ALASKA LEGISLATURE COMMITTEE FILES 1999-2000 8672

9876 HOUSE JUDICIARY

HJR

17

Alaska State Legislature

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Read

Representative John Coghill

Date: March 23, 1999

To: Representative Pete Kott, Chairman
House Judiciary Committee

From: Rynnieva W. Moss, Legislative Aide RWMoss

Re: Committee Hearing of HJR 17

Representative Coghill is requesting that HJR 17, "Proposing amendments to the Constitution of the State of Alaska relating to the nomination, selection, appointment, and public approval or rejection of justices of the supreme court and of judges of courts established by the legislature that have as an exclusive purpose the exercise of appellate jurisdiction over judicial acts and proceedings, and requiring legislative confirmation of those justices and judges. ", be heard in the House Judiciary Committee at your earliest convenience.

I have attached the sponsor statement and some back up information on the resolution.

Thank you for your assistance.

Representative_John_Coghill@LEGIS.state.ak.us

Alaska State Legislature

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Representative John Coghill

HJR 17 Legislative Confirmation of Judges

Sponsor Statement - March 23, 1999

HJR 17 provides for legislative confirmation of judges appointed to Alaska's Supreme Court and of judges of courts established by the legislature that have as an exclusive purpose the exercise of appellate jurisdiction over judicial acts and proceedings. Presently the Article IV, Section 5 of the Constitution provides that:

"The governor shall fill any vacancy in an office of Supreme Court justice or superior court judge by appointing one of two persons nominated by the judicial council."

Because the Supreme Court was created in Alaska's State Constitution, a constitutional amendment is necessary to change the process for selection of the Supreme Court Justices. I have introduced HJR 17 to enable the public to be included in the process of appointing judges.

The public has less input into the judicial branch than into the executive and legislative branches. The governor and the legislature have elections and compulsory public input in their decision-making processes. The governor's cabinet appointees and his appointments to boards and commissions are subject to legislative confirmation.

In recent years, court decisions have had the effect of rewriting statutes or changing legislative intent. Checks and balances must be implemented to enable the legislature and the public to review the qualifications and the values of newly appointed judges in Alaska.

"[O]ur judges are effectually independent of the nation. But this ought not to be. I would not, indeed, make them dependent on the Executive authority, as they formerly were in England; but I deem it indispensable to the continuance of this government, that they should be submitted to some practical & impartial control; and that this, to be imparted, must be compounded of a mixture of State and Federal authorities. It is not enough that honest men are appointed judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence."[1]

Thomas Jefferson

By providing for a legislative confirmation of judges, HJR 17 would allow the public to participate in confirmation hearings, the judicial candidates can present their philosophical approach to the law, and the public will have a voice in their selection.

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[1] Thomas Jefferson, Autobiography, in THE WRITINGS OF THOMAS JEFFERSON, 121 (Andrew A. Lipscomb ed., 1903)

Representative_John_Coghill@LEGIS.state.ak.us

Legislative Research Report 98.052
March 16, 1998

Selection of Judges in State Courts of Last Resort and Intermediate Appellate Courts (Revised)

Legislative Research Services
Division of Legal and Research Services
Legislative Affairs Agency
Alaska State Legislature

Prepared by Patricia Young, Legislative Analyst

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SELECTION OF JUDGES IN STATE COURTS OF LAST RESORT AND INTERMEDIATE APPELLATE COURTS (REVISED)

You wished to know how the process used in Alaska for selecting judges compares with that in other states. Specifically, you wished to know the number of states in which judges are appointed as compared to the number of states in which judges are elected. You also wished to know the number of states in which the legislature is involved in the selection process.

States typically use a variety of methods to select judges, depending on the court; however, the most commonly used selection process involves nomination of qualified candidates by a special, nonpartisan nominating body (usually composed of both attorneys and nonattorneys); appointment by the governor; and periodic voting by the electorate in regard to judges' retention of office. According to the most current available information, Alaska is among 25 jurisdictions using the merit, or commission, system for selecting judges.[1] Among these jurisdictions, the legislature (or the senate) confirms the governor's selection in Hawaii, Maryland, New York, Rhode Island, Vermont, and the District of Columbia; in Connecticut, the legislature appoints judges from nominations selected by the governor from among candidates submitted by the nominating commission; in South Carolina, the legislature elects judges from among candidates selected by a judicial merit selection commission.

Use of the merit, or commission system, appears to be on the increase, but election of judges is almost as common. Twenty-one states elect judges, either on partisan (8 states) or on nonpartisan (13 states) ballots.

Judges are selected without the use of a nominating commission in the remaining five states. The legislature elects or confirms judges in three of those states—Maine, New Jersey, and Virginia. Thus, the legislature is part of the judicial selection process for courts of last resort and intermediate appellate courts in a total of 11 jurisdictions across the country. The greatest involvement on the part of the legislature appears to be in South Carolina and in Virginia. In South Carolina, the process involves both a nominating commission and a majority vote of the full legislature. In Virginia, judges are elected by majority vote of the legislature.

Table 1 provides a synopsis of the selection methods most predominately used by states for courts of last resort and intermediate appellate courts. A more detailed description and comparison of the selection processes used by states for judges at the various court levels is provided in Attachment A. Attachment B contains an as yet unpublished update of this information, provided by the American Judicature Society. These documents also show the term of office for judges at the various court levels. Attachment C contains a brief discussion of the advantages and disadvantages of appointments versus elections, and a longer discussion of the advantages and disadvantages of various systems.

I hope you find this information useful. Please contact us if you have questions or need additional information.

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[1] This system or plan has also been known as the *Kales* plan, after one of the persons suggesting the idea; as the *Missouri* plan, after the first state adopting it; and more frequently as the *merit* system or *commission* system after the impartial body or commission responsible for evaluating applicants and submitting names for appointment.

List of Attachments

Attachment A – Council of State Government, Book of the States, 1996-97 (pp. 127-128 and 133-135).

Attachment B – American Judicature Society, "Judicial Selection in the States: Appellate and General Jurisdiction Courts, 1997," unpublished draft update of 1997 revision.

Attachment C – "Election of Supreme Court Justices," House Research Agency Memorandum 85.042; and Peter D. Webster, "Selection and Retention of Judges: Is There One 'Best' Method? Florida State University Law Review, 1995.

Special Report

Above the Law

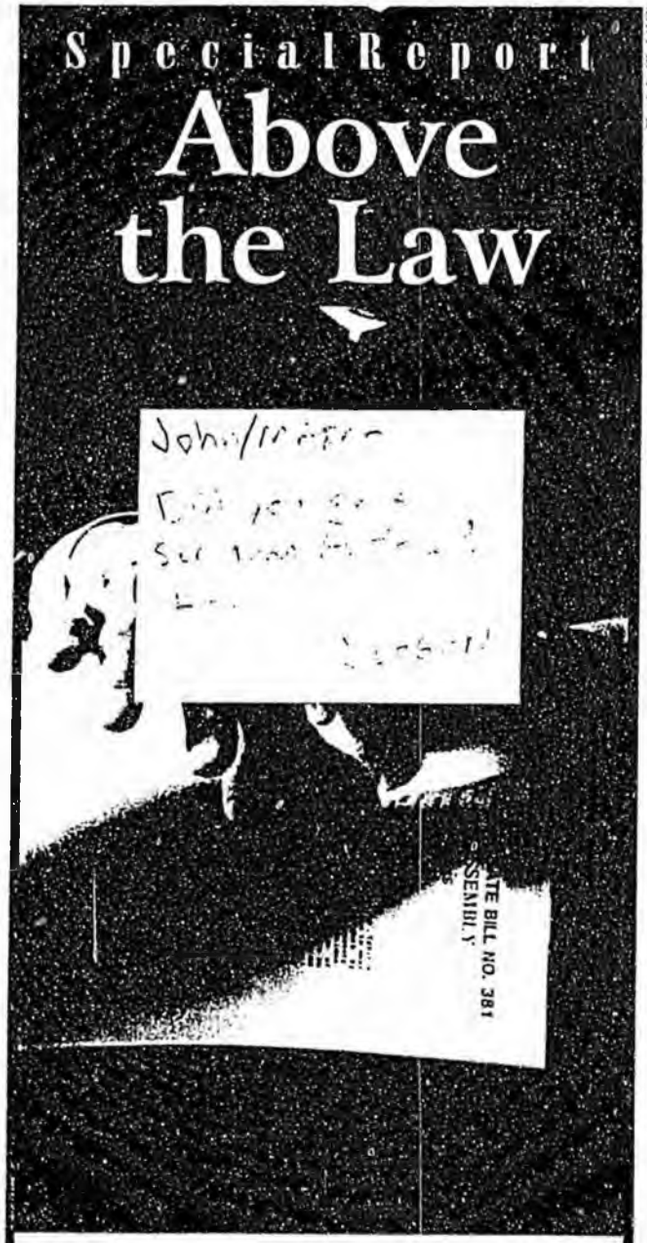


Photo by Todd Cook/ALEC

State Courts are Increasingly Flexing Their Judicial Muscles by Overruling State Legislatures and Making Policy

by Michael Hotra

The unprecedented level of judicial activism in our state courts begs the question: with state judges making public policy, do state legislators matter anymore?

In many states, and across a broad spectrum of issues, state courts and state court judges have undermined legislatures' ability — and constitutional charge — to represent the voters and craft public policy. In the next decade the largest battles in state capitals will likely be power struggles between legislatures and courts.

Each branch of state government, the legislature, the executive, and the judiciary, is a creation of the state constitution, which is, in most cases, a lengthy, detailed and highly prescriptive document.

Precisely because state constitutions are so prescriptive, it is incumbent upon the judiciary to exercise restraint in its interpretations of certain clauses and phrasing.

When the state courts attempt to use clauses in state constitutions as the predicate for an activist agenda, the result is an infringement on the role of the legislature, and bad public policy.

As final arbiters of state constitutions, state courts trump legislatures with their decisions. Legislatures then have little recourse, short of amending the state constitution — a lengthy and complicated process that can occupy significant portions of time in more than one legislative session. Even then, at least one state appellate court — Pennsylvania's — has thrown out constitutional amendments using highly controversial interpretations of the state constitution. The notion of judicial restraint has seemingly disappeared.

Gone are the days when state court judges, in particular state supreme court judges, saw their role as limited, principled arbiters of the cases and controversies before them. Today, state courts prescribe school district funding levels (and in one state, curriculum), levy taxes, trash criminal sentencing guidelines, and discard reasonable liability reforms. If the courts make state policy, what is left for the legislature to do?

Equally disturbing is the chilling effect of judicial activism on the spirited and worthy public policy debate that occurs between organizations such as ALEC and those organizations and individuals holding dissimilar views. If state courts create our public policy, then lively policy and issue debates become a purely rhetorical exercise.

When state supreme courts make policy, they do so in the course of deciding the case or controversy before them. They hear from lawyers pleading their respective cases; they review briefs and deliberate behind closed doors. The court's policy making is a by-product of the case or controversy before it.

State legislatures, by contrast, make policy in full public view. Any interested citizen can watch the legislature in action, testify at hearings, and choose their representatives to make the laws, a characteristic critical to the proper administration of a representative government.

State Constitutions Are Subject to Almost Any Interpretation

State constitutions afford judges and courts tremendous leverage. Constitutions are literally chock full of vague clauses, catchall phrasing and obscure rules that have been recently used by the courts as a predicate for making policy. Unlike the U.S. Constitution, which is about 10 letter-sized pages long, state constitutions can run on for 200 to 300 pages.

