is given oral and written examinations by a panel composed of a representative of the Office of Administrative Hearings (OAH), a representative of the state personnel Board and a member of the public. Panelists evaluate the applicant and a ranking is established on the basis of the resulting scores. The ranks are based on percentiles and those who place in the top 3 percentiles are eligible for appointment. Note that additional points are automatically given for prior state service.

When a position opens, the Director of OAH advises all persons in the top three ranks. All interested candidates are interviewed by the Director who is usually joined by senior hearing officers. Applicants are probed on writing skills, ability to communicate, and demeanor. The Director makes the final hiring decision.

Colorado

Applications are screened by the Department of Administration to determine if minimum qualifications are met. There must be evidence of sufficient trial experience and background to be familiar enough with procedural rules to conduct a hearing. An oral board is then administered to the applicant by a performing or retired hearing officer, a lawyer with expertise in the area for which the hearing officer is sought, and a third person. The oral board grades the exams.

The Director of the Division of Hearing Officers interviews the top 3 applicants. Also present is a representative from the agency where the prospective hearing officer will hear cases on the first assignment. The Director makes the final decision with approval of the Executive Director of the Department of Administration (Colo. Rev. Stat. §24-30-1003(1)).

Florida

Applications are reviewed by the Director of the Division of Administrative Hearings. The current Director looks for a distinguished academic background and experience. Expertise is not a criterion. The final decision is made by the Director.

Massachusetts

The Chief Hearing Officer of the Division of Hearing Officers reviews resumes and writing samples from each of the applicants and interviews them. The Chief Hearing Officer then makes the hiring decision.

Minnesota

The Department of Personnel administers and grades a competitive examination. Points are also given if certain requirements are met. These include being admitted to the Minnesota Bar (or a state bar having similar requirements), being out of law school 5 years, having been involved in trial work and/or administrative hearings. Other sources of points include involvement in rule making hearings and veterans (and disabled veterans) preference. The Chief Hearing Examiner (CHE) receives the names of the top 10 candidates, who in turn, are notified of their status and asked to submit samples of their legal writing. Supervisors (Hearing Examiner III's) conduct interviews with those applying, and recommends "2 or 3" to the CHE. The CHE interviews these candidates and makes the decision to hire.

New Jersey

As of 1980, the Director of the Office of Administrative Law had the power to appoint temporary ALJs. The Director used this power to acquire the ALJs needed to begin operations. (The same system continued to be used.) The Director reviews the credentials of candidates and interviews them. Those hired by the Director are appointed on a temporary basis with final employment depending upon the results of performance evaluation. These results are given to the governor who makes the final decision to hire upon recommendation of the Director. As of 1982, "Permanent administrative law judges shall be appointed by the Governor with the advice and consent of the Senate to initial terms of 1 year.... First reappointment of a judge after this initial term shall be by the Governor for a term of 4 years.... Subsequent reappointments of a judge shall be by the Governor with the advice and consent of the Senate to terms of 5 years.... (N.J. Stat. Ann. §52:14F-4).

Tennessee

The Secretary of State is responsible for hiring but the decision is made upon recommendation of the Director, Administrative Procedures Division. The APD selects one or two applicants and sends them to the Secretary of State for a final interview.

Table 5-5
Selected Characteristics of Central Panel ALJ Respondents

Question:	Attorneys (N=72)	Percent	N
What was your occupation prior to serving as an ALJ in the central panel? (Note: Seven respondents were not attorneys.)	Solo practice	11.1%	(8)
	Small firm (2-10)	16.7	(12)
	Medium firm (11-30)	4.2	(3)
	Large firm (30 or more)	1.4	(1)
	Government	45.8	(33)
	ALJ	20.8	(15)
How many years have you been an ALJ with your central panel office?	Mean = 4.1		
	Median = 8.4		
Does your current position as an ALJ represent financial improvement or financial sacrifice when compared to your previous position?	Financial sacrifice	22.1%	(19)
	About the same	32.6	(28)
	Financial improvement	45.3	(39)
How did you learn of the vacancy for your current position?	General circulation newspaper ad	5.7%	(4)
	Legal newspaper or magazine	28.6	(20)
	State Employment Bulletin	8.6	(6)
	Informal means	57.1	(40)
Item:			
Percent of ALJ respondents receiving highest academic degree in the state of current employment:	Educated in state	69.0%	(60)
	Educated out of state	31.0	(27)

Table 5-6
Selected Characteristics of Central Panel ALJ Respondents by State

	California (N=21)	Colorado (N=7)	Florida (N=9)	Massachusetts (N=8)	Minnesota (N=10)	New Jersey (N=22)	Tennessee (N=2)
Prior Occupation*							
Solo practice	14.3%	28.6%	0 %	25.0%	0%	6.7%	0 %
Small firm (2-10)	19.0	14.3	11.1	12.5	10.0	20.0	50.0
Medium firm (11-30)	4.8	0	11.1	0	0	6.7	0
Large firm (30 or more)	0	0	11.1	0	0	0	0
Government attorney	52.4	42.9	44.4	50.0	40.0	40.0	50.0
ALJ	9.5	14.3	22.2	12.5	50.0	26.7	0
Years with central panel agency (mean)	9.1	3.7	2.6	2.4	3.5	1.9	2.0
Education							
Per cent of ALJ respondents receiving highest academic degree in the state of current employment	95.2	50.0	72	88.9	63.6	50.0	50.0

*All respondents were attorneys except seven ALJs in New Jersey.

Table 5-7
Administrative Law Judges' Profile: Term of Office and Removal Provisions

	Term of Office	Removal
California	No specific term (civil service status)	Civil Service procedure—removal for cause.
Colorado	No specific term (civil service status)	Civil Service procedure—removal for cause.
Florida	No specific term—Career Service System (6 month probationary period during which hearing officers may be fired without cause. They then acquire permanent employment status.)	Following a 6 month probationary period, removal for cause.
Massachusetts	No specific term	Removal at the discretion of the Chief Hearing Officer.
Minnesota	No specific term	Civil Service procedure: Following a 6 month probationary period, removal for cause.
New Jersey	Five years (and until the appointment of a successor) (N.J. Stat. Ann. §52:14F-4)	Removal for cause.
Tennessee	No specific term	Removal at the discretion of the Director.

Table 5-8
Administrative Law Judges' Profile: Evaluation

California
An annual review is prepared by the Director. In addition, Senior ALJs periodically review decisions of ALJs they supervise.

Colorado
Annual performance planning and review by the Director.

Florida
Annual review by the Director.

Massachusetts
Informal. Director observes hearings and reviews written decisions.

Minnesota
Annual review by the Chief Hearing Examiner.

New Jersey
Elaborate system of evaluation emanating from a report issued by a committee of the New Jersey Supreme Court regarding evaluation of state judges.
The document stressed three areas of importance: productivity, conduct, and quality.
- Several sets of statistics concerning case dispositions are used by the Director to measure productivity.
- Conduct is evaluated by a series of questionnaires sent confidentially to attorneys, litigants, and others involved in matters before the ALJs.
- Quality is measured through these questionnaires and by the Directors' review of a sample of ALJ decisions rendered during the six month evaluation period.

The Director compiles the results of the three-pronged system and generates an evaluation every six months.

Tennessee
Annual evaluation by the Director.

Table 5-9
Administrative Law Judges' Profile: Promotion and Salary Decisions

California
Salary increases are based on Civil Service procedures which require an annual evaluation report.

Colorado
Civil Service System: Automatic 5 per cent salary increase annually. Note: Future raises for hearing officers will depend on performance planning and review.

Florida
Salary increases based on across the board pay raises that may be provided by the legislature and discretionary salary increases given by the Director (based in part on the Director's evaluation of hearing officer performance).

Massachusetts
Automatic salary increase under the State's salary schedule.

Minnesota
Appointments to Hearing Examiner I (a trainee position), Hearing Examiner II or Hearing Examiner III (a supervisory position) made by Chief Hearing Examiner from list of eligible names certified to the Office of Administrative Hearings by the Department of Employee Relations. Salaries based on results of ALJ performance evaluation. Increases range from 0-8% for satisfactory performance, 0-11% for above average performance, 0-14% for outstanding performance. There are no cost of living adjustments nor any yearly guaranteed increases. Compensation judges' salaries are set at $36,000 annually by the legislature and receive no guaranteed increases nor performance increases.

New Jersey
Salary ranges are tied to the performance evaluation system. The only automatic raises are cost of living increments that the legislature may provide. On the basis of the evaluation, ALJs receive two salary increments annually; they may receive as much as a 10 per cent increase or a 5 per cent decrease.

Tennessee
Salary increases at the discretion of the Secretary of State who utilizes the annual evaluation prepared by the Director.

Table 5-10
Viewpoints of Central Panel ALJ Respondents on Evaluation and Expertise

Statements:	Agree*	Undecided	Disagree**
The presence of a mechanism evaluating the overall performance of ALJs will jeopardize the independence of ALJs. (N=84)	28.9%	22.9%	48.2%
An ALJ should have specific expertise in the areas over which he/she presides. (N=87)	43.6	13.8	42.5

*Respondents answered "agree" or "strongly agree."
**Respondents answered "disagree" or "strongly disagree."

Table 5-11
Work-Related Attitudes of Central Panel ALJ Respondents by State
Issue: The presence of a mechanism evaluating the overall performance of ALJs will jeopardize the independence of ALJs.

