

ALASKA STATE LEGISLATURE
JOINT COMMITTEE ON ADMINISTRATIVE REGULATION REVIEW
February 19, 2003
8:58 a.m.

MEMBERS PRESENT

Senator Gene Therriault, Chair
Senator Lyda Green
Senator Hollis French

Representative Bruce Weyhrauch, Vice Chair
Representative Tom Anderson
Representative Les Gara

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

Discussion of Central Panels to Create Independent Hearing
Office Functions

Committee Administrative Function Re: Continuous Service

PREVIOUS ACTION

See ARRC minutes dated 2/5/03.

WITNESS REGISTER

Ms. Pam Varni
Executive Director
Legislative Affairs Agency
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Explained changes to personnel rules.

Mr. Bob Boerner
Program Principal
National Council of State Legislatures
Denver, CO

POSITION STATEMENT: Answered questions about centralized panels
of administrative law judges in other states.

Mr. Ed Hein

National Oceanic and Atmospheric Administration (NOAA)
302 Gold St.
Juneau, AK 99801

POSITION STATEMENT: Answered questions about the NOAA administrative law judge system.

ACTION NARRATIVE

TAPE 03-2, SIDE A

CHAIR GENE THERRIAULT called the Joint Committee on Administrative Regulation Review meeting to order at 8:58 a.m. Senators Green, French, Chair Therriault and Representative Gara were present. He told members the committee would first take up an administrative matter.

ADMINISTRATIVE FUNCTION RE: CONTINUOUS SERVICE

MS. PAM VARNI, Executive Director of the Legislative Affairs Agency (LAA), told members the House and Senate employment policy passed by the Legislature in 1988 has worked well with the exception of the longevity step provision. To correct the longevity step problem, the House and Senate Rules Committees adopted a new policy in early February. She asked the Administrative Regulation Review Committee (ARRC) to do the same. The change to the employment policy will affect the longevity step provision that covers steps J through M.

MS. VARNI explained that legislative staff frequently change pay ranges because legislators have different positions available at different pay ranges at different times of the year. When an employee takes a job at a lower pay range but was paid at a high step, the step must be lowered to an "F". This policy penalizes staff monetarily. She noted that a change in policy will not be costly and, in fact, may result in a savings in some cases because, due to budget constraints, an employee might be willing to take a job at a lower range. She pointed out that one ARRC staff member will be affected by the policy change.

SENATOR HOLLIS asked for further clarification of the range and step procedure.

MS. VARNI explained that a legislator may be able to hire two employees during the legislative session; one at a range 19 and the other at a range 15. During the interim, that legislator may only be able to hire one employee at a range 17. If the range 19 employee has a lot of longevity, that employee might be at the

"J" step. However, if that person accepts the interim employment position at a range 17, he or she can no longer be paid at the "J" step and must be paid at the "F" step because of the longevity step provision in the current policy.

CHAIR THERRIAULT added that because that employee may bounce back and forth between the pay ranges, he or she will never accumulate seven years of continuous service.

REPRESENTATIVE GARA asked if, under the current policy, the longevity steps are based on legislative experience only and not state service in general, and whether this change will affect that.

MS. VARNI told members that steps A through F apply to legislative experience, steps J through M apply to employees of the executive branch. Executive branch employees are not affected because they are covered by bargaining units and their salaries can never decrease.

REPRESENTATIVE GARA asked whether staff members with a lot of state experience but no actual legislative experience would benefit from the new longevity step policy. He specified that he was referring to someone who worked for the Office of the Governor for eight years.

MS. VARNI said the step provision applies strictly to legislative experience so nothing will change in that regard.

CHAIR THERRIAULT announced that Representative Weyhrauch was present.

SENATOR FRENCH moved, "that the Administrative Regulation Review Committee not adopt AS 39.27.022, pay increments for longevity for state service, but instead adopt their own plan which better applies to legislative service. This new policy is before the members and would be effective January 16, 2003."

CHAIR THERRIAULT announced that without objection, the motion carried. He then told members that the purpose of the press conference that preceded the meeting was to announce that the Administration is willing to work with members of the Legislature to consider and evaluate a central hearing office panel concept in Alaska. He noted the Alaska liaison from the National Council on State Legislatures (NCSL) would give a presentation on the topic to the committee.