The California Constitution, for example, contains the obscure "right to fish" in state waters. But, as the *Madison Review* wryly notes, "There is no comparable right to camp,

Hotra is Director of ALEC's Civil Justice and Criminal Justice Task Forces

to hunt, or to walk in the woods; hence, California's state statutes and local ordinances in managing fish have constitutionally restricted status compared to similar laws and regulations that manage other recreational activities."

The Illinois State Constitution contains the peculiar requirement that three of the seven state Supreme Court Justices be drawn from Cook County — Chicago. Florida's Constitution contains the following catchall: Article II, Section 7, which reads: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." Using this clause, a state court judge could ban billboards, smokestacks, pink flamingos on front lawns, and sport fishing — the very same right protected by California's Constitution.

As one attorney familiar with state constitutions has jokingly observed, "If you look carefully, you can find a ham sandwich in state constitutions."

There are other vague constitutional clauses, such as "separation of powers," "special legislation" and "open courts" that many courts use to run roughshod over the legislature. These amorphous, ill-defined clauses are subject to varying and highly inconsistent interpretations, even within the same state.

A Constitutional Crisis in Pennsylvania

The most egregious case of imperialistic judicial policy making has occurred in Pennsylvania. There, the Commonwealth Court has decided to ignore the voters, legislature and common sense while playing fast and loose with the state Constitution.

In the mid-1980s, the Pennsylvania legislature and the Governor, in an attempt to spare children the horror of reconfronting their attackers face to face, enacted legislation to permit children victimized by sexual abuse to testify in court by videotape. The law was struck down by the Pennsylvania Supreme Court on the basis of a clause in the state Constitution that one has the right to "face" one's accuser. Videotaped testimony in sex crimes, the Court felt, didn't meet that standard. "Face to face," meant "in person," or so the Court ruled.

In 1993, Senator Stewart Greenleaf, an ALEC member, spearheaded efforts to amend the Pennsylvania Constitution and permit videotaped testimony in sex offense cases involving victims who are minors.

The hurdles that one must clear to amend Pennsylvania's Constitution are set high. Any proposed amendment must pass two votes held in two consecutive sessions of the legislature. Then, the amendment must be approved by Pennsylvania's voters in a ballot initiative.

Greenleaf's amendment passed in both the 1993-1994 session of the legislature and the 1995-1996 session. In November 1996, the Pennsylvania voters spoke. They approved Greenleaf's amendment by a 3-1 margin. This should have been the end of the story. Unfortunately, it is not.

In May 1997, the Pennsylvania Commonwealth Court invalidated the ballot initiative. It accepted a petition from three lawyers who had no standing (no actual case) before the Court. While the amendment directly changed the "face-to-face" provision in sex offense cases, which was its intent, the Court decreed that the amendment also *implicitly* changed the court's rulemaking authority, which is — you guessed it — constitutionally protected.

Greenleaf- Even though his amendment to protect children testifying again· pedophiles jumped all the constitutional hurdles, the Pa. Supreme Court still voided it

The Pennsylvania Constitution prohibits any ballot initiative that changes more than one section of the Constitution. According to the creative reasoning of the Commonwealth Court, this amendment affected two portions of the Constitution — one explicitly, one implicitly — and was therefore invalid.

"This is absurd," said Greenleaf, Chairman of the Pennsylvania Senate Judiciary Committee. "If the Court will not properly defer to the legislature on policy matters, even constitutional amendments, then I have to question the Court's commitment to a three-branch government."

In Pennsylvania, as in other states, all three branches of government are creations of the state constitution, and therefore derive their powers from it. By invalidating a legitimate ballot initiative to amend the constitution, the Commonwealth Court has, in effect, declared itself superior to, and exempt from, Pennsylvania law.

The lower Court ruling is being appealed to the Pennsylvania Supreme Court, which has an activist agenda on par with the Commonwealth Court's. The Pennsylvania Supreme Court has the constitutional authority to suspend any statute passed by the legislature that it believes impinges upon its rulemaking authority. It has applied this doctrine inconsistently, but with increasing regularity, much to the frustration of the Pennsylvania General Assembly. In Pennsylvania and in 19 other states, there is no check on the Supreme Court's ability to enact such suspensions.

Recently, the Pennsylvania Supreme Court has suspended a state law expediting death penalty appeals that would have required parties appealing death sentences to file all appeals within one year of initial sentencing. The Court found this to be a judicial rulemaking function. Under existing Pennsylvania law, the legislature has no recourse. The Court also suspended Pennsylvania's *Post-Conviction Release Act* on similar grounds.

Greenleaf and others have tried to work constructively with the courts to fashion reasonable standards and rulemaking procedures beneficial to both branches of government; so far, they have had little success. Right now, the legislature is under court order to implement by July 1 a statewide funding plan for trial courts.

Education: A New Frontier of Judicial Activism

Since 1989, 18 state supreme courts have declared state education funding formulas unconstitutional (See March 9,

FYI). Most state constitutions contain provisions that entitle students to "adequate and equitable education," or some similarly amorphous standard.

Courts have used these vague standards as mandates for school funding reform, despite the dubious correlation between school funding and educational quality.

According to ALEC's 1994 *Report Card on American Education*, which analyzed data from all 50 states and the District of Columbia, "It is also true that none of the states that rank in the top 10 in performance rank in the top 10 states in per-pupil expenditures. Utah ... ranks in the top 10 in all measures of academic achievement. Yet in expenditures per pupil, Utah ranks 51st."

The Vermont State Supreme Court admits as much in its decision declaring Vermont's educational funding system unconstitutional: "We recognize that equal dollar resources do not necessarily translate equally in effect. ... Money is clearly not the only variable affecting educational opportunity, but it is the one that government can effectively equalize."

The Vermont Supreme Court has ruled that a school district funding formula that is 60 percent reliant on local taxes is unconstitutional because it deprives children of an "equal educational opportunity" and violates the Vermont Constitution.

Unfortunately the Court only considered funding when it examined the question of "equal educational opportunity." Lacking in the 16-page decision is any indication that the Court considered other potential factors in ensuring equal educational opportunity such as class size, dropout rates, test scores, teacher certification or pupil performance.

These important factors were absent from the Court's deliberations because they weren't at issue in the narrow case before the court — only public education and property taxes were at issue.

New Jersey Judges Dictate School Programs

The New Jersey State Supreme Court has gone even further. There, the Court has used its decision to overturn state education funding schemes as a predicate to dictate actual school programs.

After striking down the state's school funding formula, which had already appropriated $2.3 billion in state funds (about half of what the state spends on public education, according to the *New York Times*) for poor schools, the legislature appropriated an additional $248 million.

Judge King- Recommended the New Jersey legislature come up with $3.1 billion in new funding for poorer schools

The Court then instructed New Jersey education officials to identify additional educational programs and curricula to be implemented in poor districts, as well as assess the conditions of buildings and facilities in these districts.

New Jersey Appellate Judge Michael Patrick King has also been asked by the New Jersey Supreme Court to recommend new programs and services that poor school districts should implement. The cost of his recommendations, which include all-day preschool and a long-term building improvement fund: $3.1 billion.

Not surprisingly, New Jersey Attorney General Peter Verniero and the legislature are growing incredulous. Referring to the involvement of judges in school management, Verniero said in the *New York Times*: "It's the question of which branch of government shall determine, control, and ultimately implement the educational policies of New Jersey." In a letter to the Supreme Court, New Jersey Assembly Speaker Jack Collins and Senate President Donald DiFrancesco reminded the Court that the legislature "doesn't have a blank check when it comes to funding education."

Said one legislator of his state's education funding morass, "We are in special session right now responding to a court order related to education funding. When you're trying to please the court rather than improve education, you're going to have people displeased with the result."

According to Dr. Lewis Solomon of the Goldwater Institute, courts enter a policymaking minefield when they begin to prescribe programs to ensure "adequacy" in education

"Implicit in this view of adequacy is the belief that there is some consensus about what is adequate in terms of buildings, facilities and equipment for public schools," says Solomon. "Of course, every interest group will find an expert to testify that more of what they want is necessary and appropriate to achieve adequacy."

Illinois Courts: Soft on Crime, Tough on Tort Reform

Illinois' partisan judiciary has also become quite adept at making policy by fiat. In two recent decisions, Illinois courts have struck down important laws using inconsistently applied and vague clauses in the Illinois Constitution.

On March 4, the Illinois 4th District Appellate Court overturned the state's truth-in-sentencing law (which specifies the minimum percentage of an inmate's sentence he or she must serve before becoming eligible for parole) because the Illinois Constitution prohibits a state statute from containing more than a single issue — the Constitution's so-called "single-subject rule."

The Court struck down Illinois' truth-in-sentencing legislation, sponsored by Senator Kirk Dillard, now Chair of ALEC's Civil Justice Task Force, because it found that the law, as enacted in 1995, contained matters relating to both civil and criminal law — truth-in-sentencing and reimbursement of hospital costs from plaintiff personal injury awards.

"If this reasoning holds up, the Court might as well toss Illinois' statutes from the last 50 years," said Michael Flynn, Director of ALEC's Tax and Fiscal Policy Task Force, and a former policy analyst for the Illinois legislature. "Every day was Christmas in the statehouse. Attaching riders and amendments to popular legislation was not only common, it was considered something of an art form," Flynn added.

Illinois estimates that some 1,500 criminal sentences will have to be recalculated because of the Court's ruling.

including the case of a murderer who repeatedly stabbed his victim, slit her throat, and left her to die. Under Illinois' truth-in-sentencing law, the killer would be required to serve a minimum 30 years of a 36-year sentence. Now, after serving only three years, he's eligible for day-for-day good-time credits and could be released in another 15 years.

According to Dillard, as quoted in the *Chicago Tribune*, "This is just another example of the Illinois Court wanting to substitute its judgment for that of the legislature."

On December 18, 1997, the Illinois State Supreme Court struck down the *Civil Justice Reform Amendments* of 1995 — Illinois' comprehensive tort reform package. That package, also sponsored by Dillard, reformed damage awards in tort cases, abolished joint and several liability, and raised standards of proof in certain types of tort cases.

In its decision, the Court struck down portions of the Illinois *Civil Justice Reform Amendments* — abolishing joint and several liability — not even at issue in the case before it. No other state supreme court has struck down as unconstitutional tort reform that abolishes joint and several liability. The Illinois Supreme Court reasoned that since the legislation was enacted as a package, it had to be struck down as a package, despite the insertion of a severability clause into the bill.

According to the Court, "Determining whether portions of an Act are severable is a matter of statutory construction, and the existence of a severability clause within the statute is not conclusive of the issue."

In his eloquent dissent from the Court's opinion, Justice Miller writes, "Today's decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its essence, the majority's mode of analysis simply constitutes an attempt to overrule by judicial fiat the considered judgment of the legislature."

Tort Reform: an Unprecedented Level of Judicial Activism

In striking down tort reform, the Illinois Supreme Court joins 72 other courts that have used obscure, vague and little-understood clauses in state constitutions to strike down tort reform. In all of these cases, state courts have based their decisions solely on clauses appearing in state constitutions, and not in the U.S. Constitution. Not coincidentally, state court justices effectively lock their decisions at the state level. There can be no appeal to the U.S. Supreme Court.

A recent monograph published by the Washington Legal Foundation entitled *Who Should Make America's Tort Law: Courts or Legislatures?* discusses the rise of state constitutionalism and its impact on tort reform:

"Never before have state constitutional provisions been used on so grand a scale to overturn state legislative policy decisions. The pace is unparalleled in American history, without precedent, and simply wrong. In addition, some judges have, on a retroactive basis, created brand new tort claims that have no basis in precedent or state public policy. The courts have, in some instances, acted as legislators."

Possible Solutions

Arizona faced problems similar to those found in other states: its judges were creating entirely new causes of action, and overturning tort reform. At the request of both chamber's leadership, Senator John Kaites has convened a study commission consisting of judges, legislators and members of the legal community to examine some of the issues raised by ALEC's *Separation of Powers Act*, and the proper role of the legislature and the courts.

