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THE 1981 MODEL STATE ADMINISTRATIVE PROCEDURE ACT: THE IMPACT ON CENTRAL PANEL STATES

DUANE R. HARVES*

I. INTRODUCTION

In order to ensure public participation and uniformity in administrative proceedings, federal and state governments have adopted administrative procedure acts. Since the adoption of the 1961 Model State Administrative Procedure Act by the National Conference of Commissioners on Uniform State Laws, state administrative law has grown enormously in size and complexity. This fact was noted and discussed by the Commissioners in their prefatory note when adopting the 1981 Model State Administrative Procedure Act (MSAPA).

During those twenty years, legislatures have been delegating more substantive authority to state agencies in areas of law such as energy and the environment which were not even being discussed in 1961. These same areas of law have led to an increase in litigation following state agency action. Thus, the necessity of establishing a uniform act containing procedures to safeguard public participation yet maintaining agency flexibility and which will survive legal challenge almost speaks for itself. While the 1981 Act has provided some excellent suggestions for states to utilize, the central question is whether it has gone far enough in its attempt to ensure truly fair adjudicative hearings where individual rights, duties or privileges are granted, denied or restricted.

Eight states have addressed this issue by creating an independent office to conduct administrative hearings. The independence of the persons conducting administrative hearings is necessary to ensure not only actual impartiality, but the appearance of impartiality. If government is judged by the methods by which it performs its tasks, the appearance of an evil is just as destructive as the evil itself.

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Therefore, an effective administrative procedure act, which is extremely important to all governments, should contain provisions for an independent agency of administrative hearing personnel, be they called administrative law judges, hearing examiners or hearing officers.

The 1981 Model State Administrative Procedure Act¹ provides for the creation of an Office of Administrative Hearings as a separate agency to conduct adjudicative hearings.² The provisions, however, are deficient in two respects. First, while proclaiming its independence, it is proposed for inclusion within an existing executive branch agency.³ Second, state agencies would not be compelled to use the office,⁴ which could also have an adverse impact on eight states which have created a central panel of administrative law judges or hearing examiners to conduct administrative hearings.⁵ This article will discuss these deficiencies and their impact on the central panel systems, with emphasis on the Minnesota system which was established in 1975.⁶

II. INDEPENDENCE

The MSAPA, in Article IV, Chapter III, proposes that the Office of Administrative Hearings (OAH) be located within another agency of state government. In the comments accompanying the MSAPA, it is stated: "The intent is to place the office in the most neutral possi-

1. MODEL STATE ADMINISTRATIVE PROCEDURE ACT (Uniform Law Commissioners 1981) (approved and recommended for enactment in all the states at the National Conference of Commissioners on Uniform State Laws Annual Conference in New Orleans, Louisiana, July 31-August 7, 1981) [hereinafter cited as MSAPA].

2. *Id.* § 4-301.

3. *Id.* § 4-301(a) provides: "There is created the office of administrative hearings within the [Department of _____, to be headed by a director appointed by the governor and confirmed by the senate]." *Id.*

4. *Id.* § 4-202(a) provides:

The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301 [or, unless prohibited by law, one or more other persons designated by the agency head], in the discretion of the agency head, may be the presiding officer.

Id.

5. CAL. GOV'T CODE § 11370 (Deering 1982); COLO. REV. STAT. § 24-30-1001(1) (1982); FLA. STAT. ANN. § 120.65 (West 1982); MASS. ANN. LAWS ch. 7, § 4H (Michie/Law Co-op. 1980 & Supp. 1983); MINN. STAT. ANN. § 14.48 (West Supp. 1984); N.J. STAT. ANN. § 52:14F-1 (West Supp. 1983-1984); TENN. CODE ANN. § 4-5-321 (Supp. 1983); WASH. REV. CODE ANN. § 34.12.010 (Supp. 1983-1984); and 1975 MINN. LAWS ch. 380, § 60.

6. 1975 MINN. LAWS ch. 380, § 60.

ble organizational position, so as to maximize the independence of the office."⁷ Can the OAH be truly independent if it is reliant on a larger agency for its budget, housing and other needs? A look at the systems in the eight central panel states may be helpful.