CENTRAL PANELS TO CREATE INDEPENDENT HEARING OFFICE FUNCTIONS

MR. BOB BOERNER, Program Principal with the NCSL in Denver, said he has been the state liaison for Alaska since 1996. He covers 10 topic areas for NCSL, which include attorney regulation, civil rights, legislative program evaluation, privatization, state government and telecommunications. He is still in the discovery process of the central panel issue and is not a national expert but can act as a resource for the committee. He provided the following overview of his findings on administrative law panels.

Agencies hear more arguments than courts do so it is imminently important that administrative law judge [ALJ] panels be considered. Administrative hearings cover a variety of subject areas, including workers compensation, personnel issues, and social security benefits. Often, the ALJs propose opinions but agency heads are free to substitute their own judgments.

John Hardwick, a retired Maryland ALJ, is the national expert in this area. He has reported that 25 states have a central panel system, as well as Chicago, Washington, D.C., and New York. The system is intended to provide for fair and impartial hearings by judges who are independent of the agencies who are parties to the cases. Illinois, New York, and Pennsylvania are also considering such panels. Oregon passed its law in 1999. Colorado's panel was created in 1976. Colorado's panel is unique in that it also looks at workers' compensation cases; only three centralized panels in the country review workers' compensation cases. South Dakota is the only state to have adopted such a panel, abandoned it, and then readopted it.

CHAIR THERRIAULT asked how long South Dakota's system was in place before it was abandoned.

MR. BOERNER said he believes South Dakota introduced legislation to create a central panel in 1991, abandoned the project several years later, and recently re-enacted it.

REPRESENTATIVE GARA noted that Mr. Boerner mentioned that ALJs have to be independent. He asked whether any states forbid ALJS on centralized panels from being members of the regulated industry they oversee.

MR. BOERNER said he is not aware of any but will look into that question.

REPRESENTATIVE GARA said that such standards might apply within the state and asked Mr. Boerner if the current system allows members of the industry being regulated.

MR. BOERNER again said he was not familiar with that but would look into it and provide the committee with an answer at a later date.

MR. BOERNER continued his overview.

The state auditor's office in Colorado was charged in 1992, 1997, and 2000 with looking at Colorado's centralized panel. He will provide the committee with the state auditor's review. The states of Maryland and Washington have also performed program evaluations but they have not yet issued opinions. He has requested copies of those reports and will forward copies to the ARRC.

Colorado's central panel is cash-funded; it bills each agency for services performed. The panel serves approximately 70 agencies, which is not unusual. In Colorado, if a conflict between agency or panel rules arises, agency rules are followed.

Maryland's system is considered to be the "Cadillac" of centralized administrative panels. It was established in 1990. It is housed in a very impressive building and is one of the largest central panels in the country. In the year 2000, the panel reviewed agency decisions for 25 state agencies with over 200 programs. Between the years 1991 and 2000, the number of ALJs decreased from 72 to 60.

SENATOR FRENCH asked if the decrease was due to a decrease in the number of hearings.

MR. BOERNER said just the reverse happened, the panels actually had more agency decisions to review with fewer ALJs.

REPRESENTATIVE GARA asked if the function of the centralized hearing office is to hear individual disputes regarding decisions made under agency rules, rather than to evaluate the agency rules.

MR. BOERNER said he believes that varies by state. The primary function of the centralized panel is to review agency decisions, not to write its own rules.

REPRESENTATIVE GARA asked for further clarification. He said he envisions a system where the hearing officer would decide an appeal of an agency decision by an individual or business. He said the central panel would not act as an independent group of people who review agency decisions that don't involve individual cases. He questioned whether the only authority of the independent hearing officers would be to decide cases involving the application of rules and regulations on individuals and businesses.

MR. BOERNER said he believes the answer is that central panels review agency decisions that affect both businesses and individuals.

CHAIR THERRIAULT asked, "But agency decisions made under the existing regulations? It's not appeals or the public's interaction in the creation of regulations - it's just the decisions that are made under the regulations?"

MR. BOERNER believed that to be correct.

REPRESENTATIVE GARA asked, in relation to the efficiency issue, whether the centralized hearing officers are assigned to specific areas of law or whether they have to become familiar with everything.

MR. BOERNER said he believes that is a decision for the legislature to make and varies in the models he is describing. In some states, ALJs are assigned to specific types of cases; others review any type of case.