Arizona's John Kaites - at the request of leadership, he created a study commission of judges, legislators and members of the legal community to examine contentious issues between courts and legislatures

"It has been a real interesting debate, at times a fight, to keep the work of the committee going," said Kaites. "This committee of experts, legislators and judges was set up and started a dialogue on the proper role of the courts versus the Governor and the legislature. The trial bar sees this as a tort reform issue rather than an issue of judicial activism. Some of these issues happen to be tort, but the focus of the committee is clearly separation of powers," Kaites emphasized.

In other states, such as Alabama, legislators have filed amicus briefs in cases that challenge their policymaking prerogative.

Unfortunately, in many instances, legislators simply throw up their hands in despair. They feel powerless in their struggles with the judiciary. But the solution is two-fold. Legislators need to shed light on the decisions of the judiciary, and in states with popularly elected judges, those judges need to be held accountable for their decisions.

ALEC's *Separation of Powers Act* can help. This innovative model bill was developed by former Arizona Senate President John Greene and his counsel to clarify little-understood clauses in state constitutions and discern the proper relationship between courts and legislatures. It recognizes that in many cases, state supreme court judges defer to the legislature, and in those cases, the court should be acknowledged for its principled restraint. But in other cases, the courts need to be constrained from creating new causes of action.

In response to unprecedented judicial activism, state legislators may even need to consider "trimming the fat" from their constitutions. Statutes can clarify legislative intent, and in extreme cases, constitutional amendments might be needed to rein in runaway judges.

Perhaps Thomas Jefferson, referring ironically to the constitution within each of us, said it best:

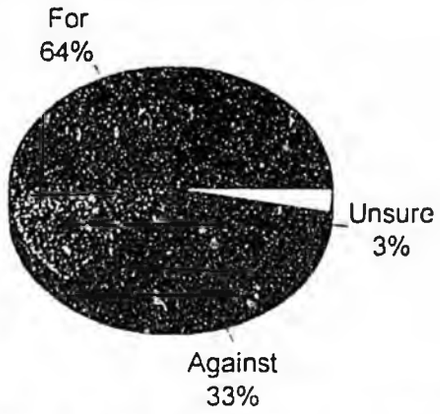
"Men by their constitutions are naturally divided into two parties: (1) Those who fear and distrust the people and wish to draw all power from them into the hands of the higher classes. (2) Those who identify themselves with the people, have confidence in them, cherish and consider them the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist; and in every one where they are free to think, speak, and to write, they will declare themselves." ■

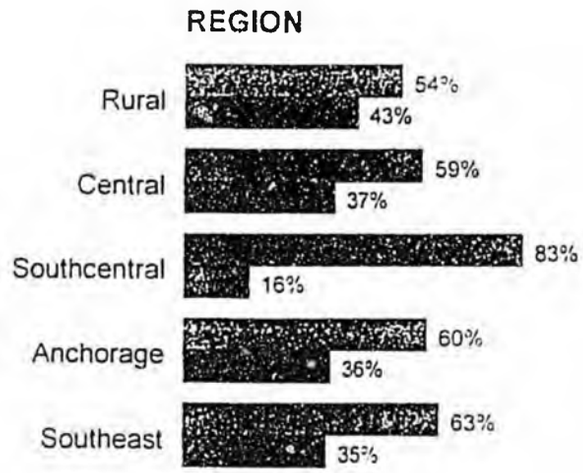
HJR 47

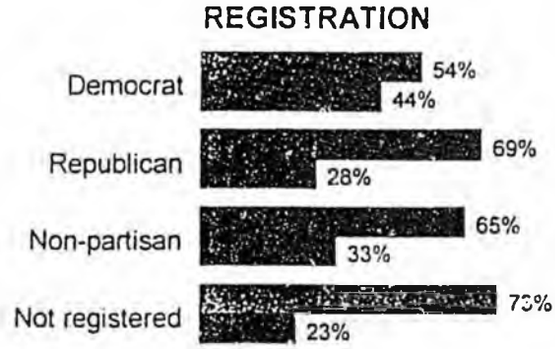
Legislative Confirmation of Judicial Appointments

Similarly, approximately two out of three Alaskans (64%) report they support legislative confirmation of judicial appointments...

"At the present time in Alaska, judges on the Supreme Court and Courts of Appeal are nominated by a judicial council and appointed by the Governor. If there were a constitutional amendment on the ballot that would require a majority vote of the Legislature to confirm judicial appointments, do you think you would vote for or against that constitutional amendment?"







For Against

Confirmation process would curb judicial abuse

By REP. JOHN COWDERY, District 17

COMPASS
POINTS OF VIEW FROM OUR COMMUNITY

I am responding to the Compass piece written against HJR 47 by William Cotton, executive director of the Alaska Judicial Council (Daily News, Opinion, March 28). If passed by the voters, HJR 47 would make the governor's nominees to the Supreme Court, the Court of Appeals and the attorney members of the judicial council subject to legislative confirmation as the three public members of the judicial council are now.


Cowdery

Mr. Cotton feels that the judicial council sends only the most qualified applicants to the governor. He didn't mention that many attorneys refuse to apply for judgeships because of the council's perceived liberal bias. Mr. Cotton would have us believe that politics occurs only in legislative provinces but never in the executive or judiciary branches. Indeed, bar association politics in Alaska, like elsewhere, is legendarily robust.

The judicial council brandishes the real judicial selection power in Alaska. If the governor does not like the two or more candidates selected by the council, too bad. If you go to buy a car and there are only two on the lot, someone has effectively made your choice for you. In Alaska, that someone is the judicial council. With so much power at stake, you can bet your bottom dollar that legislative confirmation — public accountability — is the last thing it wants.

HJR 47 is the best of both worlds. It keeps the current merit system in place while adding the crucial step of legislative review to the appointment process. Through legislative hearings, judicial nominees would be given the opportunity to discuss their views on taxation, private property rights, child abuse, crime and punishment, environmental protection, etc. Some sitting judges are adamantly against this idea because they would not have been confirmed if the public knew what they stood for in advance of their appointment.

Mr. Cotton said that judges are accountable directly to the voters through "retention elections." When was the last time you reviewed a judge's record before voting? Retention elections are uncontested. They are a formality. There is no adversarial debate, no platform and no competition for ideas. Information is scarce. It is scantily distributed.

For instance, did you know that Chief Justice Allen Compton was found guilty of sexual harassment incidents in 1995 and 1996? Yet, Justice Compton was retained in November 1996 by a margin of 2 to 1. Voters did not have all the facts because the full story wasn't released until mid-1997 — after the election. When Justice Compton was found guilty he stepped down as chief justice, but stayed on the bench. It will be 10 years before he comes up for retention again. No one responsible for administering the law should enjoy that level of elite privilege.

The judicial council brandishes the real judicial selection power in Alaska. If the governor does not like the two or more candidates selected by the council, too bad. If you go to buy a car and there are only two on the lot, someone has effectively made your choice for you. In Alaska, that someone is the judicial council.

Mr. Cotton asserted that we are just trying to "control judges." This is the classic bogeyman tactic. Once a judge is confirmed, the Legislature would be out of the picture forever. I began work on HJR 47 in August of last year, months before the courts began their latest assault on publicly made law. The only thing I want to contain is the unfettered power of the judicial council to which Mr. Cotton is, understandably, very attached.

Mr. Cotton wrote that those who accuse the courts of "lawmaking" are just complaining because they do not agree with the decisions. This statement is based on the premise that justices have the authority to create constitutional law with a wave of their pen. Isn't the constitution supposed to be written by the people and interpreted by the judiciary? Mr. Cotton's attempt to trivialize our assertions is counterproductive to a meaningful discussion. I refuse to be painted into a corner.

No matter what side of the issue one is on, when the Alaska Supreme Court says that the privacy provision in Alaska's constitution guarantees a person's right to possess marijuana, despite statutes passed by the Legislature, that is lawmaking (Ravin vs. State).

When the judiciary specifies the dietary, educational and space needs of Alaska's criminals down to the food group, class and square foot, that is lawmaking (Cleary vs. Smith).

When the Alaska Supreme Court says that we cannot lease off-shore lands because the state did not consider the effect on caribou, that is bad judgment, not lawmaking (Trustees for Alaska vs. State).

There are many decisions I may not agree with; sometimes they are lawmaking, sometimes they're not. Mr. Cotton would have us blindly follow black robes and gavels all the way to judicial domination.

Alaska is a new state. Our judicial selection process is largely unproven by the test of time. The processes in 12 other states, as well as the federal confirmation process, do not violate the separation of powers doctrine. Neither would HJR 47. The Alaska judiciary's capricious use of authority and failure to appropriately censure the conduct of its members reveal a recurring pattern of power abuse. Legislative confirmation is not a panacea for all of Alaska's judicial ills, but I believe it is a measured step in the right direction.

Rep. John Cowdery of Anchorage is serving his third term in the state House of Representatives.

HJR

18

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

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March 23, 1999

The Honorable Pete Kott, Chair
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska

Re: HJR18: Constitutional amendment for administrative hearings

Dear Representative Kott:

I am writing with respect to CSHJR 18(STA), which is pending for hearing before your committee.

I have prepared the attached analysis of the language contained in HJR 18. Currently, the legislature has the discretion to legislate administrative adjudicative authority. A constitutional amendment would presumably limit that discretion. If the intent is to change administrative adjudicative authority without curtailing the legislature's current powers, the appropriate route would be through statutory change rather than amendment to the state's constitution.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Teresa Williams
Assistant Attorney General

Enclosure

cc: Members, House Judiciary Committee
Representative Scott Ogan
Pat Pourchot, Legislative Director, Office of the Governor
Chrystal Smith, Legislative Liaison, Department of Law

03-C32LH

ANALYSIS OF LANGUAGE IN HJR 18

I. THE OFFICE OF ADMINISTRATIVE HEARINGS IS VESTED WITH THE "**POWER TO CONDUCT ADMINISTRATIVE LAW HEARINGS**."

Alaska law defines the term "administrative law hearings" broadly to cover any agency dispute-resolution process. An administrative adjudicative proceeding commences when one party serves on the other party a document that sets in motion **regulatory or statutory procedures for the resolution of a dispute**. Hickel v. Halford, 872 P.2d 171 (Alaska 1994) The term "administrative law hearings" would apply whether or not a hearing officer currently conducts the proceeding and would also apply to reviews currently conducted at a lower agency level. It would apply to hearings that are conducted in writing, rather than by personal appearances.

The boards and commissions that exist for the primary function of conducting administrative hearings would no longer have that function. Those agencies include: Alaska Workers' Compensation Board, State Board of Parole, Occupational Safety and Health Review Board, Fisherman's Fund Advisory and Appeals Council, State Assessment Review Board, Violent Crimes Compensation Board, Alaska Labor Relations Agency, Alaska Commission for Human Rights, Alaska Public Utilities Commission, and Alaska Public Offices Commission.

II. THE OFFICE OF ADMINISTRATIVE HEARINGS IS VESTED WITH THE "**POWER TO RENDER FINAL AGENCY DECISIONS**."

The term "agency decisions" is a misnomer, because the decision would not in fact be a decision by the agency.

The constitutional mandate would encompass all aspects of state programs. An attorney in the Office of Administrative Hearings would decide any formal dispute involving state licensing, loan programs, tax matters, public assistance programs, employee relations, resource use, safety regulation, state land allocation, procurement, and the myriad other state functions.

The constitutional mandate would include agencies of the legislature and the judicial branch, as well as the executive branch.