	Agree	Undecided	Disagree
California (N=21)	19.0%	23.8%	57.1%
Colorado (N=10)	30.0	20.0	50.0
Florida (N=9)	44.4	44.4	11.1
Massachusetts (N=7)	28.6	14.3	57.1
Minnesota (N=11)	45.5	18.2	36.4
New Jersey (N=23)	26.1	17.4	56.5
Tennessee (N=2)	0.0	50.0	50.0

Table 5-12

Work-Related Viewpoints of Central Panel ALJ Respondents

Statements:	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
An ALJ should be free to deviate from the central panel rules of hearing procedure if the situation necessitates. (N=86)	23.3%	45.3%	8.1%	17.4%	5.8%
ALJs are adequately compensated for their work. (N=86)	0	18.6	3.5	47.7	30.2
An ALJ's skills are utilized more effectively in a central panel system. (N=85)	45.9	41.2	7.1	4.7	1.2
ALJs in a central panel system experience too much variety in the cases coming before them. (N=86)	1.2	5.8	8.1	46.5	38.4
ALJs are under undue pressure to decide cases quickly. (N=86)	16.3	37.2	9.3	31.4	5.8
Agency officials still view ALJs as agency employees. (N=84)	7.1	21.4	15.5	39.3	16.7
If an ALJ is employed by a central panel, his/her decisions will be better insulated from inappropriate agency influence. (N=85)	57.6	32.9	4.7	2.4	2.4
A central panel ALJ whose office quarters are located within an agency will more likely be subject to inappropriate agency influence. (N=86)	36.0	40.7	14.0	8.1	1.2

Table 5-13
Work-Related Attitudes of Central Panel ALJ Respondents by State
Issue: An ALJ Should Have Specific Expertise In The Areas Over Which He/She Presides.

	Agree*	Undecided	Disagree**
California (N=21)	4.8%	14.3%	80.9%
Colorado (N=10)	70.0	20.0	10.0
Florida (N=10)	30.0	0.0	70.0
Massachusetts (N=9)	88.9	0.0	11.1
Minnesota (N=11)	63.7	27.3	9.1
New Jersey (N=24)	50.0	16.7	33.3
Tennessee (N=2)	0.0	0.0	100.0

*Respondents answered "agree" or "strongly agree."
**Respondents answered "disagree" or "strongly disagree."

Table 5-14
How Administrative Law Judges are Assigned: Case by Case or to One Agency for an Extended Time Period.

California
Case by case

Colorado
To assigned agency for extended period of time

Florida
Case by case (Beverage cases and Baker Act cases are one year assignments.)

Massachusetts
Case by case

Minnesota
Case by case

New Jersey
Assigned to two or more agencies for extended period of time; then assigned on a case by case basis

Tennessee
Case by case

Table 5-15

Administrative Law Judge Assignment: Expertise

California
ALJs with particular specialties will be assigned to cases where they may make use of their talents. No ALJ, however, is assigned to just one agency and ALJs are not hired with expertise as a criterion.

Colorado
ALJs assigned with expertise in mind, but they are rotated to train them to hear a variety of cases.

Florida
ALJs assigned with expertise in mind, but they are rotated to hear a variety of cases.

Massachusetts
ALJs assigned with expertise in mind, but they are rotated to hear a variety of cases. ALJs are not hired with expertise as a criterion.

Minnesota
ALJs organized into 3 divisions for the purpose of case assignment: 1) Utilities and transportation law, 2) Environmental law, 3) All other areas. An attempt is made to assign ALJs with expertise in the area to be heard.

New Jersey
ALJs assigned with expertise in mind. The expertise will not result in assignment to one agency exclusively.

Tennessee
ALJs are not generally assigned on basis of expertise, but this is a factor when a highly technical case is involved.

NOTES

1. Kestin, "Reform of the Administrative Process," 92 *New Jersey Lawyer* 35 (1980).

2. Riccio, "Due Process in Quasi-Judicial Administrative Hearings: Confining the Examiner to One Hat," 2 *Seaton Hall L.J.* 398 (1971).

3. Kestin, *supra* note 1.

4. Interview with director of New Jersey central panel, September 1980.

5. An example of learning of the job vacancy through informal means is learning of it from friends or contacts in the work-setting.

6. "Selective certification allows federal agencies to hire individuals with special skills or experience in a particular area." The result is that individuals possessing these special skills most commonly acquire them by working or practicing before the agency using selective certification to hire its ALJs. Thus, many within the federal corps of ALJs have backgrounds including government employment. Report by the Comptroller General of the U.S., *Management Improvements in the Administrative Law Process: Much Remains to be Done*, FPLD 79-44 (May 23, 1979), at 42.

7. ALJs are selected by the agencies from rosters prepared by the Office of Personnel Management (OPM). Agencies can normally choose each ALJ from among the top three names on the appropriate roster. However, under the system of selective certification, an agency can arrange with OPM to select an ALJ from among the top three candidates fulfilling special requirements pertaining to specialized expertise. To qualify for placement on the roster, one needs to receive a score of 80 on a 100-point scale consisting of points for experience, recommendations, writing ability, and performance at an oral interview. The process is scored by OPM personnel. "Administrative Law Judge," *Office of Personnel Management, Announcement No. 318* (October 1979).

For a two-part article on federal ALJ selection, *see* Mans, "Selecting the 'hidden judiciary:' how the merit process works in choosing administrative law judges," 63 *Judicature* 60, 130 (1979). *See also* Lubbers, "Federal Administrative Law Judges: A Focus on Our Invisible Judiciary," 3 *Admin. L. Rev.* 109 (1981). For an evaluation of the federal ALJ selection process, see Sharon, "Validation of the Administrative Law Judge Examination," Report to the Office of Personnel Management (June 1980). *See also* Sharon, "The Measure of an Administrative Law Judge," 19/4 *The Judges' J.* 20 (1980).

8. For an overview of legislative efforts in these matters, *see* note 35 of Chapter 2 and "Congress hears proposals for 'performance reviews' of ALJs," 63 *Judicature* 144 (1979).

9. 613 F2d 10 (2d Cir. 1980).

10. Interview with director of New Jersey central panel, September 1980.

11. Interviews with Chief Hearing Examiner in Minnesota, September-October 1980.

12. Proposed legislation providing for evaluation of federal ALJ performance was vigorously opposed by all organizations of federal ALJs. *See* note 8 *supra*. One example of ALJ efforts to oppose the legislation was testimony before various Congressional committees. *See, e.g., Senate Committee on Governmental Affairs* 96th Cong., 1st Sess. (May 1979) (testimony of Judge William Fauver on behalf of the Federal Administrative Law Judges Conference).

For an overview of the evaluation issue, *see* Rosenblum, "Evaluation of Administrative Law Judges: Aspects of Purpose, Policy and Feasibility," a paper submitted to the Administrative Conference of the United States, February 1981 (cited with permission of author).

13. Interview with director of New Jersey central panel, September 1980.

14. Interview with director of Colorado central panel, September 1980.

15. Interview with director of Massachusetts central panel, September 1980.

16. Interview with Chief Hearing Examiner in Minnesota, September 1980. Minn. Stat. Ann. §15.052 (subd. 3).

Table 6-1

Work-Related Activities of Central Panel ALJ Respondents

Question:	Mean	Median
How much of the total time spent doing your job is devoted to the following activities? (N=87)		
Pretrial preparation (reading, researching)	9.4%	9.8%
Conducting prehearing conferences and negotiations	6.5	5.1
Presiding at formal hearings	31.7	29.9
Writing decisions	33.8	33.1
Travel	6.5	5.1
Administrative duties	9.8	5.5
Other hearing-related activities	2.4	0.2

Table 6-2
Reported Work-Related Activities of Central Panel ALJs

	Frequently	Occasionally	Infrequently or Never
Read decisions of other ALJs (N=87)	55.2%	34.5%	10.3%
Read final agency decisions or opinions (N=86)	65.1	32.6	2.3
Read industry publications or commercial services (N=85)	9.4	35.3	55.3
Consult other ALJs for advice or information prior to hearing (N=86)	40.7	47.7	11.6
Consult other ALJs while case is pending (N=86)	26.7	45.3	27.9
Request drafts of decisions from your law clerk (N=75)	5.3	22.7	72.0
Talk with individual members of the private bar about agency procedures (N=87)	3.4	46.0	50.6
Make suggestions to agency officials about policy changes (N=87)	3.4	41.4	55.2
Make suggestions to agency officials about procedural changes (N=87)	5.7	44.8	49.4
Disqualify yourself from hearing a case (N=86)	0.0	29.1	70.9
Attend professional meetings or seminars (N=87)	18.4	72.4	9.2
Wear a robe during a hearing (N=82)	*	*	*

*No respondents currently wear judicial robes but respondents in New Jersey report that they will soon begin to wear robes during hearings.