CHAIR THERRIAULT acknowledged that would be a policy call for the legislature and said it is his understanding that ALJs who work on the same issues have a higher burnout rate. He noted that the attorneys in the Division of Legal and Research Services are periodically rotated to prevent burnout and for cross-training purposes.

MR. BOERNER added that having a core group of ALJs on the panel review specific cases, such as workers' compensation cases, could alleviate that concern.

REPRESENTATIVE WEYRAUCH asked Mr. Boerner if his review of other states included an analysis of the federal government's approach to a centralized officer pool.

MR. BOERNER said it did not.

CHAIR THERRIAULT informed members that Mr. Ed Hein, a hearing officer with the National Oceanic and Atmospheric Administration (NOAA), was present. He noted that Mr. Hein formerly worked for the Legislature as a legal drafter.

REPRESENTATIVE WEYRAUCH said the court system assigns cases in a random fashion. If that is not done, the ALJs in a pool may want to carve out a niche for themselves by specializing in a specific area.

MR. BOERNER said he believes the method used to assign cases could be established in the organic legislation. He then continued his overview.

Since 1998, the Maryland centralized panel has engaged in alternative dispute resolution. It has also used videoconferencing as a means of conducting and recording hearings. He repeated that John Hardwick, Maryland's previous chief administrative law judge, is a national expert in this area and is someone the committee might want to consult.

MR. BOERNER told members the State of Washington created its office of administrative hearings in 1982. Its central panel has 70 administrative law judges located in nine field offices throughout the state. The greatest number of cases heard in Washington relate to unemployment insurance, public assistance benefits, and child support. The mission statement on its website is to conduct fair and independent hearings, followed by sound and timely decisions. He provided the committee with a chart of systems used by other states.

He said proponents of the centralized hearing panel argue that where the hearing officer is an employee of an agency, the agency is allowed to act as a police officer, prosecutor, and judge, with the hearing process appearing to be a mere rubber stamp for agency staff decisions. Proponents also argue that even if an agency employee has had a fair hearing, the potential for unfairness remains because the hearing officer is an employee. A third argument for centralized hearing panels is the standardization of services and quality control. A fourth argument is that uniform procedures and standards can be adopted. The final argument in favor of centralized panels is one of professionalism. Many states' panels have adopted a code of ethics; proponents reason this code produces more consistent and fair adjudication.

MR. BOERNER pointed out one argument against a centralized panel involves lack of expertise. Opponents of a centralized panel reason the agencies are highly dependent on the specialized knowledge of hearing officers in their specific area of law. A second argument is one of cost. Oregon created an office of administrative hearings in 1997 but the office was not opened because the cost was \$1.6 million. In the year 2001, the State of Kansas reviewed its centralized hearing panel. The State of Kansas's report appendix contained [three] considerations for its legislature to consider in expanding that panel:

- How to fund a centralized panel. Agencies could pay a fee for hourly services, agencies could pay a percent of the panel's budget based on the percent of workload, or the panel could receive a direct appropriation from the legislature.
- The role of the agency head. Would the agency head be able to overturn the decision of the centralized panel?
- Standards for hearing officers. The National Association of Administrative Law Judges offers a model code of standards.

9:28 a.m.

REPRESENTATIVE GARA expressed concern that hearing officers do workers' compensation cases today. After awhile, they learn the workers' compensation statutes and can walk into a hearing without having to reread the statutes and regulations every time. If hearing officers are paid by the hour or the amount of work they produce, over time they will not have to spend as much time doing their work. He noted that Mr. Boerner said one state's panel reviews cases for 200 state programs. He questioned how it will be more cost efficient to have hearing officers take workers' compensation, oil and gas, social security and other program cases. He noted that in the court system, a judge studies the law before the case comes to trial. He asked if the State of Oregon was considering the resultant cost of increased preparation time when it decided not to fund its newly created panel.

MR. BOERNER said he was not certain and would look into how the State of Oregon established the cost. He said his overall sense is the question of expertise is something the committee should consider when drafting legislation.

REPRESENTATIVE GARA asked if any information on cost is available from other states in which hearing officers hear many

types of cases. He noted, "Logically, I can't see how it would not cost more but maybe I'm missing something."

MR. BOERNER repeated that he would locate that information and provide it to the committee.

