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OPERATIONAL ASPECTS OF A CENTRAL HEARING EXAMINERS POOL: CALIFORNIA'S EXPERIENCES

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I. INTRODUCTION

In talking about the California experience with a central pool of hearing officers, I will talk about some of the negative aspects of our experience, with the thought in mind that you will be able to benefit thereby. It is very easy for me to extoll the virtues and successes of the independent hearing officer system in California and, because I may be highlighting some of our problems, that should in no way be taken to mean that our experience in California has not been a successful one.

Some years ago, a prominent, elected California official made the statement that money was the "mother's milk of politics." Money may also be the "mother's milk" of administrative adjudication. Certainly, the operation of the California Office of Administrative Hearings since 1945 has demonstrated that the success of the system of administrative adjudication depends as much upon money as upon good laws and able personnel.

In reviewing your Administrative Procedure Act, I see inherent within it the same problems we have had in California, insofar as money is concerned. Parenthetically, I think you have done an excellent job in drafting your Act, have avoided some of our errors, and have developed procedures now more advanced than our own in California.

II. ORGANIZATION OF THE DIVISION

Before I discuss "mother's milk," let me explain briefly the operation of the California Office of Administrative Hearings. The State of California has issued approximately one million licenses in the business and professions areas. Recipients range from doctors to barbers, from teachers to automobile garages. Some 60 licensing agencies are involved.

In 1945 the California Legislature created the Administrative Procedure Act and established a Division of Administrative Procedure in the Department of Professional and Vocational Standards—the Department which housed many of the licensing agencies. Interesting-

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ly, the first draft of the Administrative Procedure Act had called for a separate agency in state government with the power of final decision being placed in the hearing officer, but for various reasons, this was not to be. In the Department of Professional and Vocational Standards, we were merely a division in a large state agency with a civil service chief, and with the appointing power vested in the director of that agency, who himself was the head of two licensing agencies.

The licensing agencies could employ their own hearing officers—they did not have to use our hearing officers, although they were subject to the procedures established in the Administrative Procedure Act. It was not until 1961 that the then Division of Administrative Procedure was transferred from the Department of Professional and Vocational Standards to the Department of Finance, and the head of the office, now known as the director, became a Governor's appointee.

Experience had demonstrated that it was difficult for the civil service head of our office to deal with boards, commissions, and agencies, members of which had been appointed by the Governor. For that reason, it was felt that the director of our office would better be able to carry out his duties and responsibilities if he were at the same level in the "pecking order" as those with whom he had to deal. In 1963 we were transferred to the newly created Department of General Services for housekeeping purposes. The problem with our office is that we do not seem to fit logically in any particular place in state government. As I read your Administrative Procedure Act, I gather that you have attempted to create an organizational form which will hopefully eliminate some of the problems we have experienced.

To give you some idea of the nature of our operation, I must give you a few statistics. From a staff standpoint, we have 21 hearing officers, 21 hearing reporters and 21 clerical personnel, for a total of 63 employees. The personnel are divided among three offices: Sacramento, where we have the main administrative office; Los Angeles; and San Francisco. For the fiscal year 1973-1974, we completed 2,847 hearings, of which 2,656 were for state agencies and 191 were for local government agencies. At the local government level we have been hearing personnel cases, student discipline cases, and retirement cases. Our budget for the current fiscal year amounts to \$1.4 million, 80 percent of which is for salaries.

In addition to our regular hearings conducted under the Administrative Procedure Act, we have a contract with the state Department of Social Welfare, for which we hear categorical aid cases. We have established this as a separate operation involving 27 hearing examiners, who are paid less than hearing officers, with a clerical support of nine

people. The state Department of Social Welfare pays us \$800,000 for this operation.

III. THE HEARING PROCESS

The hearing officer is expected to complete 189 hearings per year. It takes approximately two and a half hours, on the average, for a hearing officer to complete the hearing in any particular case, although it is not too unusual for hearings to take 10 to 15 days, and we currently have one contractors' hearing in southern California which will occupy the full time of one hearing officer for at least one year.

Agencies desiring a hearing notify us in writing of the place of hearing, which may be anywhere within the state, and estimate the time anticipated to complete the hearing. We then calendar the case, assign a hearing officer and notify the agency.