First, where do we find provisions similar to MSAPA? California's Office of Administrative Hearings, headed by a director,⁸ is located within the Department of General Services.⁹ The director is appointed by the Governor subject to confirmation by the California Senate.¹⁰ In Colorado, the Division of Hearing Officers is located within the Department of Administration, headed by a director with civil service status,¹¹ who also serves as the executive director of the Department of Administration.¹² In Massachusetts, the Division of Hearing Officers is located within the executive offices for Administration and Finance.¹³ Its chief hearing officer is appointed by the secretary of the executive office, with the approval of the Governor.¹⁴ Tennessee's Administrative Procedures Division, headed by a director who is appointed by and serves at the pleasure of the Secretary of State, is located within the Office of the Secretary of State.¹⁵

Examining the other central panel states, Minnesota's Office of Administrative Hearings is a separate agency of state government,¹⁶

7. MSAPA, *supra* note 1, § 4-301 comment at 71-72.

8. CAL. GOV'T CODE § 11370.2(a). "There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director." *Id.*

9. *Id.*

10. CAL. GOV'T CODE § 11370.2(b).

11. M. RICH & W. BRUCAR, *THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES* 38 (1983).

12. COLO. REV. STAT. § 24-30-1001(1). "There is hereby created the division of hearing officers in the department of administration, the head of which shall be the executive director of the department of administration." *Id.*

13. MASS. ANN. LAW, ch. 7, § 4H. "There shall be within the executive office for Administration and Finance a division of hearing officers under the direction of a chief hearings officer who shall be appointed by the secretary of the executive office for Administration and Finance with the approval of the governor." *Id.*

14. *Id.*

15. M. RICH & W. BRUCAR, *supra* note 11, at 37-39; TENN. CODE ANN. § 4-5-321. "[T]here is created in the office of the secretary of state a division to be known as the administrative procedures division." *Id.*

16. MINN. STAT. ANN. § 14.48.

A state office of administrative hearings is created. The office shall be under the direction of a chief administrative law judge, who shall be learned in the law and appointed by the governor, with the advice and consent of the senate, for a term ending on June 30 of the sixth calendar year after appointment. . . . [T]he chief administrative law judge shall be in the unclassified service, but may be removed from his position only for cause.

Id.

as is the Washington Office of Administrative Hearings.¹⁷ In New Jersey, the Office of Administrative Law is independent, but, because of constitutional requirements, is located within the Department of State.¹⁸ Florida's Division of Administrative Hearings, while located within the Department of Administration, which must provide administrative support and services, is specifically not subject to control, supervision, or direction of the Department of Administration.¹⁹

In Minnesota, the chief administrative law judge is appointed by the governor, subject to confirmation by the Senate, for a six-year term.²⁰ Washington's chief administrative law judge is appointed by the governor with the advice and consent of the Senate, for a term of five years.²¹ In New Jersey, the director is appointed by the governor with the advice and consent of the Senate for a term of six years.²² Florida's director is appointed by a majority vote of the Administration Commission but serves at the discretion of that

17. WASH. CODE ANN. § 34.12.010.

A state office of administrative hearings is hereby created. The office shall be independent of state administrative agencies and shall be responsible for impartial administration of administrative hearings in accordance with the legislative intent expressed by this chapter. . . . The office shall be under the direction of a chief administrative law judge, appointed by the governor with the advice and consent of the senate, for a term of five years.

Id.

18. N.J. STAT. ANN. § 52:14F-1.

There is hereby established in the Executive Branch of the State Government the Office of Administrative Law. For the purpose of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the Office of Administrative Law is hereby allocated within the Department of State, but notwithstanding said allocation, the office shall be independent of any supervision or control by the department or by any personnel thereof.

Id.

19. FLA. STAT. ANN. § 120.65(1).

There is hereby created the Division of Administrative Hearings within the Department of Administration, to be headed by a director who shall be appointed by the Administrative Commission and confirmed by the Senate. . . . The Department of Administration shall provide administrative support and service to the division. The division shall not be subject to control, supervision, or direction by the Department of Administration.

Id.

20. MINN. STAT. ANN. § 14.48. It should also be noted that the chief hearing examiner is the only department head in Minnesota who does not serve a term coterminus with the governor and at the pleasure of the governor. *Id.* § 15.06(2).

21. WASH. REV. CODE ANN. § 34.12.010.

22. N.J. STAT. ANN. § 52:14F-3. "The head of the office shall be the director who shall be an attorney-at-law of this State. The director shall be appointed by the Governor with the advice and consent of the Senate. The director shall serve for a term of 6 years." *Id.*

commission.²³

From the foregoing, it can be seen that four of the existing central panel states have adopted language similar to that found in the MSAPA,²⁴ while the other four opted for actual and near total independence.²⁵ Only where the central panel is a totally separate and independent agency is true independence achieved. While Florida's director serves at the discretion of the Administrative Commission; in fact, the director has never been threatened with removal nor his independence challenged.²⁶ The addition of a fixed term of office together with a removal only for cause, however, as recommended in the MSAPA,²⁷ would certainly be the better approach. For that the drafters of the MSAPA are to be commended.