III. **THE JURISDICTION OF THE OFFICE SHALL BE PRESCRIBED BY LAW.**

The proposed clause does not give the legislature the express authority to exempt agencies or certain levels of proceedings from the constitutional mandate. The Alaska courts hold that the identical language for the judiciary does not allow the legislature, by statute, to take away judicial power vested by the constitution in the courts.

IV. THE HEAD OF THE OFFICE IS NAMED "CHIEF **ADMINISTRATIVE LAW JUDGE**."

Alaska has purposively not adopted the "Administrative Law Judge" style of hearing officer. An Administrative Law Judge is more likely to use hearing chambers, wear robes, and to be referred to as "judge" or "your honor." Alaska administrative proceedings are intended to be more informal and less threatening to the participants.

V. "THE CHIEF ADMINISTRATIVE LAW JUDGE SERVES A **TERM OF FIVE YEARS**."

No provision is made for removal for cause of the chief administrative law judge.

1-LS0513\I
Cook
4/27/99

CS FOR HOUSE JOINT RESOLUTION NO. 18( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES OGAN, Foster, Dyson, Rokeberg

A RESOLUTION

Proposing amendments to the Constitution of the State of Alaska relating to an office of administrative hearings.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** Article III, Constitution of the State of Alaska, is amended by adding a new section to read:

Section 28. Office of Administrative Hearings. (a) The power to conduct administrative law hearings and to render final agency decisions is vested in an office of administrative hearings.

(b) The chief administrative law judge is the head of the office of administrative hearings. The chief administrative law judge shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The chief administrative law judge serves a term of four years and may be reappointed and reconfirmed to serve more than one term.

(c) The legislature may exempt any agency of the State from (a) of this section by law.

*** Sec. 2.** Article XV, Constitution of the State of Alaska, is amended by adding a new

section to read:

Section 30. Application of Amendment Relating to Administrative Hearings. The 2000 amendment relating to administrative hearings made in Section 28 of Article III applies only to administrative hearings begun on or after January 1, 2002.

*** Sec. 3.** The amendments proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

REPRESENTATIVE SCOTT OGAN Alaska State Legislature

House District 27 • Palmer • Greater Palmer • Sutton • Chickaloon • Sheep Mountain

SPONSOR STATEMENT

HJR 18

Elimination of in-house administrative hearing officers

This constitutional amendment, if approved by voters, will establish an office of administrative hearings apart from and separate from state agencies.

All research shows significant cost savings, efficiency of process, and a re-establishment of fairness, when hearing officer functions are consolidated, held to due process standards, and politically insulated from agencies.

Benefits to the public, in addition to saving money, are extremely positive. They include less litigation, stable investment climate, comfort for small entrepreneurs, and an increase in public confidence in fair hearings.

Perhaps most importantly, full time independent hearing officers provide a level playing field for those challenging regulations. They also hold those who develop, promulgate, and enforce regulations to a higher standard. All data shows regulations become less onerous when unbiased hearing officers, governed not by commissioners, but due process, scrutinize them.

HJR 18, like due process reforms in 25 other states, will correct inefficiency, increase professional standards, save money, restore public confidence, stimulate development and restore the proper balance between the adjudicatory and prosecutorial functions of executive branch.

Interim: 600 E. Railroad Ave. #1, Wasilla, AK 99654 • **Session:** State Capitol, Juneau, AK 99801 465-3878
(907) 376-4866 Fax (907) 373-4724 1 (800) 862-3878 Fax (907) 465-3265

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Rather, Covington ...
...mpossible for him to disc...
... because he did not ...
..., he asserts that revoking ...
...of the treatment program ...
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...pported by sufficient evi-
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...y reviewable to determine
...on was supported by sub-
See Anchorage v. Coffey,
(Alaska 1995); *Handley v.*
1231, 1233 (Alaska 1992).
...s exercise of its discretion-
...eviewed under the "reason-

...e v. Woveris, 138 N.H. 33, 635
State v. Gleason, 154 Vt. 205,
...90); *State v. Peck*, 149 Vt. 617,
...988); *State v. Bennett*, 35 Wash.
...d 390 (1983).

able basis" standard, to insure that its determinations are supported by evidence in the record as a whole and there is no abuse of discretion. *See Lake and Peninsula Borough v. Local Boundary Com'n*, 885 P.2d 1059, 1062 (Alaska 1994); *Cook Inlet Pipe Line Co. v. Alaska Public Utilities Com'n*, 836 P.2d 343, 348 (Alaska 1992).

[9] The parole board found that Covington violated a condition of his parole:

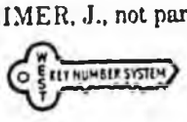
> VIOLATION A: Since his release to the State of Tennessee on November 7, 1991, Charles R. Covington failed to enroll in or complete a sex offender treatment program. This is a violation of parole condition number twenty-one. This finding is based on the evidence and testimony presented at the hearing.
>
> Based on the nature of your offense and the fact that you failed to cooperate with sex offender treatment providers, the Board voted to revoke your parole.

Covington contends that the state did not meet its burden of proving, by a preponderance of the evidence, that Covington violated a condition of his parole. Covington argues that he satisfied condition # 21, which required him to "actively participate" in a program, by merely applying to the Luton program. The state contends that Covington's application to the program, but refusal to discuss his offenses, does not constitute compliance with the condition.

Based upon the record of this case, the parole board could determine that Covington willfully refused to admit his prior offenses in spite of his guilt of those offenses, and that this action resulted in Covington's ineligibility for sexual offender treatment. The board could determine that sexual offender treatment was critical for Covington's rehabilitation and that his failure to obtain that treatment was a violation of his parole conditions and constituted a sufficient ground to revoke his parole.

AFFIRMED.

MANNHEIMER, J., not participating.



Martha Jo ROZKYDAL, Appellant,

v.

STATE of Alaska, Appellee.

No. A-6039.

Court of Appeals of Alaska.

May 30, 1997.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, Elaine M. Andrews, J., of first-degree theft and was sentenced to four years' imprisonment with 32 months suspended. Defendant appealed, challenging sentence. The Court of Appeals, Mannheimer, J., held that: (1) statute providing that defendants convicted of felonies may appeal their sentences only if they receive more than two years to serve governs only appeals in which sole assertion of error is that sentencing judge abused his or her discretion by imposing too severe a sentence; (2) that statute eliminates only right to "appeal" sentence, not right to seek discretionary review by filing petition for review; and (3) that statute does not violate equal protection or procedural or substantive due process.

Appeal dismissed.

1. Criminal Law ⇐1134(3)

Statute providing that defendants convicted of felonies may appeal their sentences only if they receive more than two years to serve governs only appeals in which defendants' sole assertion of error is that sentencing judge abused his or her discretion by imposing too severe a sentence. AS 12.55.120(a).

2. Criminal Law ⇐1026

Statute under which defendants convicted of felonies may appeal their sentences only if they receive more than two years to serve eliminates only those defendants' right to "appeal" their sentence, i.e., their right to

convicted of felonies may appeal their sentences only if they receive more than 2 years to serve. The pertinent portion of the statute reads:

> A sentence of imprisonment lawfully imposed by the superior court for a term or aggregate terms exceeding two years of unsuspended incarceration for a felony offense ... may be appealed to the court of appeals by the defendant on the ground that the sentence is excessive[.]

At the same time, the legislature enacted a corresponding limit on this court's jurisdiction to hear sentence appeals. *See* SLA 1995, ch. 79, §§ 11–12.[1]

As explained above, Rozkydal received only 16 months to serve. The State therefore asserts that Rozkydal has no right to appeal her sentence. Rozkydal concedes that the legislature has apparently eliminated her right to appeal her sentence. She argues, however, that the legislature's action denies equal protection of the law to felony defendants who receive 2 years or less to serve. Rozkydal also contends that the legislature's action denies due process of law to these defendants. Finally, Rozkydal contends that, regardless of how the legislature may try to restrict sentence appeals, the judiciary has an inherent power to review criminal sentences.

For the reasons explained in this opinion, we conclude that the legislative changes to AS 12.55.120(a) and AS 22.07.020(b) are constitutional and that Rozkydal has no right to appeal her sentence, either to this court or to the supreme court. However, we also conclude that Rozkydal retains the right to petition the Alaska Supreme Court to review her sentence. We therefore dismiss Rozkydal's appeal, but without prejudice to Rozkydal's filing a petition for review in the supreme court.

The effect of the amendment to AS 12.55.120(a)

[1] Before addressing Rozkydal's constitutional arguments, it is important to clarify what was accomplished by the 1995 amendment to the sentence appeal statute. Certain legal concepts are key to our interpretation of the current statute: the definition of a "sentence appeal", and the distinction between an "appeal" and a "petition".

By its terms, AS 12.55.120 deals only with "sentence[s] of imprisonment lawfully imposed by the superior court" that are being appealed "on the ground that the sentence is excessive[.]" In order to interpret this language, we must look to a thirty-year-old decision of the Alaska Supreme Court: *Bear v. State*, 439 P.2d 432 (Alaska 1968).

In *Bear*, the supreme court held that, absent legislative authorization, it had no authority to review a lawful sentence "for abuse of discretion"—that is, for excessive severity or leniency. *Bear*, 439 P.2d at 435. The supreme court did not question its authority to decide cases in which the defendant claimed that the sentence was illegal, or cases in which the defendant claimed that the sentencing procedures were flawed. *Id.* at 436, 438. The issue presented in *Bear* was something different: whether the court had the authority to hear an appeal in which the defendant failed to allege any illegality in the sentence or the sentencing proceedings, but argued simply that a concededly legal sentence constituted an abuse of sentencing discretion. *Id.* at 434. The court ruled that it had no such authority.

The legislature responded to *Bear* the following year by enacting AS 12.55.120, a statute that explicitly granted the supreme court the authority to entertain sentence appeals. As the House Judiciary Committee explained in its report on the pending legislation (House Bill No. 281):

> The majority of the courts have held that where a sentence imposed by a trial judge is within the limits prescribed by statute and otherwise lawful, an appellate court cannot review the discretion the trial judge exercised in determining the sen-

1. The current version of AS 22.07.020(b) provides:

> Except as limited in AS 12.55.120, the court of appeals has jurisdiction to hear appeals of unsuspended sentences of imprisonment exceeding two years for a felony offense ... on the grounds that the sentence is excessive, or a sentence of any length on the grounds that it is too lenient.

require appellate court to review sentence, but such defendants retain right to seek discretionary appellate review of sentence by filing petition for review. AS 12.55.120(a); Rules App.Proc., Rules 215(a), 402(a)(1).

3. Criminal Law ⇨1023.5, 1072

Right of "appeal" means right to require appellate court to review lower court's decision, in contrast to right of "petition," which means right to request appellate court to review lower court's decision, which request appellate court may grant or deny as it sees fit.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇨250.2(5)
Criminal Law ⇨1005

Statute providing that defendants convicted of felonies may appeal their sentences on ground of excessiveness only if they receive more than two years to serve does not violate equal protection, particularly as such defendants retain right to petition for discretionary review; information before legislature was that great majority of sentences of less than two years were affirmed on appeal, and legislature could validly conclude that resources of appellate courts, Department of Law, Public Defender Agency, and Office of Public Advocacy would be better spent if appellate review of such lesser sentences were discretionary. U.S.C.A. Const.Amend. 14; AS 12.55.120(a); Rules App.Proc., Rule 215(a)(2).

5. Constitutional Law ⇨271
Criminal Law ⇨1005

Statute providing that defendants convicted of felonies may appeal their sentences on ground of excessiveness only if they receive more than two years to serve did not violate defendant's right to procedural due process, particularly as defendant retained right to petition for discretionary review; defendant did not show that petition for review to Supreme Court would deny her meaningful opportunity for sentence review. U.S.C.A. Const.Amend. 14; AS 12.55.120(a); Rules App.Proc., Rule 215(a)(2).