For fiscal reasons, we attempt to conduct the majority of our hearings in one of the three cities, but for statutory or practical reasons many hearings are held in smaller towns and communities throughout the state. On at least two occasions, we have conducted hearings in the states of Oregon and Nevada for the California Department of Real Estate on out-of-state subdivisions being sold in California.

In calendaring cases, we suffer from the same problems that our courts do, with the additional difficulty that, because of our relatively small size, we are unable to overcalendar cases or operate a trailing calendar, as do the courts in our major cities in California. We have conducted experiments in overcalendar and in trailing cases, but have discovered that there is not sufficient advantage to justify the inconvenience to the public and to the lawyers.

In calendaring, we give preference to those hearings where the licensing agency has denied the issuance of a license and, beginning in January of 1975, these hearings must be scheduled by us within 90 days of the applicant's request for a hearing. Our goal in calendaring has been to set a case for hearing within 45 days from the time the request has been made to us, but our average is closer to 90 days.

We assign hearing officers on a rotation basis. Hearing officers do not specialize in any one agency or in any particular group of agencies. We feel that a hearing officer has a broader approach when he hears cases for all agencies. Hearing officers are experts in the hearing of cases, in determining ultimate facts and interpreting and applying the law. Expertise or knowledge of the subject matter can be imparted to the hearing officer in the particular hearing or in the course of many hearings for the same agency.

IV. PROBLEMS OF AN INDEPENDENT DIVISION

The creation of a separate Office of Administrative Hearings coupled with the fact that hearing officers do not specialize in any particular field does create some problems. The hearing officers are proposing decisions to the licensing agencies which, under the law, have the responsibility of regulating a profession or business. These agencies, under the law, must determine their enforcement procedures, methods and policies. From experience they know what the particular problems are at any given time and they also have learned what forms of disciplinary orders are most effective.

How is this information to be imparted to the hearing officer? We have developed an informal system in California which may be subject to some criticism. Each of the licensing agencies communicates to our director its policies in regard to the appropriate discipline and the types of orders which it prefers. These memoranda are placed in a manual available to every hearing officer, with the understanding that these are only guidelines to the thinking of the agency and in no way binding upon the hearing officer. We also, from time to time, have meetings with the heads of agencies and with the boards and commissions in which we exchange views on mutual problems.

One of the problems in separating hearing officers from the agencies for which they hear cases is that the hearing officer tends to become merely a name without a face. If the hearing officers are individually known to the licensing agencies and the agencies have a better understanding of the problems facing hearing officers, these licensing agencies are more apt to adopt the proposed decisions of the hearing officers.

There is some question raised by our use of the agencies' policy statements. They appear to be rules of general application and perhaps should be adopted by the agency as a regulation under the Administrative Procedure Act, then printed and made available to the public.

An independent Office of Administrative Hearings necessarily creates another difficulty. By its very nature, it takes away power from the administrative agency and thereby causes an atmosphere of antagonism. No administrator likes to have his power curtailed—especially not by lawyers. This is particularly true where, as in California, most of our licensing agencies are controlled by the profession or business regulated. Therefore, agencies will, on occasion, try to avoid the use of hearing officers, sometimes by encouraging the licensee to stipulate to some sort of penalty or perhaps by seeking legislation to give them powers to assess fines or other penalties before the hearing. Constant vigilance is required at the legislative level to make certain

that the purposes and aims of the Administrative Procedure Act are not subverted in the name of economy and efficiency.

V. BUDGETARY CONSIDERATIONS

The success of the independent hearing officer system depends primarily upon being able to recruit and retain highly qualified hearing officers. In 1960, when I became a hearing officer, we had a total of seven hearing officers in the state. At that time, there were 11 hearing officers working for other state agencies who had been trained in our office. They had left, not because they were dissatisfied with the work they were doing for us, but because they could obtain a 20 percent increase in salary.

We feel that it takes at least one year to develop a competent hearing officer. Therefore, the hearing officer's salary should be at a high enough level that a hearing officer will stay on the job for many years. In California we now have been able to have our hearing officers' salaries set at the same level as the hearing officers in the other three agencies; that is, the Public Utilities Commission, Workmen's Compensation Appeals Board and Unemployment Insurance Appeals Board.