Table 6-3
Reported Resources Available to Central Panel ALJs

	Adequate	Inadequate	Do not have but desirable	Do not have and unnecessary
Law library (N=85)	61.2%	37.6%	1.2%	0.0%
Personal law clerk (N=83)	0.0	2.4	38.6	59.0
Shared law clerk (N=85)	23.5	8.2	41.2	27.1
Personal secretarial assistance (N=80)	12.5	2.5	46.2	38.7
Shared secretarial assistance (N=83)	63.9	30.1	4.8	1.2
Subscriptions to legal periodicals or commercial services (N=83)	47.0	37.3	10.8	4.8
Regular policy briefings by agency officials (N=85)	15.3	12.9	11.8	60.0
Hearing manual for ALJs (N=84)	32.1	8.3	41.7	17.9
Technical assistance by designated staff member (N=81)	30.9	6.2	22.2	40.7
Index of prior ALJ decisions (N=85)	34.1	16.5	36.5	12.9
Uniform rules of practice for all hearings (N=85)	81.0	7.1	6.0	6.0
Magnetic media typewriters or other modern office equipment (N=84)	50.0	13.1	27.4	9.5
Financial support for attending continuing education seminars, meetings (N=84)	35.7	44.0	19.0	1.2

Table 6-4
Hearing Process: Rules of Procedure

California	State Administrative Manual (behavior and conditions of employment for all state employees); Forms Book (for the assistance of the ALJ); Policy statements from agencies (guidelines from which ALJs may deviate); Operation Memos (relate to hearing procedures, e.g., how much time to give a lawyer to submit a written argument, who swears in a witness, etc.). California Administrative Procedure Act.
Colorado	Administrative Procedure Act §24-14-101 *et. seq.* Rules of Civil Procedure For District Courts of Colorado (as far as practicable)
Florida	Ch. 28-5 Fla. Admin. Code Model Rules of Procedure
Massachusetts	Informal and formal rules of procedure drafted by a former Director, Division of Hearing Officers. Rules of Practice and Procedure, 801 CMR 1.00
Minnesota	9 Minn. Code of Agency Rules §2.101 *et. seq.*, 2.201 *et. seq.*, 2.301 *et. seq.*, 2.401 *et. seq.*, 2.501 *et. seq.*
New Jersey	Uniform Administrative Procedure Rules of Practice
Tennessee	Uniform Rules §1360-1-7

Table 6-5
Hearing-Related Activities: Are Hearings Public, Are Hearings Recorded, and Is There a Right to Counsel?

	All hearings public	All hearings recorded	Right to counsel
California	Yes	Yes	Attorneys may represent litigants in all cases but attorneys are never assigned.
Colorado	Yes	Yes	Same
Florida	Yes	Yes	Same*
Massachusetts	Controlled by statute. Qualified parties have the right to request hearings be public	Yes	Same
Minnesota	Yes	Yes	Same
New Jersey	Yes	Yes	Same
Tennessee	Yes	Yes	Same

*Note: Public defenders represent indigents in Baker Act (civil commitment) proceedings.

Table 6-6
Types of Cases Heard by Central Panel Administrative Law Judges

	Frequently	Occasionally	Infrequently or never
Licensing, permit, or certificate applications, suspensions, or revocations (N=86)	74.4%	22.1%	3.5%
Ratemaking or valuations (N=81)	17.3	19.8	63.0
Rulemaking, regulations (N=80)	12.5	21.2	66.2
Individual benefit claims, disability allowances, worker's comp. (N=81)	28.4	37.0	34.6
Enforcement proceedings (civil rights, unfair trade, labor relations, safety, etc.) (N=81)	27.2	54.3	18.5
Other (See Appendix B) (N=40)	55.0	35.0	10.0

Table 6-7
Patterns in Types of Cases Heard Frequently by Central Panel ALJ Respondents*

One one type of case heard	
Licensing only (N=26)	35.6%
Ratemaking only (N=1)	1.4
Rulemaking only (N=0)	0.0
Enforcement only (N=1)	1.4
Benefits only (N=8)	11.0
Total	49.4%
Multiple types of cases heard	
Licensing & ratemaking (N=5)	6.8
Licensing & rulemaking (N=3)	4.1
Licensing & enforcement (N=7)	9.6
Licensing & benefits (N=5)**	6.8
Ratemaking & benefits (N=1)**	1.4
Enforcement & benefits (N=2)**	2.7
Licensing & ratemaking & enforcement (N=1)	1.4
Licensing & rulemaking & enforcement (N=4)	5.5
Licensing & enforcement & benefits (N=5)**	6.8
Licensing & ratemaking & rulemaking & enforcement (N=2)	2.7
Licensing & ratemaking & enforcement & benefits (N=1)**	1.4
Licensing & ratemaking & rulemaking & enforcement & benefits (N=1)**	1.4
Total	50.6%

*Respondents in mail questionnaire survey reported hearing these cases frequently. The question asked was: "How often do you preside over each of the following general categories of proceedings?"
**Denotes combination of cases heard which includes regulatory and benefits adjudication. See text for discussion.

Table 6-8

Hearing-Related Reported Activities of Central Panel ALJs

Activities	Frequently	In some cases	Never
Conduct prehearing conferences (N=87)	31.0%	63.2%	5.7%
Direct counsel to brief certain legal issues (N=87)	24.1	75.9	0.0
Go off the record to deal with procedural problems (N=84)	17.9	73.8	8.3
Question witnesses directly (N=87)	55.2	44.8	0.0
Call in witnesses on your own initiative (N=87)	0.0	25.3	74.7
Admit evidence for whatever it may be worth (N=86)	13.9	57.0	29.1
Deliver decisions orally (N=87)	0.0	25.3	74.7
Rule on requests for discovery (N=87)	18.3	63.2	18.4
Employ sanctions for improper conduct in hearing room (N=87)	0.0	32.2	67.8

Table 6-9

Hearing Process: Form of the Administrative Law Judge Decision

California	In writing. It shall contain findings of fact, a determination of the issues presented, and the penalty, if any.
Colorado	In writing. It shall contain findings of fact, conclusions of law, and a recommendation.
Florida	In writing. It shall contain conclusions of law, findings of fact, recommended order, and a preamble with notes of when the hearing was held, who the hearing officer was, etc.
Massachusetts	In writing. The positions shall be identified at the outset. An extensive summary of the evidence is included. Then, there are findings of fact and a conclusion which would involve the ultimate finding of fact and the application of the appropriate law to it.
Minnesota	In writing. It shall contain findings of fact, conclusions and recommendations. In rulemaking hearings, in addition to the above, a discussion of the extent to which the agency has established its statutory authority to take the proposed action, and the extent to which the agency has made an affirmative presentation of facts regarding its case. Compensation judges' decisions contain findings of fact, conclusions of law and an award on each issue presented.
Tennessee	In writing. It shall contain findings of fact, conclusions of law, and reasons for the ultimate decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

Source: Interviews with directors of central panel systems, September-October, 1980.

Table 6-10

Hearing Process: Can Litigant See the ALJ's Decision Before the Agency Issues its Final Order?

California	Yes; After the agency issues its decision, a respondent may petition for reconsideration (Cal. Gov't Code §11521) or seek judicial review (Cal. Gov't Code §11523).
Colorado	Yes; litigant may file exceptions and present arguments before final decision is made.
Florida	Yes; litigant has 10 days to file exceptions.
Massachusetts	Yes; litigant has 14 days to file written exceptions.
Minnesota	Yes; litigant is allowed 10 days to file exceptions and present arguments before a final decision is made.
New Jersey	Yes; litigants have an "exception filing period." (N.J. Stat. Ann. §52:14B-10).
Tennessee	Yes; litigant has ten days to file exceptions. (Tenn. Code Ann. §4-5-315).

Table 6-11

Hearing Process: Is ALJ Decision Final or Recommended?

California	Recommended
Colorado	Recommended (Social service decisions are final)
Florida	Recommended (Final when ALJ decisions involve review of the validity of rules. Also final in adjudicative proceedings if authority is delegated.)
Massachusetts	Recommended (Appeals from Rate Setting Commission are final)
Minnesota	Recommended (Final in workers' compensation cases; occupational safety and health cases; state employee disciplinary matters; discrimination cases under the state Human Rights Law)
New Jersey	Recommended (Decision becomes final if agency does not act within 45 days).
Tennessee	Recommended (Decisions on procedural questions of law are final).

Table 6-12
Hearing Process: The Extent to Which Agencies Accept ALJ Decisions

California	95 per cent accepted as written
Colorado	60 per cent accepted as written, 40 per cent accepted with modifications.
Florida	50-60 per cent accepted as written, 20-30 per cent accepted with modifications.
Massachusetts	85-90 per cent accepted as written, 5-8 per cent accepted with modifications.
Minnesota	75 per cent accepted as written, 15-20 per cent accepted with modifications.
New Jersey	85-90 per cent accepted as written.
Tennessee	High percentage accepted as written.

Source: Interviews with directors of central panel systems, September-October 1980.

Table 6-13
Central Panel Agencies: How Are ALJ Decisions Cataloged?

California	Compiled in the Office of Administrative Hearings and stored by agency.
Colorado	Compiled and stored by each agency.
Florida	Compilation and indexing of all final orders in adjudicative cases.
Massachusetts	Division of Hearing Officers required to compile and index all decisions. (Only rate setting cases are available to the public.)
Minnesota	ALJ and agency decisions on file in the Office of Administrative Hearings. Cataloging system and computerized retrieval system now being constructed.
New Jersey	Office of Administrative Law publishes official reports of ALJ and agency decisions.
Tennessee	Significant decisions of law are indexed to serve as in-house reporting system.

NOTES

1. Interview with director of California central panel, September 1980.
2. *Id.*
3. Interview with director of New Jersey central panel, September 1980.
4. Interview with Chief Hear Examiner in Minnesota, September 1980.
5. Interview with director of Tennessee central panel, September 1980.
6. Interview with Chief Hearing Examiner in Minnesota, September 1980.
7. *Id.*
8. Interview with director of Tennessee central panel, September 1980.
9. Interview with director of Massachusetts central panel, September 1980.
10. Interview with director of Florida central panel, September 1980.