CHAIR THERRIAULT referred to the Maryland example where more decisions are now being made with fewer people. He said he would assume that Maryland has seen a cash savings and that he could see how a lot would depend on how the panel is structured. If the current workers' compensation hearing officers are moved to a centralized agency, they may perform their function in that area of expertise. However, over time, they would take on other subjects to broaden their scope of knowledge. He felt in the case of Oregon, perhaps the proposed cost consisted of creating a centralized function with randomly assigned cases to all new employees.

MR. BOERNER said one concept behind the centralized panel is to cross-train ALJs and offer standardized training in specific areas of law that they may not be familiar with.

CHAIR THERRIAULT said he is not sure that legislators have any feel for the existing due process system since it is not centralized. He questioned whether the hearing officer in DNR uses the same notice requirements as the hearing officer in DHSS. He said a centralized panel would assure that the same due process is available to everyone.

MR. BOERNER said, in closing, he would provide written responses to the questions posed by committee members, and that he stands as a resource to the committee.

REPRESENTATIVE WEYRAUCH asked whether it is more expensive to hire hearing officers as salaried employees of the state or to hire them as contract employees.

MR. BOERNER said he was not familiar with any such studies but would find out.

CHAIR THERRIAULT said he would like to gather salary information on the hearing officers in Alaska and is aware that they are paid as both employees and contractors.

REPRESENTATIVE GARA said he shares the Chair's concern that people who have decisions imposed upon them be accorded due process rights during the administrative process. His instinct

is that all state agencies are required to follow the Administrative Procedures Act when holding a hearing. He assumes most states have similar acts. He said he would like to find out whether that is being done to identify the problem before fixing it. He asked Mr. Boerner if model administrative procedures acts around the country address the standards and rules that apply to a hearing.

MR. BOERNER said he believes the extent of the administrative procedures acts varies by state. Some states have an exhaustive act that provides for due process, others do not. He said he was not familiar with Alaska's act.

9:36 a.m.

CHAIR THERRIault thanked Mr. Boerner and asked Mr. Hein to testify.

MR. ED HEIN, Chief Appeals Officer with NOAA, told members he worked for eight years in the Legislative Affairs Agency central drafting office. He pointed out he has not worked as a state hearing officer, but he is an officer and board member of the Alaska Association of Administrative Law Judges, an affiliate of the National Association of Administrative Law Judges. He said he is speaking today on his own behalf and wanted to inform the committee about his background experience. He also told members that Representative Weyhrauch, as a private attorney, has some cases pending before him at NOAA.

MR. HEIN said he followed the legislation introduced by Senators Ogan and Taylor about four years ago. That legislation took a broad approach: it tried to cover all of the agencies in the state and put them under the Administrative Procedures Act. The legislation would have required a constitutional amendment, primarily because of strong opposition by the Administration.

MR. HEIN said his main thought is that it is very important to get a clear idea of the existing problems before deciding on a solution because the system is diverse. Different state agencies have different procedures, rules, levels of expertise and caseloads. The Alaska Association discussed this issue a few weeks ago and found many factors should be considered. He commended members for studying the problem and identifying the number of hearing officers, the differences in their relationships with their agencies, and then taking a surgical approach to problem solving.

CHAIR THERRIAULT asked if his decisions as an ALJ within NOAA are final or whether "higher-ups" can overturn his decisions.

MR. HEIN said officially, his decision is not final. There is no right to review by the parties, but a discretionary review by the federal agency at a regional level is allowed. In the vast majority of cases, the regional administrator takes no action. In effect, his decision becomes the final agency action, which can be appealed to the federal district court.

CHAIR THERRIAULT said it is his understanding that states have set things up differently. In some states the judge's decision is final, in others the decision is advisory and the commissioner makes the final determination or the commissioner can elect to give the case to an independent adjudicator whose decision would be final.

MR. HEIN agreed and said that most states do proposed decisions. However, in some states, California being one, the agency that sends the case to the central panel can specify whether it wants the panel's decision to be final. He noted that was a big issue the last time the Alaska Legislature considered central panel legislation.

REPRESENTATIVE WEYHRAUCH noted that Mr. Hein was tasked to the National Transportation Safety Board to investigate airplane crashes and asked if that was an effort to broaden his experience as an administrative law judge.

MR. HEIN said he chose to attend an executive training program at the National Transportation Safety Board to see how it operates. The training focus was on management techniques; it was not part of his ALJ training.

REPRESENTATIVE GARA asked if ALJs in other states adhere to model ethical standards or whether anything governs the ethics of ALJs on the state level.