But why stop short? The drafters missed a golden opportunity to provide for independence. We are unable to discern from the comments to the MSAPA why it was decided to place the OAH within another agency of government as the drafters are silent on that issue. One can only surmise that recommending the creation of the OAH was such a "hot" issue with the commissioners that compromises had to be made and total independence of the OAH was sacrificed in the process.

Based on the experience of the central panel states to date, the data treating the OAH as a totally separate agency is the more favorable approach. While none of the semi-independent OAH's have complained of interference with decisional independence, lacking total control over personnel and, more significantly, lacking full control of the budget has had an impact on these operations.²⁸ Therefore, it is recommended that when considering the creation of an OAH, states should legislate independence to their OAH rather than creating a "division" within an existing agency.

III. MANDATORY USE OF THE OAH

While the comments to the MSAPA indicate that "the question

23. M. RICH & W. BRUCAR, *supra* note 11, at 38-39. The Florida Administration Commission consists of the governor and his cabinet of six. *Id.* See also FLA. STAT. ANN. § 120.65(1).

24. California, Colorado, Massachusetts and Tennessee. See *supra* notes 8-15 and accompanying text.

25. Florida, Minnesota, New Jersey, and Washington. See *supra* notes 16-19 and accompanying text.

26. Interview with Director Chris H. Bentley.

27. MSAPA, *supra* note 1, § 4-301.

28. Conversations with directors of central panel systems in California, Colorado, Florida, New Jersey and Washington.

whether the use of administrative law judges from the OAH is permissive or mandatory depends on whether or not a state adopts certain language that is bracketed in [s]ection 4-202(a)."²⁹ A reading of the bracketed language, however, does not necessarily mandate this outcome in every case. The bracketed language referred to is: "or unless prohibited by law, one or more other persons designated by the agency head."³⁰ Even if one were to follow the suggestions in the commentary, an "agency head, [or] one or more members of the agency head"³¹ could still conduct a hearing, totally at their discretion. This leaves to the agency the decision to keep or refer cases without any standards or criteria to guide it. Thus, an agency could choose to keep those cases of political importance to itself. This could deprive a respondent, in a sanctions case for instance, from a truly fair hearing before a totally impartial presiding officer.

How have the existing central states responded to this issue? As was probably the case during the commissioners' deliberations, there is a split among the states.

Colorado, Florida and Washington statutes have language similar to the MSAPA.³² In Colorado, the agency head may conduct the hearing and, if authorized by law, a hearing officer from the agency may conduct the hearing.³³ Conversely, it can be deduced that if an agency is not specifically authorized by law to have its own hearing officers conduct the hearings, it must use a hearing officer from the Division of Hearing Officers if the agency head does not personally preside. Florida's APA most closely tracks the MSAPA language by requiring the use of a hearing officer from the Division of Administrative Hearings unless the hearing is conducted by an agency head or a member of an agency.³⁴ Washington's act, while not tracking the MSAPA language verbatim, does allow the final decision to be rendered by an agency official even though that person may preside over the hearing.³⁵ Thus, Colorado would benefit from adoption of

29. MSAPA, *supra* note 1, § 4-301 comment, at 71.

30. *Id.* § 4.202(a).

31. *Id.*

32. *See infra* notes 33-35 and accompanying text.

33. COLO. REV. STAT. § 24-4-105(3). "At a hearing only one of the following may preside: the agency or if otherwise authorized by law, a hearing officer who if authorized by law may be a member of the body which comprises the agency." *Id.*

34. FLA. STAT. ANN. § 120.57(1)(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. . . ." *Id.*

35. WASH. REV. CODE ANN. § 34.12.040. "Whenever a state agency conducts a hearing which is not presided over by officials of the agency who are to render the final

the MSAPA language but there would be no apparent impact in Florida or Washington.

None of the existing central panels have jurisdiction to conduct 100% of the administrative hearings in their states due to exemptions created by the legislatures in those states. However, the remaining five states have either mandatory language for all hearings or a combination of mandatory and permissive. It is in these states where adoption of the MSAPA language could have a negative impact by allowing agencies to "pick and choose."