7
Summary and Conclusion

Administrative law judges have become major figures in America's justice system today, though they are so little known that they are sometimes called "the hidden judiciary." When administrative agencies were first established to regulate major industries and to administer government benefit programs, they employed hearing officers to merely assist them in their duties. Since then, the evolution toward judicialized adjudication has resulted in a corps of federal and state ALJs that now resemble judges in their duties as finders of fact or as decisionmakers or both.

But judicialization of administrative adjudication with its focus on providing justice in a new forum has collided with an emerging emphasis on expedient resolution of cases involving administrative agencies. Attempts to resolve this conflict have resulted in new ways in which ALJs are utilized in federal and state governments. Seven states (and now an eighth state) have initiated a new approach to administrative adjudication by placing ALJs in an independent agency—a central pool or central panel.

Creating Central Panels

Each of the panels was created through the action of the state legislature, which established the broad duties and limits of the central panel. The legislative battles associated with this process often helped shape the organizational structures as well as define the central panels' jurisdiction.

These legislative debates spawned a competition among special interests that are critical to the conflict surrounding the central panel notion. That is to say, some agency officials saw in the legislative debates an attempt to replace their administrative authority with the inflexible rule of law, thereby reducing the effectiveness of the system. Proponents of the legislation saw separating ALJs from agencies as a way to improve the administration of justice and to enhance the job status of ALJs. The conflict between law and administrative authority had an impact on personal interests that resulted in fierce agency opposition in the majority of central panel states.

Budgetary Considerations

Under central panel systems, either the agencies or the central panel directors need to make accurate forecasts of requirements for hearings so that realistic budget appropriations can be made. Existing operations are funded through general funding (in which the state legislature appropriates to the central panel a specific sum), revolving fund (in which state legislatures give agencies funds to pay for hearings and the central panel office bills the agencies for the use of ALJs), or a combination of the two. However, we found strikingly little data exists concerning budgetary issues. Most views on the best way to fund central panels are not based on financial studies; necessary data are often unavailable.

Differing Jurisdictions

The central panel approaches share the notion of separating ALJs from agencies but vary in terms of daily operating procedures—from the number of ALJs in each pool to the number of agencies which utilize central panel ALJs. The number of ALJs ranges from five to 45 and not only do states differ in terms of the number of agencies actually utilizing central panel ALJs, there is another distinction based on whether specified agencies must use these ALJs (mandatory jurisdiction) or may use central panel ALJs (permissive jurisdiction).

The Panel Director's Impact

In each of the seven states, the director has shaped the structure of the central panels. While such aspects as organizational structure, jurisdiction, and types of funding may differ, all panels have a director whose role is quite powerful. Directors develop budgets and serve as general office manager. They assign cases to the ALJs, and in many of the states their evaluation of ALJ performance helps determine salary increases. They are also integrally involved in the ALJ selection process in all seven states.

The importance of the position, though, raises a potentially troubling issue. Although the central panel is supposed to eliminate bias, directors are selected by state government officials and could be susceptible to their influence. The newness of the systems and lack of information about the systems preclude any conclusions as to this matter. Current directors downplay this possibility, though, and in a May 1981 workshop on central panels (sponsored by the American Judicature Society and the Administrative Conference of the U.S.), several of them saw their role as a buffer between state government and the decisionmaking independence of ALJs. For example, a director familiar with and accepted by the political system can better resist attempts by a governor to interfere with the administrative process.

Role of the ALJ: The Need for Expertise

The ALJ role has often been generally defined in terms of the required amounts of expertise and requisite amounts of independence. Should administrative judges be "generalists," capable of hearing a variety of case types, or "specialists," possessing narrow expertise and only hearing cases in that area?

The need for expertise probably depends on the type of case—a rate-making proceeding may require more technical expertise than a case involving eligibility for benefits. Central panel ALJs preside over a variety of cases, which confuses the issue even more. The respondents to our mail survey of central panel ALJs were nearly evenly split between those who agree and those who disagree that ALJs should have specific expertise. The responses vary substantially by state, suggesting that ALJ viewpoints are fashioned on individual experiences. These experiences include the importance of specialized expertise in the ways directors assign ALJs to their cases.

The Role of the ALJ: The Need for Independence

In both state and federal systems, ALJ independence is related to ALJ performance evaluation. Opponents of ALJ performance evaluation view it as undermining the decisionmaking independence that the central panel approach is supposed to bring about. Proponents of the evaluation of ALJs claim that administrative judges should be accountable for their actions, and accountability, in their view, can come through evaluation. We asked central panel ALJs whether the presence of a performance evaluation system would jeopardize their independence. Although there is fairly uniform opposition to performance evaluation on the part of federal ALJs, this is not necessarily the case among central panel ALJs in our seven states. There were fewer of those central panel ALJs who agreed that performance evaluation would jeopardize their independence than those who disagreed. As with the outcome to our question concerning expertise, the results varied substantially by state. This suggests that the state ALJ viewpoints toward performance evaluation and independence, like their viewpoints on the expertise issue, are fashioned by individual experiences.

The ALJ in the Hearing Process

Central panel ALJs hear a variety of cases. Over half of our respondents report that they hear at least two types of cases frequently. Approximately a fifth of reporting ALJs say the combination of cases they hear includes both regulatory and benefits adjudication—two very different areas of adjudication.

The variety of cases coupled with the physical separation of central

panel ALJs from the agencies has led some commentators to question whether those ALJs can acquire the agency guidance they need as to the meaning of agency policies. Directors report that their ALJs will be bound by public agency regulations but not by interpretations of regulations issued by the agencies. Yet agency policies, even when promulgated through the rulemaking function, leave a large amount of room for interpretation. To the extent that the clarity of agency policies varies from type of case to type of case, the ALJ role will differ as well.

Conclusion

The goal of the central panel approach is to promote more objective and efficient adjudication by separating ALJs from the agencies they serve. Our purpose was to focus on the variety of systems encompassed by the central panel notion. We broadly conclude that existing central panels are very different in terms of such dimensions as jurisdiction and the role of both directors of these panels and central panel administrative law judges. As a result of these differences, we found that the role of an ALJ varies from system to system since the discretion and the independence of ALJs are defined in part by what they do on a day-to-day basis.

The central panel approach is an increasingly used concept to balance the need for administrative justice with the goal of efficient and effective administrative action. The way in which this approach is used varies from state to state. These systems differ in factors ranging from means of funding to the number of ALJs to the types of agencies they serve. As a result, the role of the ALJ differs as well. Directors are often extremely influential in shaping the panels but they have different powers and, in addition, profess various operating philosophies about such factors as the importance of specialized expertise when ALJs are assigned to cases.

Finally, the procedures agencies follow in the administrative process also affect central panel operations. One example is the clarity with which agencies make known their policies, including the amount of leeway left by the agencies for interpretation. The duties of the ALJ are affected by these types of agency choices, particularly for central panel ALJs, who must deal with numerous agencies.

The central panel approach, in sum, has provided only the framework for separating ALJs from the agencies. The states have individually adapted the panels' operating procedures to the larger political and economic environments. The result has been seven central panel systems that differ along important dimensions. This flexibility is an important characteristic that the federal government and any state interested in implementing the central panel approach should recognize.

Appendices

Appendix A
Breakdown of Mean Responses by State of Employment

	Calif.	Colo.	Fla.	Mass.	Minn.	N.J.	Tenn.	Aver.
1. How often do you preside over each of the following general categories of proceedings? (0) Infrequently or never (1) Occasionally (2) Frequently								
Licensing	2.000	1.200	2.000	0.875	1.909	1.708	2.000	1.709
Ratemaking	0.053	0.400	0.700	1.286	0.700	0.696	0.000	0.543
Rulemaking	0.167	0.111	1.000	0.833	1.455	0.083	0.000	0.462
Individual benefits	1.150	1.800	0.000	1.625	0.000	0.957	0.000	0.938
Enforcement	1.000	1.100	1.300	1.143	1.300	0.955	1.000	1.086
2. How frequently do you do the following? (0) Never (1) In some cases (2) In most cases (3) In all cases								
Conduct pre-hearing conferences?	0.810	1.100	1.200	1.444	1.545	1.625	1.000	1.276
Rule on discovery requests?	0.381	1.100	2.000	0.889	1.273	1.208	1.000	1.057
Direct counsel to brief issues?	1.000	1.100	1.500	1.333	1.364	1.417	1.000	1.264
Initiate motions?	0.238	0.300	0.500	0.778	0.364	0.833	1.000	0.529
Go off record for procedural problems?	0.950	1.222	0.889	1.333	0.909	1.250	1.500	1.107
Question witnesses directly	1.524	2.000	1.500	1.778	1.545	1.750	1.500	1.667
Call in witnesses on your own?	0.143	0.400	0.100	0.111	0.364	0.333	0.500	0.253
Raise objections during hearings?	0.905	0.600	0.800	0.889	0.636	0.667	1.000	0.759
Admit evidence "for what it's worth?	0.667	1.000	0.500	1.000	0.909	1.083	1.000	0.872
Deliver decisions orally?	0.048	0.800	0.200	0.111	0.182	0.292	0.500	0.253
Sanction improper conduct?	0.238	0.400	0.400	0.111	0.273	0.417	0.500	0.322