6. Constitutional Law ⇨251.6

Essence of due process is meaningful opportunity to be heard. U.S.C.A. Const Amend. 14.

7. Constitutional Law ⇨271
Criminal Law ⇨1005

Statute providing that defendants convicted of felonies may appeal their sentences on ground of excessiveness only if they receive more than two years to serve did not violate substantive due process, despite claim that there was no legitimate government purpose to support legislature's action; legislature's apparent purpose was to reduce workload of appellate courts and workload of prosecutors and defense attorneys funded by state government. U.S.C.A. Const.Amend. 14; AS 12.55.120(a); Rules App.Proc., Rule 215(a)(2).

Cynthia L. Strout, Anchorage, for Appellant.

Leonard M. Linton, Jr., Assistant District Attorney, Kenneth J. Goldman, District Attorney, Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before BRYNER, C.J., and COATS and MANNHEIMER, JJ.

OPINION

MANNHEIMER, Judge.

Martha Jo Rozkydal was convicted of first-degree theft, AS 11.46.120(a), for embezzling over $125,000 from her employer. She was sentenced to 4 years' imprisonment with 32 months suspended—that is, she received 16 months to serve. Rozkydal has now filed a sentence appeal with this court. The question is whether Rozkydal is entitled to appeal her sentence.

In 1995, the Alaska Legislature limited the right of sentence appeal by amending the sentence appeal statute, AS 12.55.120(a). *See* SLA 1995, ch. 79, §§ 7–8. Under the current version of the statute, defendants

Morgan v. State, 635 P.2d
6 (Alaska 1981); *State v.*
1 925, 929–931 (Alaska

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We believe that the supreme court's decision in *Browder* illuminates the proper construction of AS 12.55.120(a). The statute declares that felony sentences "may be appealed" only if they exceed 2 years to serve. The statute does not mention or purport to limit a defendant's right to petition a higher court for discretionary review of a sentence. Given *Browder*'s interpretation of an analogous statute (the statute limiting the State's right of appeal in criminal cases), we conclude that AS 12.55.120(a) should be interpreted in the same way. The statute eliminates certain felony defendants' right to "appeal" their sentence (that is, their right to require an appellate court to review the sentence), but these defendants retain the right to seek discretionary appellate review of a sentence by filing a petition for review. This right is explicitly recognized in Appellate Rule 215(a)(2):

> *Right to Seek Discretionary Review.* A defendant may seek discretionary review of an unsuspended sentence of imprisonment which is not appealable . . . by filing a petition for review in the supreme court under Appellate Rule 402.

To summarize: The sentence appeal statute, AS 12.55.120, governs a particular type of appellate claim—instances in which the defendant concedes the legality of his or her sentence but contends that the severity of the sentence constitutes an abuse of discretion. The statute declares that a felony defendant may raise such a claim on appeal only if the challenged sentence exceeds 2 years to serve. However, because the statute does not restrict a defendant's right to petition for discretionary review of a sentence, and because this right is explicitly codified in Appellate Rules 215(a)(2) and 402(a)(1), we conclude that a felony defendant who receives a lesser sentence retains the right to seek discretionary review of that sentence by filing a petition for review in the supreme court.

Thus, under current Alaska statutes and court rules, Rozkydal does not have the right to appeal her 16-month sentence, but she does have the right to petition the supreme court to review it. Against this background, we now assess Rozkydal's constitutional challenges to AS 12.55.120(a).

The constitutionality of AS 12.55.120(a)

Rozkydal raises three constitutional challenges to AS 12.55.120(a). One of Rozkydal's arguments is that the judiciary has an inherent authority to review sentences, an authority that the legislature can not eliminate. However, as we explained in the previous section of this opinion, even after the 1995 amendment to AS 12.55.120(a), Alaska law still allows felony defendants who receive sentences of 2 years or less to seek discretionary review of their sentences. Given our construction of AS 12.55.120(a) and the supreme court's enactment of Appellate Rule 215(a)(2), Rozkydal's "inherent authority" argument is moot.

[4] Rozkydal next argues that AS 12.55.120(a) violates the equal protection clause of the Alaska Constitution (Article I, Section 1) because, under the statute, felony defendants sentenced to serve 2 years or less are treated differently from felony offenders sentenced to serve more than 2 years. However, not all differences in treatment violate the equal protection clause. As the supreme court stated in *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994), the equal protection clause commands the legislature to give the same treatment to "those who are similarly situated":

> The common question in equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment. Equal protection jurisprudence concerns itself largely with the reasons for treating one group differently from another[,] . . . asking whether a legitimate reason for disparate treatment exists, and, given a legitimate reason, whether the enactment creating the [different treatment] bears a fair and substantial relationship to that reason. *State, Dep't of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993).

Gonzales, 882 P.2d at 396 (footnote omitted).

Rozkydal argues that the recent amendment to the sentence appeal statute has created two groups of felony offenders: those

tence, even though it may appear in retrospect to have been too severe or too lenient.

Enactment of [this legislation] would provide jurisdiction for appellate review of sentences in Alaska.

1969 House Journal 665.

We recognize that the term "sentence appeal" is not always used this narrowly. For instance, under current Alaska appellate practice, the "sentence appeals" filed under Appellate Rule 215 often include allegations that the sentencing proceedings were irregular or that the sentencing judge erred in making various factual and legal determinations affecting the range of authorized sentences. As an administrative matter, there is generally no problem with handling such appeals under the expedited procedures specified in Appellate Rule 215. In fact, this court encouraged this practice in *Juneby v. State*, 641 P.2d 823, 835 n. 18 (Alaska App. 1982).

However, the issue in Rozkydal's case is the scope of AS 12.55.120. In light of the legislative history described above, it is apparent that this statute was meant to authorize and govern a particular kind of appeal: appeals in which the defendant's sole assertion of error is that the sentencing judge abused his or her discretion by imposing too severe a sentence.

[2] Now that we have clarified the type of appellate claim governed by AS 12.55.120, it is also important to clarify the type of restriction that this statute places on a defendant's ability to obtain appellate review of such claims. AS 12.55.120(a) declares that sentences of more than 2 years' imprisonment "may be appealed ... on the ground that the sentence is excessive[.]" To interpret this language, we must distinguish between an "appeal" and a "petition".

[3] The right of "appeal" means the right to *require* an appellate court to review a lower court's decision. The right of "petition", on the other hand, means the right to *request* an appellate court to review a lower court's decision—a request which the appellate court may grant or deny as it sees fit. *See Kerttula v. Abood*, 686 P.2d 1197, 1200–01 (Alaska 1984); *Morgan v. State*, 635 P.2d 472, 480–81 & n. 16 (Alaska 1981); *State v. Browder*, 486 P.2d 925, 929–931 (Alaska 1971).

In *Browder*, the supreme court dealt with a legal question analogous to the one presented in Rozkydal's case. The defendant in *Browder* was being prosecuted for contempt of court (for bringing a shotgun into a courtroom). The district court ruled that Browder was entitled to a jury trial, and the State sought appellate review of this ruling by filing a petition for review. One key issue in *Browder* was whether the State could employ a petition for review to seek appellate review of the trial court's ruling.

Under former AS 22.05.010 (as it existed in 1971), the legislature had placed substantial restrictions on the State's right of appeal in criminal cases: the State had no right of appeal except "to test the sufficiency of the indictment or [to assert] that the sentence [was] too lenient". *See Browder*, 486 P.2d at 929. Thus, under the governing statute, the State had no right to appeal the district court's jury trial order. Nevertheless, the supreme court concluded that the State could seek judicial review of the lower court's order through a petition for review:

> [T]he limitation placed upon the state's right to appeal in a criminal case, found in AS 22.05.010, was intended to apply only to instances where our jurisdiction is ... invoked by appeal. AS 22.05.010 clearly distinguishes between appeals and other forms of review. Appeals are specifically limited, whereas the other forms of review authorized under AS 22.05.010 ... have no limitations placed on them.

Browder, 486 P.2d at 930. The supreme court noted that if AS 22.05.010 were construed to prohibit the court from reviewing any ruling in a criminal case except those rulings expressly made appealable, then the statute would raise serious constitutional problems under Article IV, Section 2 of the Alaska Constitution (the provision which declares the supreme court to be "the highest court of the State, with final appellate jurisdiction"). *Id.* at 931.

who can obtain appellate review of their sentences, and those who can not. However, as explained in the previous section, AS 12.55.120 does not restrict a defendant's ability to seek appellate review of illegalities in either the sentence or the sentencing process. Moreover, even when a defendant's appellate claim deals solely with the excessiveness of a legal sentence, the combination of AS 12.55.120(a) and Appellate Rule 215(a)(2) still gives all felony offenders the right to seek judicial review. The distinction drawn by AS 12.55.120(a) involves the right of "appeal"—the right to demand appellate review of a sentence. Under the statute, only felony offenders who receive more than 2 years to serve are entitled to demand appellate review of the sentencing decision, but felony offenders who receive lesser sentences are still entitled to seek discretionary review of the sentencing decision.

For purposes of equal protection analysis, then, the question is whether the legislature can give one group of felony offenders the right of sentence review upon demand, while at the same time requiring a second group of felony offenders to convince the appellate court that their sentence merits review. We note that, from the time sentence appeals were first authorized in Alaska, the right of sentence appeal has always depended on the length of a defendant's sentence. As originally enacted in 1969, AS 12.55.120 limited the right of sentence appeal to defendants who received sentences of 1 year or more. Seven years later, when the supreme court promulgated an appellate rule to govern sentence appeals, the court continued the practice of denying appeals to defendants who received lesser sentences—although the supreme court's cut-off was 45 days' imprisonment, considerably lower than the legislature's dividing line. *See Johnson v. State*, 816 P.2d 220, 221–22 (Alaska App.1991). Now, both AS 12.55.120(a) and Appellate Rule 215(a)(1) establish the cut-off for felony sentence appeals at 2 years' imprisonment.

We first must ask whether there is a valid purpose behind the legislature's decision to restrict the right of sentence appeal based on the length of a defendant's sentence. *Gonzales, supra.* The legislature's apparent purpose was to reduce the workload of the appellate courts and the workload of the prosecutors and defense attorneys funded by the state government. Rozkydal concedes that the legislature may properly concern itself with the cost and efficiency of state government. However, she contends that such concerns can not justify a statutory classification that denies some felony offenders the right to appellate review of their sentences. The next question, then, is whether the legislature's restriction of sentence appeals bears the necessary "fair and substantial relationship" to the legislature's goals. *Gonzales, supra.*

The aim of sentence review is to identify instances in which a judge has abused his or her admittedly broad sentencing discretion. *State v. Wentz*, 805 P.2d 962, 965 (Alaska 1991); *State v. Chaney*, 477 P.2d 441, 443 (Alaska 1970). In cases brought by defendants, the aim is to identify sentences that are excessive—sentences that are too severe as a matter of law.

The premise underlying any sentence appeal dividing line (whether that line is drawn at 45 days or at 2 years) is that lesser sentences are less likely to be excessive. If lesser sentences are less likely to constitute an abuse of discretion, then there is arguably less justification for conducting a full appellate review of each of these sentences. The legislative history of AS 12.55.120 shows that the legislature relied on this reasoning when it restricted felony sentence appeals to defendants receiving more than 2 years to serve.

Two years' imprisonment is the presumptive term for a second felony offender convicted of a class C felony—the lowest class of felony. *See* AS 12.55.125(e)(1). When a court sentences a defendant for a C felony, this 2-year presumptive term is the dividing line under *Austin v. State*, 627 P.2d 657, 657–58 (Alaska App.1981)—the case in which this court held that a first felony offender's sentence should be more favorable than the presumptive term established for second felony offenders unless the State proves aggravating factors under AS 12.55.155(c) or extraordinary circumstances under AS 12.55.165. *See also* AS 12.55.125(k).