MR. HEIN said he is not certain what the law is now but he believes there are some ethical guidelines, if not statutes. The legislation introduced several years ago addressed that so he assumes that no uniform standard is required by law. He noted many hearing officers are not attorneys; those who are would be subject to the ethical rules for attorneys.

TAPE 03-2, SIDE B

REPRESENTATIVE GARA said some agencies do not accept an ALJ's decision as final and, assuming the state was using the system used by the federal government, if an ALJ's case is appealed to court, the court will give deference to the ALJ's findings because the ALJ saw the witnesses' demeanor. However, if the agency head disagreed with the ALJ's decision and makes a finding that is then appealed, the court will not give deference to the agency head because the agency head did not watch the witnesses. He asked if that is a fair rendition of what happens.

MR. HEIN said the answer is complicated. The decisions made by the ALJs become the agencies' decisions. The court tends to give no deference on legal questions, but the court gives a lot of deference on factual issues. The court gives a varying degree of deference on issues depending upon the level of expertise involved. Therefore, the courts tend to give deference to agencies when they are explaining their own regulations and have specific expertise. He repeated the decision is always considered to be the agency's decision. He is not aware that the courts make a distinction between the hearing officer's decision and the agency head's decision. In many cases in which the hearing officer's decision is a proposed decision, the agency head will either adopt or change it and the proposed decision goes away. His office publishes its decisions on the Internet so a public record is kept. Some state laws require hearing officers' decisions to be part of the record because a problem arose where agency heads buried those decisions so the parties had no way of knowing what the hearing officer decided.

REPRESENTATIVE WEYHRAUCH said the committee has a great resource in Mr. Hein as the procedures used by his office provide an incredibly valuable lesson for state agencies. His office sometimes reviews decisions with parties before they are final and publishes agency decisions so that they are easily accessible to the parties and the public. Sometimes providing that information, making people available, and working in a way that is open, honest and accessible alleviates problems. He said perhaps the legislative body has to do that to gain public trust in what the government does.

CHAIR THERRIAULT said he has come to realize if agencies know that an independent adjudicator will be making decisions based on the regulations, the regulations improve over time. They understand the adjudications will not take place in-house where employees understand what is meant by the regulations. He hopes a central panel will raise the level of professionalism and the public's ability to understand.

REPRESENTATIVE WEYHRAUCH agreed that public trust is critical in impartial tribunals.

MR. HEIN noted the agency he works for did not have a hearing officer before he was hired. The person whose decisions he ended up reviewing originally hired him. That became a structural problem so within a year his office was separated out and now consists of three people. He believes the new structure helps the perception, as well as the reality, of independence. His office has overturned the agency's initial decisions 25 percent of the time. He feels that is a fair indicator that his office is independent. In addition, his office is not involved in drafting regulations so they view the regulations with a fresh eye.

CHAIR THERRIAULT asked how many decisions were being appealed before his office was formed and whether decisions are now being made in a timelier manner.

MR. HEIN said he does not believe there has been a significant difference in his office since it became separated because his office has heard nothing but appeals the entire time. The main difference is that the new structure provides more independence and his officers can give what they believe is the right answer without worrying that it will affect their performance reviews.

CHAIR THERRIAULT asked members to contact his staff if they have further questions and said he would like to work toward drafting legislation for introduction.

REPRESENTATIVE GARA asked Mr. Hein if all of the work he does is within NOAA so that he does not work in a centralized office system.

MR. HEIN said that is correct.

REPRESENTATIVE GARA asked if the advantage of Mr. Hein's set-up, from his standpoint, is that he is protected from any influence by his superiors within NOAA.

MR. HEIN said an inherent conflict always exists when a hearing officer is employed by the agency. He has the same supervisor as the person issuing the initial determinations. His supervisor understands that he will disagree with the other person at times. However, agency administrators are not always that enlightened. He has heard many stories at national conferences

where hearing officers are pressured into changing their decisions. Hearing officers have quotas and cannot side against the agency too often. He said the more the legislature can create a structure to protect against that, the better off everyone will be. He thinks central panels do that but central panels are not a one-size-fits-all system. He said he does not know which agencies in this state are having more problems than others and which would be more amenable to a central panel structure. He believes that determination will take some study.

CHAIR THERRIAULT thanked Mr. Hein and adjourned the meeting at 9:58 a.m.