	Calif.	Colo.	Fla.	Mass.	Minn.	N.J.	Tenn.	Aver.
3. Do you do any of the following things? (0) Infrequently or never (1) Occasionally (2) Frequently								
Read decisions of other ALJs?	1.143	1.400	1.500	1.444	1.909	1.542	1.000	1.448
Read agency decisions?	1.100	1.800	1.900	1.667	1.727	1.833	1.500	1.628
Read federal court decisions?	0.857	1.200	1.300	1.111	1.364	1.083	1.500	1.115
Read industry publications?	0.619	0.600	0.500	0.500	0.900	0.375	0.000	0.541
Consult others before hearings?	1.190	1.300	1.500	1.375	1.364	1.208	1.500	1.291
Consult others during hearings?	0.571	1.200	1.200	1.333	1.200	0.917	1.500	0.988
Request decision drafts from clerk?	0.000	0.222	0.000	1.000	0.545	0.391	0.500	0.333
Talk with the private bar?	0.238	0.800	0.500	0.889	1.000	0.292	1.000	0.529
Make policy suggestions to agencies?	0.190	1.000	0.700	0.667	0.636	0.250	1.000	0.483
Make procedure suggestions to agencies?	0.333	1.100	0.700	0.778	0.545	0.375	1.000	0.563
Disqualify yourself?	0.286	0.500	0.000	0.125	0.182	0.548	0.000	0.291
Attend professional Seminars?	0.905	1.200	1.000	0.889	1.182	1.292	1.000	1.092
4. How much of the total time spent doing your job is devoted to the following activities? (all answers are percentages)								
a. Pre-trial preparation	8.286	7.800	10.600	7.556	13.182	9.708	5.000	9.356
b. Pre-hearing negotiations	1.333	5.300	6.300	10.000	6.182	10.500	7.500	6.540
c. Presiding at hearings	44.190	30.800	25.700	27.778	22.273	28.250	45.000	31.678
d. Writing decisions	28.571	36.300	33.800	43.333	38.364	32.000	30.000	33.805
e. Travelling	8.619	5.700	10.700	1.111	5.909	5.625	5.000	6.494
f. Administrative duties	6.810	10.400	6.400	9.667	12.182	12.792	6.500	9.793
g. Other hearing duties	2.190	3.700	6.500	1.111	1.909	1.125	1.000	2.391

	Calif.	Colo.	Fla.	Mass.	Minn.	N.J.	Tenn.	Aver.
5. Are you assigned to hear cases of only one agency? (0) No (1) Yes	0.000	0.200	0.000	0.222	0.091	0.043	0.000	0.071
6. How many cases per month do you have pending before you?	18.750	52.100	22.000	11.000	7.182	27.957	17.500	23.345
7. How many cases do you decide after a formal hearing each month?	15.350	35.700	11.600	5.875	14.696	9.500	14.762	
8. To what extent do you agree or disagree with the following statements? (0) Strongly Disagree (1) Disagree (2) Undecided (3) Agree (4) Strongly agree								
An ALJ should be free to deviate from CP rules of procedure if the situation necessitates.	3.000	3.000	2.700	2.000	2.000	2.625	3.000	2.628
Developing the record of a case is one of the most important tasks of an ALJ.	3.571	3.444	3.000	3.444	3.636	3.625	2.000	3.465
An ALJ should intervene more in a case where one of the litigants is not represented by counsel.	3.095	3.500	2.778	3.333	3.182	3.083	3.500	3.151
An ALJ should have specific expertise in the areas over which he/she presides.	1.000	2.700	1.700	3.000	2.909	2.500	1.000	2.138
An ALJ should adhere to established agency policy when deciding a case.	2.571	2.600	2.111	2.875	2.273	2.667	3.000	2.553
Most agency rules and regulations are clear enough to be effectively applied to individual cases.	2.524	1.889	2.111	2.333	2.182	2.583	1.500	2.341
ALJs are adequately compensated.	1.714	1.000	1.200	0.222	0.727	1.174	0.000	1.105

	Calif.	Colo.	Fla.	Mass.	Minn.	N.J.	Tenn.	Aver.
ALJs are more effective with a central panel system.	3.333	3.000	3.600	3.500	3.364	3.000	3.500	3.259
ALJs in central panel systems experience too much variety in cases coming before them.	0.476	0.800	0.500	0.889	1.182	1.174	1.000	0.849
ALJs are under undue pressure to decide cases quickly.	2.143	2.300	2.000	1.778	2.727	2.478	2.000	2.267
Agency officials still view ALJs as agency employees.	2.048	2.000	1.444	2.667	1.000	1.708	1.500	1.802
CP systems better insulate ALJs from inappropriate agency influence.	3.476	3.500	3.800	3.500	2.818	3.391	3.500	3.412
CP ALJs will be more subject to inappropriate agency influence if their offices are located within an agency.	3.476	3.400	3.300	3.000	2.364	3.130	2.500	3.023
Mechanism for the evaluation of overall ALJ performance will undermine the independence of ALJs.	1.619	1.800	3.000	1.714	1.909	1.478	1.500	1.810
Mechanisms for the evaluation of quantitative ALJ performance will undermine the independence of ALJs.	2.048	2.000	3.100	2.000	2.000	1.913	2.000	2.118
CP system ensures ALJ independence.	3.810	3.200	4.000	4.000	2.909	3.667	4.000	3.628
9. To what extent do any of the following problems arise in your work? (0) Not a problem (1) Somewhat a problem (2) Significant problem								
Delay in proceedings.	1.000	1.800	1.200	0.889	0.636	0.625	1.000	0.954
Ambiguity in law.	0.619	0.800	0.500	0.667	0.818	0.417	0.500	0.598
Too great a caseload.	0.476	1.500	0.400	0.444	0.545	1.042	0.000	0.736
Cases overly complex.	0.095	0.300	0.100	0.000	0.727	0.500	0.500	0.310

	Calif.	Colo.	Fla.	Mass.	Minn.	N.J.	Tenn.	Aver.
Lack of agency policy enunciation.	0.238	0.400	0.000	0.222	0.300	0.375	0.500	0.279
Lack of review standards.	0.524	0.000	0.500	0.333	0.909	0.875	0.000	0.552
Review by unqualified persons.	0.550	0.600	0.667	0.222	0.727	0.917	0.000	0.647
Lack of procedural uniformity.	0.286	0.900	0.600	0.333	0.182	0.625	0.000	0.471
Too close supervision.	0.143	0.100	0.100	0.000	0.091	0.125	0.000	0.103
10. What is your age? (All answers are mean years)	51.500	46.000	43.700	33.667	36.182	42.792	32.000	43.244
11. Are you an attorney?	1.000	1.000	1.000	1.000	1.000	0.696	1.000	0.918
12. Type of law school attended? (1) Private (2) Public	1.571	1.600	1.500	1.000	1.700	1.625	1.500	1.526

Appendix B
"Other" Types of Cases Reported Heard by Central Panel ALJs

Civil Service (employment protections)

Civil Service disciplinary actions

Social Service privileges, teacher tenure, parole violations

OSHA, securities matters, agricultural laws, motor vehicle registration, education matters, veterans rights, some tax related hearings, et al.

Teacher dismissal hearing, local government personnel hearings

Rule challenges

Confiscation for drug offenses

Environmental permits variances

State contract disputes and teacher layoff proceedings and personel disciplinary hearings

Education Appeals

Civil Service

Medical reimbursement cases

Appeals from agency denials

Tax, environmental

Teacher tenure and related job issues

Hearings on continued involuntary placement in state mental hospitals and refusal of patients to take prescribed medication

Personnel disciplinary hearings

Establishment of watershed districts or projects; special education placement, data privacy

Forfeiture

Welfare, public assistance, juvenile parole

Airport noise hearing

Institutional claims

Taxation, rule challenges

Teacher dismissals and layoffs

Educational employees—layoffs, probationary dismissals, firings, etc.

Retirement hearings

Educational disputes

Sale of agricultural products (under bond)

Education law hearings

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Report of the Subcommittee on Comparable Law and Practices to the Commission on Administrative Hearings

Approved by the Subcommittee and Referred to the Commission on September 22, 1988

Subcommittee

Tom Barkin
Rep. Judith Bauman
Sen. Jeannette Hamby
David Marcus, Chair
Larry Mylnechuk

I. Introduction and Overview

The Commission on Administrative Hearings' subcommittee on Comparable Law and Practices was formed to provide a base of information about "the practical experiences of comparable systems in several states" to the full Commission for consideration in its studies as charged under chapter 465, Oregon Laws 1987.

The subcommittee first grappled with identifying a manageable scope of inquiry. Emphasis was placed on gathering information from states that have adopted a centralized office of hearings, and particularly western states.

The subcommittee wishes to acknowledge the extensive assistance of Legislative Counsel Law Clerk, Rich Hume, who conducted numerous initial telephone inquiries and reviewed recent, relevant literature on the topic. Based on input from Mr. Hume, the subcommittee invited and heard testimony from representatives in New Jersey, Washington and California as well as from Professor L. Harold Levinson, a nationally recognized authority on administrative law and reform. The subcommittee has also reviewed a considerable number of articles, studies and reports provided by various states.

Recognizing that the subcommittee simply could not manage a broad, comprehensive study of other state experiences, this report will nevertheless provide some useful input from other states on how they have dealt with issues that are the focus of the Commission's work.