When the legislature was considering the current 2-year dividing line for felony sentence appeals, the legislature relied on statistical information indicating that ninety percent of appeals from felony sentences of 2 years or less ended in affirmance. *See* 1995 House Journal 489–490 (reprinting the Governor's transmittal letter accompanying House Bill No. 201, the bill that contained the proposed amendment to AS 12.55.120). Thus, the legislature apparently concluded that felony sentences of 2 years or less were unlikely to constitute an abuse of sentencing discretion.

Rozkydal asserts that, regardless of the legislature's statistics, significant legal errors have often occurred in felony cases where defendants received 2 years or less to serve. In her brief, she lists eleven published opinions from the years 1981 to 1993, ten decided by this court and one decided by the supreme court, in which felony sentences of 2 years or less were reversed on appeal. However, in each of these cases the defendants' sentences were reversed because of illegalities in the sentencing process.[2] That is, none of these eleven cases was the kind of appeal governed by AS 12.55.120; all of these cases would be appealable under current law.

Rozkydal also contends that, even it could be shown that felony sentences of 2 years or less rarely involve an abuse of sentencing discretion, there would still be some instances of abuse, and it would still be unjust to deny those defendants the opportunity for sentence review. However, as explained above, Alaska law does not deny anyone the opportunity to seek sentence review. Instead, under AS 12.55.120(a) and Appellate Rule 215(a)(2), certain felony defendants (those who have been sentenced to 2 years or less) must seek sentence review by petition rather than by appeal. The effect of this procedural distinction is to require those defendants who receive lesser sentences to convince the appellate court that there is good reason to hear their case before the criminal justice system devotes the time and money required to pursue and decide a sentence appeal.

The real issue, then, is whether the government violates the equal protection guarantee when it grants a right of sentence appeal to defendants who receive severe sentences, leaving all other defendants with only the right to petition for review of their sentences. Rozkydal cites no authority on this issue. However, as we have already noted, Alaska law governing sentence appeals (both statutes and court rules) has consistently distinguished among defendants on this very basis—the length of the defendants' sentences—since 1969, the year that sentence appeals were first authorized.

Authority on this issue from other jurisdictions is sparse. However, the cases indicate that a state government may properly create procedural distinctions based on a defendant's sentence.

In *Massie v. Hennessey*, 875 F.2d 1386, 1389 (9th Cir.1989), the petitioner asserted that California denied him equal protection of the law by providing different appellate procedures for those defendants sentenced to death. The Ninth Circuit upheld California's appellate procedures. In *State v. Delgado*, 161 Conn. 536, 290 A.2d 338, 344–45 (1971),

2. In eight of these cases—*Lewis v. State*, 845 P.2d 447 (Alaska App.1993), *Reynolds v. State*, 736 P.2d 1154 (Alaska App.1987), *Tate v. State*, 711 P.2d 536, 538–540 (Alaska App.1985), *Shaishnikoff v. State*, 690 P.2d 25, 27–28 (Alaska App. 1984), *Fleener v. State*, 686 P.2d 730, 736–37 (Alaska App.1984), *Poggas v. State*, 658 P.2d 796, 798 (Alaska App.1983), *Sears v. State*, 653 P.2d 349, 350 (Alaska App.1982), and *McManners v. State*, 650 P.2d 414, 416 (Alaska App.1982)—the defendants' sentences were reversed for violation of the *Austin* rule (the rule that a first felony offender must receive a sentence more favorable than the presumptive term for second felony offenders unless the sentencing judge finds aggravating factors or extraordinary circumstances).

In *Harlow v. State*, 820 P.2d 307 (Alaska App. 1991), the sentencing judge mistakenly treated the defendant as a second felony offender when the defendant's prior conviction from another state did not qualify under AS 12.55.145(a) as a prior felony conviction for purposes of Alaska sentencing law. In *DeHart v. State*, 781 P.2d 989, 990–92 (Alaska App.1989), the sentencing judge mistakenly ruled that the defendant was subject to a presumptive term. And in *Morris v. State*, 630 P.2d 13, 17–18 (Alaska 1981), the court upheld the length of the defendant's sentence but reversed because the sentencing judge utilized an improper legal standard in imposing sentence.

the Connecticut Supreme Court rejected an equal protection challenge to a statute which authorized sentence appeals for all defendants who received a prison term of at least one year, but which denied sentence appeals to murder defendants sentenced to death or life imprisonment under a special sentencing procedure.

More pertinent to the issue raised in Rozkydal's case, the New Jersey Supreme Court has upheld an expedited appeal process for sentence appeals—a streamlined procedure in which sentence appeals are decided without briefs, based solely on the record and on oral argument. *State v. Bianco*, 103 N.J. 383, 511 A.2d 600 (1986). The Texas Court of Appeals has rejected an equal protection attack on a statute which denies any right of appeal to defendants who receive deferred adjudications (a variant of the same idea as Alaska's suspended imposition of sentence). *Buchanan v. State*, 881 S.W.2d 376, 380 (Tex. App.1994). And the Washington Court of Appeals has rejected an equal protection challenge to a Washington statute that precludes defendants from appealing their sentence if they receive a sentence within a predefined standard range for their offense. *State v. Rousseau*, 78 Wash.App. 774, 898 P.2d 870 (1995), *review denied*, 128 Wash.2d 1011, 910 P.2d 482 (1996).

Having considered this matter, we conclude that the Alaska legislature's decision to restrict the right of sentence appeal to felony offenders receiving more than 2 years to serve bears a fair and substantial relationship to a legitimate government purpose. Under the *Austin* rule, sentences of less than 2 years need not be supported by aggravating factors or extraordinary circumstances. The information in front of the legislature was that the great majority of these sentences are affirmed on appeal. The legislature could validly conclude that the resources of the appellate courts, the Department of Law, the Public Defender Agency, and the Office of Public Advocacy would be better spent if appellate review of these lesser sentences were discretionary.

[5, 6] For these same reasons, we reject Rozkydal's contention that the legislature's action violated her right to procedural due process. The essence of due process is a "meaningful opportunity to be heard". *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113, 118 (1971). Rozkydal has not shown that a petition for review to the supreme court would deny her a meaningful opportunity for sentence review.

[7] We likewise reject Rozkydal's argument that the legislature's action violated substantive due process (that is, her argument that there was no legitimate government purpose to support the legislature's action). *See Gonzales*, 882 P.2d at 397–98.

We emphasize that our decision is influenced in large measure by our conclusion that defendants receiving lesser felony sentences retain the right to petition for review under Appellate Rule 215(a)(2). We express no opinion regarding the legislature's authority to preclude all forms of sentence review for specific sentencing ranges or groups of criminal defendants.

Conclusion

Because Rozkydal received only 16 months to serve, she has no right to appeal her sentence. Accordingly, this appeal is DISMISSED. Rozkydal is entitled, however, to petition the supreme court to review her sentence under Appellate Rule 215(a)(2).

Given the circumstances, we exercise our authority under Appellate Rule 521 to relax Appellate Rule 403(h)(1), the rule that sets the time limits for petitioning for review of a non-appealable sentence. If Rozkydal wishes to petition the supreme court to review the superior court's sentencing decision, the time limits specified in Appellate Rule 403(h)(1) shall be calculated, not from the distribution date of the superior court's judgement, but rather from the date our decision takes effect. *See* Appellate Rule 512(a)(2).

APPENDIX 2
QUALIFICATION STANDARDS
ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE HEARINGS

The purpose of the Office of Administrative Hearings is to promote administrative justice and to serve the public interest. An Administrative Law Judge shall be distinguished for his or her integrity, wisdom and sound legal knowledge, and shall inspire confidence in his or her personal honesty, fairness and moral courage.

A candidate or incumbent shall possess, at a minimum, the following qualifications in order to obtain an appointment to, or retain the position of, Administrative Law Judge.

Integrity

An Administrative Law Judge shall possess a high degree of personal integrity, and shall deal with his or her appointments as a public trust. An Administrative Law Judge shall be honest, sincere, upright and principled, and shall exhibit compassion, humility and moral courage. An Administrative Law Judge shall be indifferent to private political or partisan influence. An Administrative Law Judge shall not administer the office for the purpose of advancing his or her personal ambitions, and shall not allow other affairs or private interests to interfere with the proper performance of official duties.

Impartiality

An Administrative Law Judge shall adhere to a high standard of justice and lawfulness, and shall treat all parties impartially and fairly without reference to his or her own feelings or interests. An Administrative Law Judge shall have the ability to preside justly and without bias. An Administrative Law Judge shall exhibit a willingness to hear and consider what is put forth on all sides of a debatable proposition, and shall have the ability to give genuine consideration to views with which he or she does not personally agree.

Dedication

An Administrative Law Judge shall conduct his or her duties with industry and application and shall be conscientious, studious, thorough and punctual. An Administrative Law Judge shall not allow other affairs or private interests to interfere with the prompt performance of official duties.

Ability

An Administrative Law Judge shall possess superior self-discipline and shall exercise sound judgment in presiding, ruling on evidence, making decisions, and writing opinions. An Administrative Law Judge shall have the bearing and personality to allow him or her to deal with parties or counsel with sensitivity and without giving offense. An Administrative Law Judge shall be patient, courteous, attentive, yet shall also be firm and decisive. An Administrative Law Judge shall be mentally fit and alert and capable of performing the duties of office.

Ability to Preside:

An Administrative Law Judge shall conduct hearings with dignity and decorum and without interference which might detract from the proper atmosphere. An Administrative Law Judge shall so conduct himself or herself during hearings that his or her attitude, manner or tone toward attorneys or witnesses will not prevent the proper presentation of the cause or the ascertainment of truth. He or she shall not make an unnecessary display of learning, express a premature judgment, or add to the embarrassment or timidity of witnesses or attorneys. An Administrative Law Judge shall listen readily to others and be detached, even-handed and decisive.

Ability to Rule on Evidence:

An Administrative Law Judge shall be able to rule on evidence in accordance with applicable laws, rules, procedural regulations and legal precedent.

Ability to Make a Decision

An Administrative Law Judge shall possess the ability to decide causes before him or her in a fair, unbiased and impartial manner.

Ability to Write a Decision

An Administrative Law Judge shall be able to organize facts and legal opinion in a clear and concise manner.

Knowledge of Law

An Administrative Law Judge shall administer justice in accordance with the law and regulations governing the cause before him or her.

Timeliness

An Administrative Law Judge shall perform his or her duties in a timely manner as may be required in the particular cause.

Minimum Experience and Education

An Administrative Law Judge shall, at minimum, possess a Juris Doctor or equivalent degree from an accredited college or university, and be a member in good standing of the bar of any jurisdiction.

In conjunction with the initial formation of the Office of Administrative Hearings, and in order to grandfather into the Office those Hearing Examiners who performed their prior duties in an exemplary manner, individuals may be appointed to the position of Administrative Law Judge prior to February 1, 1990, without regard to this minimum experience and education requirement.[161]

[161]The Office of Administrative Hearings Administrative Law Judge Qualification Standards went into effect January 1, 1990. A copy of the signed document is on file with the author.