Recruitment of competent hearing officers, however, is always a problem. We prefer to recruit lawyers who have considerable trial experience. It is difficult for a lawyer without trial experience to control the conduct of a hearing. We have also found that being an extremely able trial lawyer does not necessarily impart to a lawyer the judicial qualities required. We must seek hearing officers who have all the qualities of our finest judges.

The other area where "mother's milk" is important is the manner of funding the office. Originally only a portion of our operation was funded from the budgets of the agencies we serve, but because most of these agencies have special funds obtained from licensing fees and because of the dislike our state Department of Finance has for special funds, pressure was placed on us over the years to collect 100 percent of our costs from these agencies. In this way these special funds could be depleted.

There are times when I think that this method of funding threatens to destroy the purposes for which an independent Office of Administrative Hearings is created. I want to place particular emphasis on this because I note that in your Administrative Procedure Act the costs of operation apparently are to be charged to the agencies for which hearings are held.

In the past few years in California we have become increasingly dollar conscious. Budgetary pressures have a significant impact upon the number of hearings conducted. We even had the experience last year of being notified by a large agency in the healing arts field that they had run out of money budgeted for the hearing process and therefore, if we had any hearings pending, they were to be cancelled—and this despite the fact that the particular licensing agency had a substantial amount of money in its special fund. The agency had not placed this money in its budget for the hearing process.

There is no question in my mind that an independent Office of Administrative Hearings should be budgeted from the general fund, just as our courts are budgeted. We are all aware of the type of problems that have arisen when the salary of a justice of the peace was dependent on the fines he was able to assess. The only way to avoid these kinds of problems is to utilize the general fund.

VI. THE ROLE OF THE HEARING OFFICER

What position does a hearing officer occupy in California? I have said he must have all the qualities we like to find in a judge. As a code of ethics, we have adopted the Canons of Judicial Ethics of the American Bar Association. A hearing officer is expected to comport himself, in all respects, as does a judge of a court of record. He does the same kind of work; he has the same duties and responsibilities; he has the same standards. In California the hearing officer is treated by attorneys, respondents, state agencies and their personnel as if he were a judge.

I note with interest that section 120.66 of your Act provides for fines for anyone making an *ex parte* communication to a hearing officer. We have no similar provision in the California Administrative Procedure Act, and I am unaware of any reason for us to have such a provision. In the nearly 30 years we have been in existence, I know of no case where anyone has ever attempted, directly or indirectly, to influence the decision of a hearing officer outside the record. Perhaps one reason for this is that the hearing officer does not render a final decision in most instances.

Our hearing officers are absolutely independent in the decisional process. No control is exerted by anyone over their decisions. We argue among ourselves about what should be done in a particular case but, in the last analysis, the hearing officer makes his decision alone. Our hearing officers are fiercely independent, which makes the job of director very interesting indeed.

VII. OTHER FUNCTIONS OF THE OFFICE

Because we have many laws which are confusing and difficult for hearing officers to interpret and apply, we decided to direct our efforts toward assisting the legislature in its consideration of bills which eventually would have some effect upon the hearing officer's work. In one year, we read the headnotes on over 5,000 bills, wrote analyses on 300, and took positions on nearly 150. By staying away from policy matters and emphasizing procedure and language, we had considerable effect upon legislation which eventually became law.

Since our inception, we have published an Administrative Law Bulletin in which we digest administrative decisions of our courts and publish articles by lawyers, judges and hearing officers. A forum such as this is essential for the success of the hearing officer system.

Internally, besides the usual operations manual, we have an agency policy manual. We also have a form book. The agency policy manual and the form book are guides only and not binding upon the hearing officer.

One of the problems of having an independent hearing officer system is that we render proposed decisions to statewide agencies that should be consistent, more or less, in similar cases. Independent as we are, we also recognize that we should have some consistency among ourselves. We attempt to do this by having at least one statewide meeting a year to discuss particular problems. In addition, unusual proposed decisions are circulated among all hearing officers. Originally all decisions were circulated, but none of us has the time to read nearly 3,000 decisions a year.

Our office has been in existence for nearly 30 years. It has been a success. I know that yours will be successful also.