Particularly appropriate for this introduction is a review of the broad national trends identified by Professor Levinson in his testimony to the subcommittee.

The first trend identified by Professor Levinson was increased utilization of the central panel system for organizing hearing officers. Twelve states plus the City of New York currently utilize the central panel and several other states have or are considering such legislation. Professor Levinson notes that no state that has adopted the central panel has later abandoned the scheme, and most of the state central panels have had their jurisdictions expanded over time. However, no state central panel system has jurisdiction over all of its state's administrative hearings.

Professor Levinson also reported that the New York State Bar Task Force on Administrative Adjudication has very recently published its report and, although the experience of centralized states was found to be favorable, it recommended against adoption of the central panel system in New York. A copy of that report, dated July 14, 1988, was acquired by the subcommittee and reviewed. The New York Task Force considered their volumes (over 1 million cases each year) to be a significant factor in considering the desirability and workability of a central panel.

No existing central panel handles more than 40,000 cases per year.

The second trend identified by Professor Levinson was increasingly explicit Administrative Procedures Act (APA) legislation, particularly with respect to separating investigation and prosecution functions from the decision maker function. Indeed, the New York Task Force found serious problems in the agencies it studied regarding the appearance of fairness, as well as actual abuses and executive interference--with the hearings process. In lieu of a central panel, the task force recommended strict internal separation of functions. Other states have reported virtually perennial amendments to their APAs.

A third trend identified by Professor Levinson is the adoption of a menu of hearing types including less formal proceedings than the traditional "contested case."

Finally, there is a very slow trend away from trial court review to intermediate appellate court review, and along with that trend, a trend toward a unitary type of judicial review.

II. Comparative Experiences, Centralization Issues

A. Perception of Fairness

Without exception, the concern for the "appearance of fairness" was a primary consideration in the adoption of the central panel system in all of the states with such a system. However, the subcommittee was unable to uncover any reports or specific information documenting such a perception in any of those states. However, the recent report of the New York Task Force specifically found that there is a perception that at least many of the hearings are not fair.

On the other hand, the current central panel states do not presently have a concern for the perception of fairness. Colorado, for instance, has an evaluation system that includes input from petitioners, attorneys, assistant attorneys general and the agencies, and the acceptance level and satisfaction with the process and the administrative law judges (ALJ) is reportedly very high.

B. Jurisdiction/Scope

No two central panel systems are alike. Jurisdiction over contested cases varies with each state central panel, and no clear rationale is discernible other than perhaps the unique politics of each state. Although Workers' Compensation and Public Utility Commission cases are generally not within the jurisdiction of a central panel, Public Utility Commission is included in Washington, Workers' Compensation is included in Colorado and Minnesota and both are included in New Jersey.

Likewise, the scope of authority of the central panels varies. In most of the centralized states, the central panel is charged simply with conducting hearings for specified agencies, and perhaps developing uniform procedures. The Office of Administrative Law in New Jersey, however, has a broader scope including rulemaking functions under the APA and is responsible for codifying and publishing all administrative rules. Similar provisions apply in North Carolina and Minnesota.

In contested cases, almost without exception, central panel ALJs issue proposed or initial orders, and final order authority remains vested in the agency, although in some circumstances the agency head is permitted to delegate final order authority to the ALJ.

C. Costs (Savings)

Most of the central panel states assert that centralization has lowered costs. However, documentation is not abundant, although almost any measure of savings could be questioned. All of the states studied by the subcommittee have documented handling of an increased workload with less personnel than were required prior to centralization. A spokesman from the New Jersey Office of Administrative Law, however, cautions that

adoption of a system that is perceived as fair may, in itself, significantly increase the caseload. New Jersey makes perhaps the most convincing case for cost savings when it reports that in the 10 years since centralization, 45 ALJs are disposing of twice the number of hearings handled by 130 hearing officers prior to centralization, and the agency's budget has increased 20 percent in that time compared to 100 percent for the rest of state government.

In any case, the subcommittee found no evidence of increased costs resulting from centralization, and Washington, in particular, documented that start-up costs for its Office of Administrative Hearings were nominal.

D. Other Efficiencies

1. Hearing officers as generalists

All of the states surveyed listed as an advantage the ability to schedule ALJs to hear more than one type of case. While the concern for ALJ subject expertise is recognized and acknowledged, most chief ALJs maintained that subject matter expertise is a legitimate concern in a very small number of technical hearings within their jurisdiction and skill in conducting hearings, and research and writing skills are generally considered to be of far greater importance. As Washinton's Chief ALJ points out, an energy facility siting hearing requires specialized, technical knowledge, but is not an every day occurrence. In Washington, cross-training and maintaining 11 offices state wide for 57 ALJs has resulted in virtually eliminating overnight travel and per diem.

2. Consolidated Support Systems/Staff

The subcommittee did not receive detailed information in this area, but written reports and comments from witnesses suggest that pooling of support staff and equipment results in greater efficiency, particularly in the planning and implementation of organizational improvements on an ongoing basis after centralization has been effected.

3. Case Disposition Time Frames

What information was received indicates, generally, more rapid disposition of cases and fewer instances of significant backlogs, but some new central panels, such as Minnesota in the late 1970s, experienced some caseload management problems in the first couple years.

4. Uniform Training Standards

Formal training of hearing officers is the exception rather than the rule. New Jersey has probably the most extensive training including in-house programs, an annual 3-day retreat and attendance at the National Judicial College (NJC). California has no formal training program at present, but is seeking

approval for some of its ALJs to attend NJC, and is developing an annual conference. Recent legislation in Tennessee requires development of a formal training plan. Minnesota provides an in-house training program as well as attendance at NJC.

It is argued that training opportunities are enhanced under a central panel system, but the subcommittee did not have sufficient comparative information to reach any conclusions. Suffice it to say, that there is growing awareness and concern among central panel states for formal training programs on an ongoing basis.

III. Comparative Law and Practices

A. Informal Resolution/Alternative Proceedings

Prehearing conferences are utilized in several states to facilitate case settlement and, at least in some case types, settlement is reached as much as 20 percent of the time. However, applications of alternative dispute resolution techniques have not been widely explored and are generally perceived as not fitting into the administrative hearing process. On the other hand, the Minnesota Office of Administrative Hearings now provides mediation services to courts, state agencies and political subdivisions, and California's Office of Administrative Hearings administers an arbitration program to arbitrate disputes between state agencies and contractors. In North Carolina, the Office of Administrative Hearings investigates and mediates state employment discrimination cases.

B. Ex Parte Communications Provisions

The central panel states uniformly have strong APA provisions prohibiting ex parte contacts on any issue in a pending matter. Such provisions generally follow the provisions of the Model State APA.

C. Recruitment, Qualification, Supervision and Evaluation of Hearing Officers

Most but not all of the states contacted require ALJs to be attorneys and members of the state Bar. Some also require five years' experience practicing law. Legislation is pending in New Jersey that would require newly appointed ALJs to be attorneys and grandfather in current nonattorney ALJs for reappointment purposes. It is clear that the future trend will be to require that ALJs be attorneys.

Information received regarding supervision and evaluation indicates that generally great care is taken to preserve ALJ independence. Hearing outcomes are generally not considered in evaluating performance. Evaluation is based on demeanor and conduct at hearing, evaluated with input from hearing participants; productivity; and quality of written product, often evaluated with input from peers.

Recruitment is usually accomplished through normal civil service announcements and/or advertising in Bar publications.

D. Ethics/Standards of Professional Conduct

Most states contacted have or will have some kind of code of professional conduct. In Washington, an internal written code of ethics applies. In California, there is an informal expectation of adherence to the canons of judicial conduct. New Jersey has enacted a code of ethics for ALJs in its law. Tennessee is currently developing a code of ethics pursuant to legislation passed in 1987. Adoption of a code of ethics is seen as an

additional insulation of ALJs and protection of their independence, as well as a vehicle for enhancing public trust and respect.

IV. Summary Profiles of Selected States Studied

1. California

California established an Office of Administrative Hearings in 1945 under its Administrative Procedure Act. The oldest state centralized hearings office in the nation, the Office of Administrative Hearings is a Division in the General Services Department and has jurisdiction over all cases where the agency involved is subject to the APA (some 70 plus agencies--primarily occupational licensing agencies, but also Alcoholic Beverage Control, Public Employees' Retirement and several other agencies/subject matters). However, not subject to the APA and therefore, not in the jurisdiction of the Office of Administrative Hearings are Public Employment Relations Board, Workers' Compensation, Unemployment Insurance Appeals, Public Utility Commission and Department of Social Services. The volume of cases involving Unemployment Insurance Appeals is larger than the volume of the Office of Administrative Hearings. The Office of Administrative Hearings does also contract with nonmandatory agencies and with local governments.

The Office of Administrative Hearings employs 28 full-time ALJs plus support staff, and, of approximately 4,700 filings per year, 3,500 hearings are actually conducted per year. The current budget is $6 million annually. Funding is based on billing user agencies for services at a current cost for ALJ of $88 per hour. Approximately 80 percent of an ALJ's total time is billable to user agencies for hearings. Under Sec. 11370.5 of the California Code, "The office is authorized and directed to study the subject of administrative law and procedure in all its aspects, to submit its suggestions to the various agencies in the interests of fairness, uniformity and expedition of business; and to report its recommendations to the Governor and the Legislature at the commencement of each general session...."