HOUSE LEADERSHIP HITS HOME RUN

HJR 18

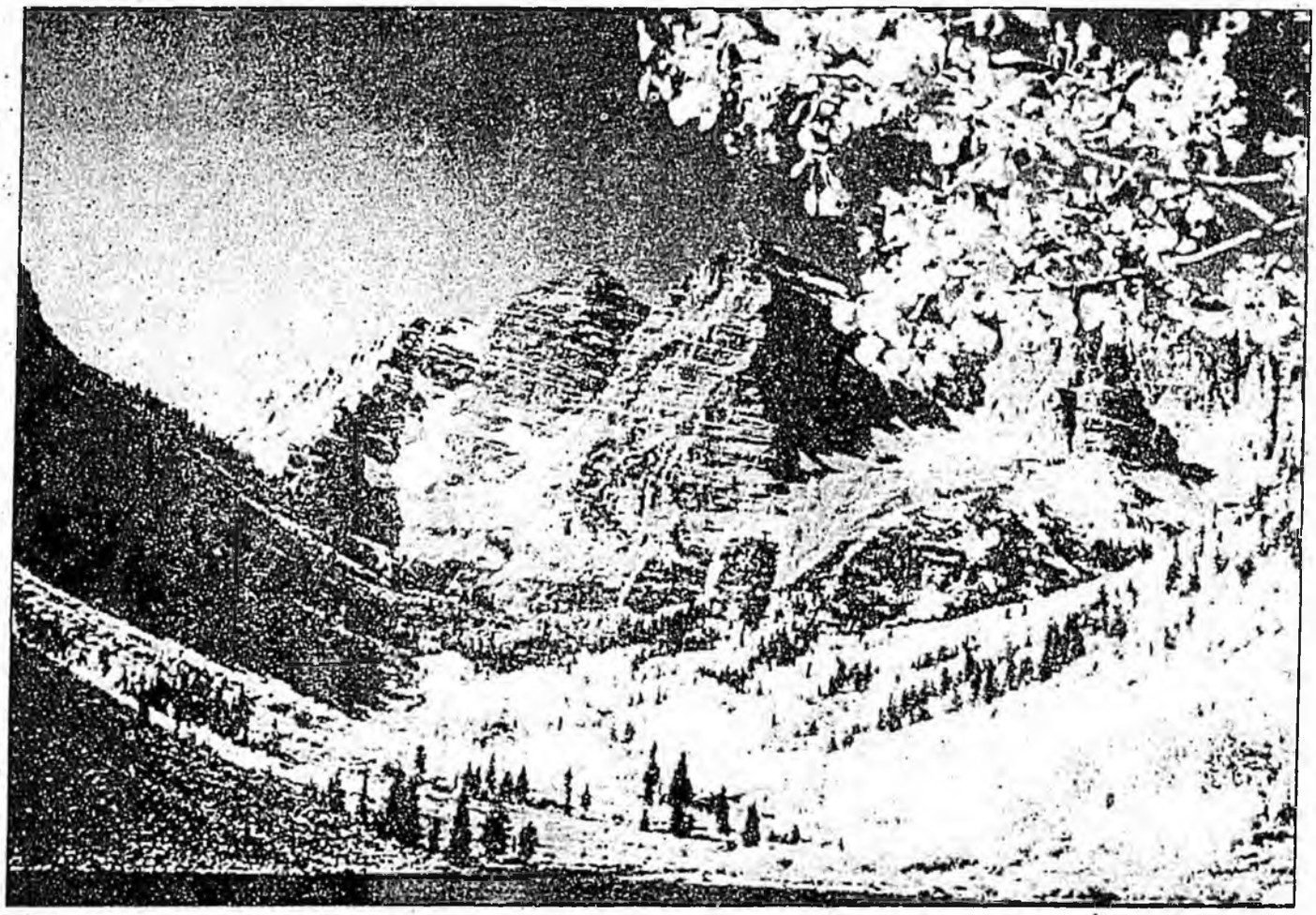
HJR 18 gives our constituents the opportunity to replace in-house, agency employed hearing officers, with independent, non-biased, due process based hearing officers.

Two years of research demonstrate: (example in the handout)

- Independent hearings improve impartiality.
- Independent hearings improve efficiency.
- Independent hearings increase expertise and professionally prepared cases.
- Independent hearings increase public confidence.
- Independent hearings improve regulation drafting.
- Independent hearings improve regulation promulgation.
- Independent hearings improve regulation enforcement.
- **Independent hearings *decrease litigation*.**
- **Independent hearings promote better business climates.**
- **Independent hearings can be tracked for cost, public approval, and efficiency.**
- **Independent hearings make agencies accountable for their actions.**
- **Independent hearings give the public true due process in an impartial professional setting.**

1. **HJR 18 will save the state money, will enrich the private sector, and will restore public confidence in government.**
2. **HJR 18 is the most sweeping positive government reform measure we have to offer our constituents. It is both a corrective and a permanent protective step on behalf of those who deal with the long sticky tentacles of government.**
3. **HJR 18 will restore due process to the people and require the bureaucracy to treat people fairly, with the dignity and respect set out in Article I, section 7.**

Division of Administrative Hearings



BIENNIAL REPORT
to the
GOVERNOR
and the
GENERAL ASSEMBLY

June 1996

Division of Administrative Hearings
General Support Services
Department of Personnel

STATE OF COLORADO

GENERAL SUPPORT SERVICES
DIVISION OF ADMINISTRATIVE HEARINGS

The Chancery
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Roy Romer
Governor

Department of Personnel
André N. Pettigrew
Executive Director

Edwin L. Felter, Jr., Director
and Chief Administrative Law Judge

THE HONORABLE ROY ROMER
Governor, State of Colorado
and
MEMBERS OF THE GENERAL ASSEMBLY

Dear Governor Romer and Members of the General Assembly:

This document is the fifth periodic report from the Division of Administrative Hearings, General Support Services.

This report describes the operation of the Division, includes accomplishments of the Division; a brief review of similar operations nationwide; an organization chart; customer agencies; budget; case statistics; backlog analyses; the recent judge and support staff evaluation survey conducted by the Office of State Planning and Budget; and, most importantly, a summary of the Division's journey into the world of quality excellence and customer satisfaction.

Edwin L. Felter, Jr.

APPROVED:

André Pettigrew, Executive Director

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Cover Photo by Sally Brown

BIENNIAL REPORT TO THE GOVERNOR

PROFILE

The Division of Administrative Hearings, a Division of General Support Services, was created in 1976, first as the Division of Hearing Officers. Enabling legislation is contained in C.R.S. §24-30-1001 *et seq.* In 1987, House Bill 1049 was signed into law, changing the name of the Division to the Division of Administrative Hearings; and, the designation "Hearing Officer" to "Administrative Law Judge." Also, H.B. 1049 gave the Executive Director of the then Department of Administration specific authority to promulgate procedural rules for the Division of Administrative Hearings [C.R.S. §24-30-102(2)(h)]. Procedural rules were, in fact, promulgated and became effective on August 1, 1987. *See*, 1 CCR 104-1.

The last major revision of the procedural rules became effective on April 1, 1993. A statute adopts the Code of Judicial Conduct for State Central Panels. H.B. 94-1304 [C.R.S. 24-30-1003(4)(a) through (b) (1995 Cum. Supp.)]. A substantive rule, adopting the Code of Judical Conduct, took effect on December 30, 1994 [1 CCR 104-2] and it fully sets forth the Code. The Rules of Practice track the Rules of Civil Procedure as much as practicable.

The Colorado Rules of Evidence apply in all proceedings before administrative law judges from the Division. On rare occasions, the administrative law "reasonably trustworthy" hearsay exception may be invoked.

In workers' compensation cases, Division of Workers' Compensation Rules of Procedure, Rule VIII, covers most workers' compensation adjudication situations. Workers' compensation adjudication rules are presently being prepared by the Division of Administrative Hearings. S.B. 94-193, effective July 1, 1994, gave the workers' compensation adjudication program, lock, stock and barrel to the Division of Administrative Hearings, General Support Services. Administrative Hearings does not act on behalf of the Division of Workers' Compensation in workers' compensation adjudications. It has original concurrent jurisdiction with the Director of the Division of Workers' Compensation. As a practical matter, the public requests a hearing directly from the Division of Administrative Hearings. [*See*, C.R.S. 8-43-103, 202 & 209 (1995 Cum. Supp.)]

In the 1995 Session of the General Assembly, a provision providing for the transfer of administrative law judges, who handle workers' compensation matters, to the Department of Labor and Employment in 1997 was repealed [S.B. 95-199, C.R.S. 8-47-101(3)(b)(i)], thus, securing the judicial independence of Colorado's Central Panel.

The Division of Administrative Hearings (DOAH) provides adjudication services for various state agencies, *e.g.*, Division of Workers' Compensation, Department of Labor of Employment, Human Services, Regulatory Agencies, Secretary of State, Insurance Division, Banking Division, Adult and Juvenile Parole, and Teacher dismissal cases. The Division is cash-funded and operates on a break-even basis. Small agencies that use this service infrequently have access to professional adjudication services on an as-needed basis and at a low cost. The **mission statement** of the Division is: **TO DELIVER HIGH QUALITY ADJUDICATION SERVICES FOR THE STATE OF COLORADO IN A TIMELY, EFFICIENT AND COST-EFFECTIVE MANNER, WITH RESPECT FOR THE DIGNITY OF INDIVIDUALS AND THEIR DUE PROCESS RIGHTS.**

Administrative Law Judges ("A.L.J.s") in the Division are required to be licensed to practice law in the State of Colorado and have five years experience as a lawyer or a judge. [C.R.S. 24-30-1003(2)] The average experience of an A.L.J. in the Division is ten years or more. Recent judge evaluation surveys, sent to attorneys who practice before the Division, reveal that the A.L.J.s function at an overall high approval

rate. The Division has regional offices in Colorado Springs, Grand Junction, and Ft. Collins. The Pueblo regional office was consolidated into the Colorado Springs office in early 1994.

Recent case statistics reveal that each individual A.L.J. is able to work more efficiently by producing more decisions in less time than in the past. Also, each individual A.L.J. spends more time in the hearing room now than in the past, without any decrease in his or her ability to produce decisions. Overall decisions increased by 10% from FY 93/94 to FY 94/95. Overall decisions per A.L.J. increased from 918 per A.L.J. in FY 93/94 to 1018 in FY 94/95.

On July 16, 1992, the report of the State Auditor, concerning a performance audit of the Division as a whole, was released by the Legislative Audit Committee, General Assembly. The Division took a total quality management approach to implementing all of the audit recommendations and it used teams of A.L.J.s and support staff to implement each recommendation. As a result of the audit, the Division developed tightened time standards for providing hearings in regulatory agency cases (cases are now ordinarily set within 90 days from the setting date), enhanced communication with client agencies including town meetings with client agency program administrators. The recommendation of the State Auditor for the Division to develop a computerized case tracking system for regulatory agency and social services cases has been implemented and will be fully operational in July 1996. Overall, the Legislative Audit Committee of the General Assembly was highly complimentary of the Division's performance and progress in implementing audit recommendations by the date of the audit hearing.

Effective January 1, 1995, the Colorado Division of Insurance dropped workers' compensation premiums 9.6%. This was for one fiscal year. Prior to Senate Bill 218 (the Workers' Compensation Reform Package of 1991), workers' compensation insurance premiums regularly went up in double digits. Since the effective date of S.B. 218 (July 1, 1991), the Division of Administrative Hearings has played a substantial role in decreased premiums by administering a streamlined adjudication system without sacrificing due process (premiums have gone down 22% since the effective date of S.B. 218).

On February 9, 1993, the Division underwent a Legislative Audit Committee hearing on its worker's compensation adjudication program. The Committee was highly complimentary of the Division's performance under S.B. 218. Senator Tilman Bishop, President *Pro Tem* of the Senate, invoked a personal privilege on the floor of the Colorado Senate on Wednesday, February 10, 1993, praising the Division for its outstanding performance in reducing the backlog in workers' compensation cases by 95%; by providing hearings in 1/3rd the time it provided them before July 1, 1991 (within an average of 88.2 days as opposed to the previous 263.8 days); and, in rendering decisions in 1/5th of the time utilized prior to July 1, 1991 (9.6 days as opposed to 49.1 days). The Legislative Audit Committee praised the Division for doing more with less. The tight time lines continue to be met today.