The preferred language should read: "All hearings of state agencies required to be conducted under this chapter shall be conducted by (hearing officers, hearing examiners or administrative law judges) from the Office of Administrative Hearings." This language, or very similar language, can be found in California,³⁶ Minnesota³⁷ and New Jersey.³⁸ Massachusetts requires use of a division hearing officer in certain cases and allows their use in other instances.³⁹ In Tennessee, some agencies are specifically authorized to use an administrative judge or hearing officer from the agency to preside over a contested case,⁴⁰ alone or in conjunction with an agency head.⁴¹

decision, the hearing shall be conducted by an administrative law judge assigned under this chapter." *Id.*

36. CAL. GOV'T CODE § 11502. "All hearings of state agencies required to be conducted under this chapter shall be conducted by hearing officers on the staff of the Office of Administrative Hearings." *Id.*

37. MINN. STAT. ANN. § 14.50. "All hearings of state agencies required to be conducted under this chapter shall be conducted by a hearing examiner assigned by the chief hearing examiner." *Id.*

38. N.J. STAT. ANN. § 52:14F-5n. "Assign an administrative law judge to any agency empowered to conduct contested cases to preside over such proceedings in contested cases as are required by . . . (C.52:14B-9 and 52:14B-10)." *Id.*

39. MASS. ANN. LAWS, ch. 7, § 4H.

[The chief hearings officer] shall hear, or assign for hearing, appeals filed pursuant to section thirty-six of chapter six A and shall make available not less than three full-time hearings officers or the equivalent thereof, to hear appeals assigned pursuant to sections forty-two and forty-three of chapter thirty-one. . . . Any officer or agency of the commonwealth authorized to conduct adjudicatory proceedings or to hear appeals from such proceedings may, subject to the approval of the secretary of the executive office within which such officer is employed or such agency is located, request the division to conduct one or more classes of such proceedings or appeals on behalf of the officer or agency. . . .

Id.

40. TENN. CODE ANN. § 4-5-102:

(1) "Administrative judge" means an agency member, agency employee, or employee of the administrative procedures division of the office of the secretary of state, licensed to practice law, and authorized by law to conduct contested case proceedings pursuant to § 4-5-301.

. . . .

Where agencies are not authorized to have staff administrative judges or hearing officers, use of the Division of Administrative Procedures staff is mandatory.⁴²

As the foregoing illustrates, the majority of the central panel states utilize the mandatory language. What is most bothersome is how easy it would be to amend the proposed MSAPA language to allow deputy or assistant department heads to serve as presiding officers. If that were to occur in Minnesota, it could be assured that only the occupational licensing boards, the Public Utilities Commission and the Pollution Control Board would continue to have their hearings conducted by the OAH, along with the workers' compensation cases which are not within the Minnesota APA. The identical situation would occur in New Jersey and Washington⁴³ and could

(4) "Hearing officer" means an agency member or employee, not licensed to practice law, and authorized by law to conduct a contested case proceeding pursuant to § 4-5-301.

Id.

41. TENN. CODE ANN. § 4-5-301:

(a) In the hearing of any contested case the proceedings or any part thereof:

(1) Shall be conducted in the presence of the requisite number of members of the agency as prescribed by law *and* in the presence of an administrative judge or hearing officer; or

(2) Shall be conducted by an administrative judge or hearing officer sitting alone.

(b)

(c) The agency shall determine whether the contested case shall be conducted by an administrative judge or hearing officer sitting alone or in the presence of the members of the agency;

(d) Any agency authorized by law to have a contested case conducted by an administrative judge, hearing officer or similar officer from the agency may direct that the proceedings or any part thereof be conducted by an administrative judge or hearing officer which the agency shall provide from the members of the agency or the agency's regular employees. Contested cases under this subsection may be conducted by administrative judges from the administrative procedures division of the office of the secretary of state upon the request of any agency being presented to the secretary of state and the request being granted.

Id. (Emphasis added).

42. TENN. CODE ANN. § 4-5-301(e):

Any agency not authorized by law to have a contested case conducted by an administrative judge, hearing officer or similar officer from the agency shall direct that the proceedings or any part thereof be conducted by an administrative judge from the administrative procedures division of the office of the secretary of state.

43. During each legislative session over the past seven years, Minnesota state agencies have sought various exemptions from the Minnesota APA. Most notable was the exemption obtained by the Department of Public Welfare in 1976 which allows the department to use its own non-attorney referees to conduct hearings on appeals from county determinations of benefit eligibility under federally funded programs. The department has attempted, in each succeeding legislative session, to expand this exemption.

reasonably be expected to occur in other central panel states.