In California, membership in the Bar for at least five years is required to be eligible for appointment as an ALJ. Salaries for ALJs range to a maximum of $73,000 annually. The office does not have an established training program, but has sought budgetary approval for training at the National Judicial College for five to six ALJs per year, and is initiating an annual meeting of ALJs for at least one full day, devoted to developing and improving skills.

Virtually all decisions issued by the Office of Administrative Hearings are proposed orders, with final authority retained in the individual agencies. Within the last few years, new legislation has included adoption of prohibitions against ex parte contacts substantially the same as provided in the Model State APA. In addition, legislation to require prehearing/settlement conferences was implemented January 1, 1987. The office reports considerable success and resultant cost savings from the program for complex cases. Not actually an alternative dispute resolution method, the prehearing conference is designed to facilitate a settlement or at least save hearing

time by providing full mutual discovery and by resolving as much as possible, procedural and substantive matters by stipulation.

While there is no statutory code of conduct, Director Donald Mitchell reports that the state canons of judicial conduct are respected and adhered to by the Office of Administrative Hearings. However, there has not been a formal adoption of the canons and they do not technically control.

Mr. Mitchell asserts that the Office of Administrative Hearings represents a significant cost savings over what would be incurred by the 70 plus agencies holding their own hearings. While no studies have been done in the last 20 years, he bases his opinion on the ability of the Office of Administrative Hearings to avoid underutilization of resources because ALJs can hear cases in several different agencies. Other benefits cited are the credibility of the system to the public (i.e., perception of fairness) and the broader scope for ALJs, which is more stimulating and challenging.

Mr. Mitchell asserts that the California system proves itself. He did express his conviction that not all agencies should necessarily be subject to the APA, and that, in any case, final decison-making authority should vest with the agency and the ALJ should not be a policymaking arm for the agency.

2. Colorado

Colorado established a Division of Hearing Officers in 1976 within the Department of Administration, with jurisdiction to hear cases from some 70 state agencies including workers' compensation cases. Public Utility Commission, Personnel, Unemployment and Department of Motor Vehicles driver license cases are not heard by the centralized office. Enabling legislation provides that ALJs must be attorneys admitted to the Bar with five years' experience practicing law. As of 1977, the Division had 12.3 professional personnel and an annual budget of $338,000.

In 1977, the Department of Administration conducted an internal study on the "Workload and Functional Analyses of the Division of Hearing Officers," and reported that cases were handled more efficiently by the new centralized panel than by the previously decentralized hearing officers. The report concluded:

> The identification of a Division of Hearing Officers together with a defined relationship with client agencies, represents a first step in conceptualizing a consolidated system of hearing services. This general direction is advocated....

Statistical research in 1980 documented a decrease in the cost per case in workers' compensation under the centralized hearings office, but no other cost comparisons were available.

Beginning in 1983, the Division began providing agency training programs for social services and cosponsoring administrative law seminars (CLE) for practitioners. 1987 legislation changed the name to "Division of Administrative Hearings" and changed the title "Hearing Officer" to "Administrative Law Judge."

The Division is funded by billing user agencies for services at an average rate in 1987 of $47-50 per hour. The 1987 Annual Report notes that 10,414 cases were docketed, 7,290 hearings were held, and 7,411 decisions were issued. The Division employed 17 full-time ALJs and had a budget of $1 million.

Colorado has instituted an annual ALJ evaluation survey, results of which show a high degree of satisfaction among participants in the process. The 1987 report indicates that the Division has become more efficient over time and documents that the number of cases heard and decided per ALJ has increased.

3. New Jersey

New Jersey established an Office of Administrative Law (OAL) in 1978, the impetus for which came primarily from the Governor, who was a former head of the Public Utility Commission and a judge. Concern for the public's perception of fairness was central to the legislation as was concern for greater efficiency. The scope of the OAL includes all contested cases except tax cases, parole cases and public employe labor disputes. However, the agency head of any subject agency may hear a case in lieu of an ALJ from the OAL, but such is rarely the case. Under New Jersey's system, the ALJ issues an initial decision in all cases which automatically becomes final unless modified by the agency within 45 days. Currently, 90 percent of ALJ initial decisions become final without agency modification.

New Jersey's OAL is more than a central hearings agency; it is also charged with advising agencies on applications of the APA, and with publishing the New Jersey Register and the administrative code.

At the time of the creation of the OAL, there were 130 hearing officers in state service. The OAL pared that number down to 45 ALJs. Between 1978 and 1988, overall state budgets have increased by 100 percent and the number of hearings has increased by 100 percent. The OAL has maintained the number of ALJs at 45 and its costs have increased by only 20 percent over that period of time. Current workload is 10,000 cases per year and the current budget is approximately $7 million.

The OAL was initially funded by billing agencies for services. However, that was later changed, and the OAL is now funded just like any other agency through legislative appropriation.

Public and Legislative Affairs Officer, Peter Traun, extols the improvements realized by the OAL and cites the following:

(a) Increased impartiality and independence of the ALJs hearing/deciding cases;

(b) Standardization of contested case procedures under the authority of the OAL (well received by the administrative Bar);

(c) Greater emphasis on and availability of funds for training, which includes an annual 3-day retreat, various in-house seminars, out-of-state conferences and coursework at National Judicial College;

(d) Increased efficiences and shorter time frames for case disposition (ALJs hear cases in several agencies resulting in more flexible scheduling);

(e) Cost savings over prior decentralized system; and

(f) Incentive and ability to seek and effect continued improvement through internal efforts and legislative recommendations.

In 1984, the new Governor established the committee on the OAL to review and assess the OAL. That committee, composed in part of agency heads who had been opposed to the legislation in 1978, reported:

> The committee's investigation led to a conclusion that the OAL was an efficient, well-run organization which represented a significant improvement over the former hearing system in terms of quality and productivity.

Significant recommendations of the committee included: (a) Newly appointed ALJs should be attorneys and members of the New Jersey Bar; (b) ALJs should not have final order authority by law but agency heads should have discretion to delegate such authority in some cases; (c) Agency staff who investigate or participate in the hearing should not be permitted to participate in or advise the agency head on the final order.

The OAL has adopted a code of ethics for ALJs which incorporates, in part, the ABA Code of Judicial Conduct. Legislation has also been adopted providing stringent prohibitions against ex parte contacts, along the lines of those provided in the Model State APA.

ALJs are not currently required to be attorneys but such legislation is pending. Current salaries range from $58,000 to $75,000 annually. ALJ evaluation is carefully designed so as not to interfere with the ALJ's independence. Evaluation is completed annually, and is based on three factors: demeanor, productivity and judicial expertise (writing). Demeanor is

evaluted by randomly surveying hearing participants (party, pro se party, attorney, assistant Attorney General, agency head). Productivity is a statistical measure completed by an outside consultant, and writing is evaluted by peer review and grading of five to 10 decisions randomly selected.

4. Tennessee

The Tennessee Administrative Procedures Division was established in 1974 in the Department of State to hear contested cases before various agencies to avoid the potential conflicts and the appearance of partiality problems when agencies conduct their own hearings. The Division also provides legal counsel for the Department of State.

Jurisdiction of the Division is somewhat limited but, in its 10-year history, the number of cases heard annually has risen 423 percent while the number of personnel has doubled.

ALJs must be attorneys, and though there previously was no formal training program, new legislation in 1987 requires development of a formal training plan. 1987 legislation also requires the development of a code of ethics. The Tennessee APA also prohibits ex parte contacts between an ALJ and any party or the forum agency.

5. Washington

Creation of the Washington Office of Administrative Hearings (OAH) in 1981 was the result of legislative concern in two areas: (1) Lack of apparent fairness where the adjudicator was an employe of the agency involved; and (2) Growing complexity and diversity of individual agency rules governing hearings.

The new agency was allocated $128,000 in its first year to carry out necessary steps to become operational on July 1, 1982. Funding at the operational stage was based on advance quarterly billings of user agencies, modeled after the system used by the Attorney General's office. As a result, there was no substantial outlay of new funds to effect the transition to a centralized system. Current billing rate is $37 per hour and there is no hard evidence to confirm either cost savings or increased costs with the centralized system.

Five major agencies are required to utilize the OAH: Employment Security, Department of Social/Health Services, Liquor Control Board, Utilities and Transportation Commission and Department of Licensing. Specifically, exempt are Board of Industrial Insurance, Workers' Compensation, Personnel/Labor Relations and Higher Education. According to Chief ALJ David La Rose, Washington has the largest jurisdictional base of all the existing centralized hearing offices. The OAH employs 57 ALJs in 11 offices and disposes of 36,000 cases per year with a current budget of $5 million. The average cost per case is $138. Mr. La Rose expressed a sense that cost efficiencies have been realized,

especially for occasional user agencies.

The OAH has two divisions, benefits and regulatory/special assignments and ALJs are assigned according to their subject expertise. However, substantial cross-training has been done and that permits mobility and more efficient utilization.

The chief benefits reported by Mr. La Rose include: (1) Increased independence and greater credibility/higher integrity of the process; (2) Ability to even out workload through cross-assigning ALJs; (3) High sense of satisfication with the system (public and user agencies).

ALJ salaries range from $32,500 to $41,700 and there is one uniform ALJ class series. The OAH has adopted an internal written Code of Ethics for ALJs.

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Utah APA 1988-89 with commentary by the Utah Administrative Law Advisory Committee.

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B. Witnesses Testifying Before Subcommittee

1. Jane Gearhart, retired Administrative Law Judge

2. David La Rose, Chief Administrative Law Judge, Washington State Office of Administrative Hearings

3. Donald Mitchell, Director, California Office of Administrative Hearings

4. Peter Traun, Public and Legislative Affairs Officer, New Jersey Office of Administrative Law

5. Max Rae, private attorney representing OAALJ, reporting on Tennessee's Office of Administrative Hearings

6. L. Harold Levinson, Professor of Law, Vanderbilt University

C. Telephone Interviews Call Reports, prepared by Legislative Counsel law clerk, Rich Hume:

1. Donald Mitchell, Director, California Office of Administrative Hearings

2. Christopher Connolly, Chief Administrative Magistrate, Massachusetts

3. Bill Brown, Chief Administrative Law Judge, Minnesota Office of Administrative Hearings

4. James Deutsch, Presiding Commissioner, Missouri Administrative Hearings Commission

5. Peter Traun, Public and Legislative Affairs Officer, New Jersey Office of Administrative Law

6. Elaine Steinbeck, Paralegal, North Carolina Office of Administrative Hearings

7. Tom Stovall, Administrative Judge, Tennessee Administrative Procedures Division, Department of State

8. Steve Wood, Professor of Law, BYU and Chair of Utah Administrative Law Advisory Committee

9. David Schwarz, Administrator, Division of Hearings and Appeals, Department of Administration, State of Wisconsin

VI. Addendum

A. Comparative Abstract of Model State APA and Oregon APA

B. Overview of six central panel agencies

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Date: 8/17/88

To: Kathleen Beaufait, Chief Deputy Legislative Counsel

From: Rich Hume, Law Clerk

Subject: Overview of six state central panel agencies.

This review for the Subcommittee on Comparable Laws and Practices includes general information received from telephone conversations with the personnel of six state central hearing corps agencies. The summary includes several generalizations regarding the central hearing corps developed from information received from various states.

The state central panel systems reviewed are Colorado, Massachusetts, North Carolina, Missouri, Wisconsin and Minnesota.

Colorado

Colorado's central panel system was adopted in 1976 and is known as the Division of Administrative Hearings. The division is cash funded, billing user agencies for services performed.

The division serves 70 state agencies including Workmen's Compensation, Social Services and licensing boards. Administrative Law Judge (ALJ) decisions differ as to their finality depending upon whether the case involves licensing, a contested case or Workmen's Compensation. In 1986-1987, 10,414 cases were docketed, 7,290 hearings were held and 7,411 decisions were rendered.

Qualifications for ALJs include being a licensed attorney with five years' experience as a lawyer or judge. Training programs include special seminars for social services and administrative law. Colorado also has a judge evaluation survey that shows a high degree of satisfaction between both parties in a case. The survey also shows that judges tend toward the middle-of-the-road in their decisions.

Massachusetts

The Division of Administrative Law Appeals was formed in 1973 after it separated from the rate setting commission. In 1974 the legislature gave the division authority to hear appeals from the Public Employees' Retirement Board and civil service disciplinary actions. The authority of the division has been gradually expanded and it may be described as a "quasi-central panel

system." The agency is under the authority of the Secretary of Administration and Finance.

The division's jurisdiction includes the Public Employees' Retirement Board, civil service disciplinary actions and appeals from change orders in capital construction contracts. Any state agency may request the division to conduct a hearing. However, each agency may have its own hearing officers if the law does not require the agency to use the central office.

For agencies that use the division to conduct hearings, the ALJ may issue a recommended order and this may be appealed to the agency head. When the division conducts a hearing for an agency within its statutory jurisdiction, an agency must file its objections within seven days; otherwise, it may only appeal to the court system. The division ALJ orders are only final as to findings of fact.

Hearing officers in Massachusetts are called Administrative Magistrates. Administrative magistrates have a salary range of $35,000-$46,000. The qualifications for an administrative magistrate require all candidates to be practicing attorneys with some trial practice. There are no formal training procedures.

North Carolina

North Carolina adopted a central panel system in 1986 and the official name of the agency is the Office of Administrative Hearings (OAH).

Most state agencies are included in the OAH's jurisdiction. An ALJ must issue a recommended decision within 45 days of a hearing. The ALJ may make findings of fact and conclusions of law. Final decisions are issued by the user agency.

All ALJs must be attorneys who have earned a specified number of CLE credits. Training also includes course work at the National Judicial College in Reno, Nevada. Administrative Law Judge salaries in North Carolina range from $42,000 to $69,000.

Missouri

Missouri adopted a central panel system in 1965 and since its inception its jurisdiction has expanded. The central panel agency is called the Administrative Hearings Commission.

Within the commission's jurisdiction is the Department of Taxation (property tax appeals are excluded), Occupational Licensing Board and health care provider services. The commission's jurisdiction varies from agency to agency. The Public Services Commission is exempted from the Administrative Hearings Commission's jurisdiction.

During hearings the user agencies act as parties and the Administrative Hearings Commission acts as the neutral finder of fact and law. In these cases, the commissioner's decision may only be appealed to the courts.

Hearing commissioners are required to be attorneys and attend the National Judicial College when funding permits. However, no formal training is required by the Administrative Hearings Commission.

Wisconsin

Wisconsin's central panel system was adopted in 1978 and is called the Division of Hearings and Appeals. The division is part of the Department of Administration.

The central panel system has limited jurisdiction and is a pilot project. Most agencies are exempted from the hearing division's authority and have their own hearing officers. The Division of Hearings and Appeals has no broad statutory jurisdictional authority. However, if the pilot project is successful, the division's authority may be expanded by the legislature. Agencies that are currently within the division's authority are the Department of Natural Resources, the Nursing Home Board and the Crime Victim's Compensation Program.

Hearing examiners may make findings of fact, conclusions of law and issue final orders. An agency may review an order if review is requested by a party. An order that becomes final is only appealable to the state circuit courts.

Hearing examiners in Wisconsin must be attorneys and have at least five years' practice experience. There are no formal training guidelines for hearing examiners. Hearing examiners are classified as Range 11-15: 15 being the highest. The classification is based upon the examiner's ability to hear complex cases.

Minnesota

Minnesota created the Office of Administrative Hearings in 1975 and added Workers' Compensation to the office's jurisdiction in 1981.

The Office of Administrative Hearings (OAH) has broad jurisdiction over most state agencies. However, the exempted areas are Unemployment Compensation and welfare entitlement hearings. The OAH has a special section that handles only Workers' Compensation cases.

Administrative Law Judges (ALJ) in Minnesota may make findings of fact and conclusions of law in their recommended orders to the agency board or commission. If a party objects to the ALJ's proposed order, it must file its objections with the

agency board or commission which will then issue a final order. Usually an agency will be represented by its own prosecutorial unit or the Department of Public Service. In personnel or human rights cases, the ALJ issues the final order that may only be appealed to the Intermediate Court of Appeals.

Recruitment for ALJs is done by the state civil service system. An ALJ candidate must be a practicing attorney in Minnesota. ALJs must undergo an in-house training program and complete the program at the National Judicial College in Reno, Nevada. ALJs are separated into three classifications: (1) ALJ I, salary -- $28,000-$41,000; (2) ALJ II, salary -- $41,000-$54,000; and (3) Workers' Compensation ALJ, salary -- 75 percent of a district court judge's salary.

SUMMARY

Several generalizations may be made from the six state central panel systems reviewed here.

For the most part the motivation for these states adopting a central hearing corps was to protect the independence of ALJs and to enhance the public's perception of fairness in regard to administrative hearings. None of the representatives of these hearing agencies indicated that the change to a central hearing corps was precipitated by a crisis in the states' administrative hearings process. However, there has been no actual data collected demonstrating whether central hearing corps have improved the public's perception of fairness regarding administrative hearings.

The six state agencies reviewed have a diverse breadth of jurisdiction. None have complete jurisdiction over all administrative hearings. Many states exempt the agencies with the highest volume of hearings (Workers' Compensation, Social Services and Motor Vehicles hearings). None of the central panel systems have final order authority. Individual agencies continue to have the final order authority.

Many of the representatives of the states reviewed revealed that, although absolute figures were difficult to ascertain, they believed the central panel system had resulted in significant budgetary savings. The claimed savings were the result of large agencies not having to maintain a hearings unit in periods of low hearing caseloads and small agencies not having to hire hearing officers in periods of high hearing caseloads. Savings were also found in having ALJs who could hear diverse subject matters rather than having several hearing officers with expertise in specialized fields.

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From: Richard N. Hume, Law Clerk

Your request for a search on behalf of the Subcommittee on Comparable Laws and Practices of the literature regarding central panel systems since 1981 has resulted in this compilation of recent works.

The subcommittee would probably have particular interest in Malcolm Rich's book and John Maurer's article. In The Central Panel System for Administrative Law Judges: A Survey of Seven States, Malcolm Rich summarizes the features of seven central panel states and their different methods of funding. Rich's book is a more comprehensive study of work that he had previously condensed into several law review articles.

John Maurer and Micheal Lepp in their work "Hiring, Training and Retention of Administrative Law Judges in Central Panel States" detail the personnel procedures in 10 central panel states. These personnel procedures include evaluation systems, ALJ qualifications, training programs and continuing education programs.

Attached is a short bibliography of recent work regarding the central panel concept and adminstrative law judges.

KB:RNH:lb

Encl.

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