Savings in both time and costs have been documented in both Minnesota⁴⁴ and New Jersey.⁴⁵ These savings have occurred because the hearings are conducted by persons properly trained in the conduct of hearings who have no other responsibilities. Additionally, a central panel system allows grouping of different cases before one judge thus saving time and costs when travel is necessary. Finally, having all cases heard in a single agency allows a review of those cases to determine whether hearings are really necessary in all instances. In Minnesota, this has led directly to a reduction of required hearings by thirty-five percent as a result of legislation proposed by the OAH and passed by the Legislature.⁴⁶ Allowing agencies the right to hear their own cases thus defeats an important reason for creating a central panel system—savings of both time and costs.⁴⁷

Therefore, care should be exercised when considering the adoption of the MSAPA so that what has been adopted in eight states will not be eliminated or weakened, and so that a newly created central panel will operate both efficiently and in a cost-effective manner.

In order to correct the deficiencies noted in this article, when considering adoption of the MSAPA, the following amendments should be made to insure mandatory use of the OAH.

§ 4-102(d): An adjudicative proceeding commences when the ~~agency or a presiding officer~~ *administrative law judge*:

§ 4-202:

(a) ~~The agency head, one or more members of the agency head;~~ One or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301 ~~in the discretion of the agency head,~~ *may shall* be the presiding officer.

The Minnesota Department of Public Safety continues to conduct its own driver evaluation hearings even though the hearings are not exempt from the Minnesota APA.

In New Jersey, the office of administrative law has been involved in legal actions to compel the Commissioner of Banks and the Secretary of Labor to submit their hearings to the jurisdiction of the office. As in Minnesota, New Jersey agencies continue to try to obtain exemptions through the legislature. In Minnesota, New Jersey and Washington, state agencies were the leading opponents of the creation of the central panel in that state. (Conversations with directors of the central panels in New Jersey and Washington.)

44. Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 JUDICATURE 257 (1981).

45. Kestin, *Reform of the Administrative Process*, 92 N.J. LAW. 35 (1980).

46. Compiled statistics for in-house budgetary planning, Office of Administrative Hearings.

47. The fair hearing arguments, being obvious, are not discussed in this article.

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute must be appointed by: *the chief administrative law judge.*

~~(1) the governor, if the disqualified or unavailable person is an elected official; or~~

~~(2) the appointing authority, if the disqualified or unavailable person is an appointed official.~~

§ 4-204:

The presiding officer designated to conduct the hearing may determine, subject to the *agency's office of administrative hearings'* rules, whether a pre-hearing conference will be conducted. If the conference is conducted:

(1) The presiding officer shall promptly notify the agency of the determination that a pre-hearing conference will be conducted. ~~The agency shall assign or request the office of administrative hearings to assign a presiding officer for the pre-hearing conference, exercising the same discretion as is provided by Section 4-202 concerning the selection of a presiding officer for a hearing.~~

§ 4-215:

~~(a) If the presiding officer is the agency head, the presiding officer shall render a final order.~~

~~(b)(a) If the presiding officer is not the agency head, The presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with Section 4-216.~~

~~(c)(b) An final order or initial order must. . .~~

~~(g)(f) An final order or initial order pursuant. . .~~

~~(h)(g) The presiding officer shall cause copies of the final order or initial order to be delivered to each party and to the agency head.~~

§ 4-301:

(a) There is created the office of administrative hearings within the [Department of ———] to be headed by a *director chief administrative law judge* appointed by the governor and confirmed by the senate. *The chief administrative law judge shall serve for a term of six years and may be removed only for just cause.*

(b) *All adjudicative hearings required to be conducted pursuant to this act shall be conducted by an administrative law judge from the office of administrative hearings.*

§ 4-503:

(a) ~~The agency head, one or more members of the agency~~

~~head; One or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301, in the discretion of the agency head, may shall be the presiding officer. Unless prohibited by law, a person exercising authority over the matter is the presiding officer.~~

IV. CONCLUSION

The drafters of the 1981 MSAPA, while trying to create independence in adjudicative hearings, missed the opportunity to create a truly independent agency, the use of which would be mandatory. If adopted in the existing central panel states, the MSAPA would have a negative impact on five of those states' independent agencies. However, the MSAPA can, and should, be amended to correct the deficiencies before adoption.