In 1984, the Division pioneered telephone hearings, by consent, in social services cases, thus, effecting substantial savings to the Department of Human Services.

In 1995, the Division implemented a mediation pilot program for regulatory agency cases. The program is well underway and many licensing board cases have been successfully mediated. Mediation of licensing board cases is a cutting-edge concept in the United States. Arizona first pioneered the concept.

In addition to adjudications, the Division conducts agency training programs on an as-needed basis. As a matter of fact, the Division trains agency personnel to conduct less complicated hearings where it would not be cost-effective for the Division to conduct these hearings for the agency.

Since 1991, the Division has become more and more deeply involved in the total quality concept, applying the principles of total quality to adjudications in legitimate areas of expectation. In 1994, the Division received two Governor's Total Quality citations: (1) one of nine organizational citations for the Division (among over 100 state government organizations); and, (2) one team citation for the workers' compensation team that streamlined docketing processes.

HISTORY, ACCOMPLISHMENTS and BASIC FACTS CONCERNING THE DIVISION OF ADMINISTRATIVE HEARINGS

The Division of Administrative Hearings began operations in 1976 (as the Division of Hearing Officers). At that time, the Division became an independent central panel of administrative law judges. Shortly thereafter, in April 1977, a study done by the Division of Management Services, Department of Administration, revealed that cases were handled more efficiently by the new Central Panel (or Corps) than by previously decentralized Hearing Officers. The report specifically noted as follows: "The Hearing Officers as a group are dedicated and methodical in the hearing process. No instances of undue delay were observed due to Hearing Officer quandary or indecisiveness." The report recommended as follows: "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."

In 1980, statistical research revealed that the centralized Division was able to handle workers' compensation cases more economically than the Division of Labor's Hearing Officers prior to the consolidation of 1976. Prior to the centralization in 1976, there were approximately 40 Hearing Officers -- some full time on the state payroll, some part time on the state payroll and some under contract with the various agencies. After the consolidation in 1976, there were 12 full time Hearing Officers on the state payroll.

Immediately after the consolidation of 1976, there was a sparsity of financial data to compare "before and after" costs. However, the second Director of the Division,* in 1979, compared the average cost of handling an average workers' compensation case before the 1976 consolidation, as referenced above, and two years later, in 1978; and, the data revealed that the cost of handling an average workers' compensation case two years after the consolidation, was $2 less. Although there is a paucity of empirical financial data from the mid-1970s, certain probabilities emerge. When a specific agency has a Hearing Officer on the payroll, the Hearing Officer is sometimes redeployed into positions such as serving as informal house counsel during down times. There have even been instances in the past where a Hearing Officer was placed in charge of a minor construction project during a cyclical down time in the hearing business. Contract Hearing Officers must be paid a fairly high hourly rate, although much less than prevailing legal fees, and someone must administer the contracts. The Division of Administrative Hearings did a **privatization** study in 1990 and found it would cost almost twice as much to have contract Hearing Officers serve the same function as staff administrative law judges, including administration of the program.

A centralized panel of judges achieves an efficiency of scale; cross-training whereby all of the administrative law judges are generalists; and, efficient case distribution whereby all of the judges are busy, all of the time, hearing and deciding cases, which is the principal and only function of a centralized panel.

In 1982, the Governor's Management and Efficiency Committee noted as follows: "The current M&E Committee notes that in 1976, the Workmen's Compensation referees of the Department of Labor and Employment were transferred to the newly created Division of Hearing Officers in the Department of Administration. The legislative intent for such a transfer was to avoid the appearance of conflict of interest within the Department of Labor and Employment and to create a separate State Administrative Law system to decide administrative cases. The Hearing Officers were to be independent of the agencies over whose claims they had jurisdiction."

"The Committee urges the State to consider the establishment of an administrative law court. While this recommendation may go beyond the scope of the Committee's charge and clearly affects other agencies not investigated by this Committee, a study may indicate significant advantages to the State in creating an administrative law court."

* Suzanne Harvey Lynch

In 1983, the Division of Administrative Hearings implemented word processing. At the present time, there are five full time word processors doing all of the word processing work for the Division. Also, each administrative law judge has a computer terminal for the purposes of doing some word processing of decisions and case management. Increases in billing rates, from year-to-year, have occurred to help fund salary survey increases, merit increases and increases in operating expenses. In the fall of 1989, the Division converted its computer system from a WANG system to an IBM system. The Division set up a computer case tracking system, with local area network (LAN), in FY 94/95.

In 1988, John H. Lewis, at the request of the General Assembly and the Colorado Division of Labor, did a study of the workers' compensation system in Colorado and found that the administrative law judges, doing workers' compensation cases, worked well, in fashioning remedies, with, according to Mr. Lewis, a poorly worded Workers' Compensation Act. Mr. Lewis had considerable praise for the administrative law judges, indicating that they had been required to perform many tasks other than adjudication in order to continue to make this system function. He recommended a stronger administration-based system whereby the administrative law judges would be liberated to perform their principal function, *i.e.*, to hear and decide cases involving genuine controversies incapable of mediation or settlement. As of this report, Mr. Lewis' recommendation has become a reality with the newly created Division of Workers' Compensation running an administration-based system with prehearing procedures, including settlement conferences; and, the administrative law judges of the Division of Administrative Hearings confining their activities to stricter adjudication functions.

A recent informal survey of client agencies revealed that the agencies, in legitimate areas of expectation, believe the centralized panel takes them out of conflict of interest situations and provides a highly professional, impartial adjudication mechanism that is well-received by attorneys who practice before the Division; also, that the Division provides quality hearings and renders high quality decisions. Most agencies' concerns (in the negative sense) involve outcomes. More specifically, some agency personnel have indicated preferences that the administrative law judges be more agency-oriented in thinking although these agency personnel understand and accept that this is not appropriate for Central Panel administrative law judges. This sentiment is understandable, since the agencies have an investigation and prosecution function.

A periodic judge evaluation survey was first implemented in 1982 and has been continued, the most recent having been released by the Office of State Planning and Budgeting on April 8, 1996. The 1996 survey results demonstrate the A.L.J.s have performed at a high professional level and have earned the respect of practitioners on both sides of the aisle. The survey reflects that A.L.J.s tend toward the middle-of-the-road in their decisions. As a matter of fact, between the last survey (December 31, 1992) and the most recent survey (April 8, 1996), overall performance of all administrative law judges in the Division went up from 88% to 97%. For workers' compensation judges, the approval rate went up from 85% to 91%. In the 1996 survey, the support staff was surveyed, for the first time, and received an overall 96% approval rate.

Beginning in 1983, the Division commenced agency training programs for Social Services; sponsored continuing legal education programs and administrative law seminars for practitioners; and, contributed significantly to numerous workers' compensation and licensing seminars. In November 1990, the Division moved to The Chancery, 1120 Lincoln Street, Suite 900 and the Department of Labor and Employment provided facilities for the workers' compensation operation in Suite 1405 through July 1, 1995. On July 1, 1995, the Division of Workers' Compensation, Department of Labor and Employment, having moved to 1515 Arapahoe in lower downtown, discontinued, per agreement, financial support for the Division of Administrative Hearings' Workers' Compensation Adjudication Program and the entire operation of the Division of Administrative Hearings, including workers' compensation adjudication, consolidated on the 14th floor of the Chancery on July 1, 1995. The additional rental expenses were to be captured by a $12 an hour increase in the billing rate (from $77 an hour to $89 an hour). At present, there are five hearing rooms for all administrative law cases handled by the Division in Denver, plus three conference rooms. These physical plant accomplishments add to the overall decorum of the administrative law system in the State of Colorado.

In 1988, with no fanfare whatsoever, all A.L.J.s began wearing robes in formal courtroom settings. Philosophically, the robe sends a message to those not familiar with administrative law that a fair and

impartial judge, who is not connected with the agency, will exercise control over the proceedings and render a fair and impartial decision.

In conjunction with the Workers' Compensation Section of the Colorado Bar Association, the Division began a "Settlement Week" project, in 1990, to alleviate the hearings backlog. The settlement week occurred in December 1990 and 40% of all targeted cases were settled. After the adoption of S.B. 218 (July 1, 1991), the new Division of Workers' Compensation created a pre-hearing program, making future "Settlement Week" projects unnecessary. In 1994, the General Assembly gave specific statutory authority to the Division of Workers' Compensation to employ pre-hearing administrative law judges to streamline issues for hearing (C.R.S. 8-43-207.5). This system has worked in the same fashion that a system of magistrates and judges work.

The A.L.J.s in the Division have endeavored to maintain a leadership role in the field of administrative law. One A.L.J. has taught administrative law at the University of Denver College of Law. Another A.L.J. has been the column editor for the Administrative Law Column of *The Colorado Lawyer*, the official publication of the Colorado Bar Association. He also is President-elect of the Rocky Mountain Chapter of the Industrial Relations Research Association in 1995/96 and will be President in 1996/97; Chair of the Administrative Law Committee of the Colorado Bar Association from July 1993 to June 1995; and, presently, Chair of the Colorado Bar Association Alternative Dispute Resolution Committee's Subcommittee on Alternative Dispute Resolution in Government. This administrative law judge, Marshall A. Snider, has written numerous articles for the Administrative Law column of the *Colorado Lawyer*, and was Chair of the Denver Bar Association Docket Committee in 1992/93. He presently teaches a course in commercial and labor arbitration at University College at the University of Denver.

Each administrative law judge, who handles workers' compensation matters, has taught extensively in workers' compensation continuing legal education programs and served as a judge for the National High School Mock Trial Championships in May 1995. One administrative law judge, Martin D. Stuber, who handles workers' compensation matters, is writing a chapter for a volume on Workers' Compensation for the Colorado Practice Series. Another administrative law judge, who handles workers' compensation cases, Morgan Rumler, taught at the University of Denver Law School's "Legal Process" class for one year.

Relevant representative articles published by Division administrative law judges, in scholarly journals, include:

"Professional Responsibility Issues in Administrative Adjudication: A Colorado Perspective", Schulman, Judith F; 2 *B.Y.U. Journal of Public Law* 269 (No. 2, 1988); "How to Lose an Administrative Law Case," Snider, Marshall A.; 19 *Colorado Lawyer* 2037 (No. 10, 1990); "Understanding Administrative Fact-Finding," Snider, Marshall A.; 20 *Colorado Lawyer* 1607 (No. 20, 1991); "Work Related Heart Attacks and Mental Illness: Medico-Legal Implications," Felter, Edwin L., Jr.; 31 *Trauma* 23 (No. 3, Oct., 1989); "Workers' Compensation Claims for Heart Attack and Mental Illness," Felter, Edwin L., Jr.; 33 *Medical Trial Technique Quarterly* 308 (No. 3, 1987); "An ALJ's View: the New Unified Hearings in Workers' Comp Cases," Felter, Edwin L., Jr.; 18 *Colorado Lawyer* 2327 (No. 12, Dec., 1989); "Colorado's Central Panel of Administrative Law Judges: The Hidden Executive Branch Judiciary," Felter, Edwin L., Jr.; 19 *Colorado Lawyer* 1307 (July 1990); updated in 14 *Journal of the National Ass'n of Administrative Law Judges 95 (No. 1 Spring, 1994);* "Workers' Compensation Fraud: 'Trashing the System,'" Felter, Edwin L., Jr.; 20 *Colorado Lawyer* 1219 (No. 6, June, 1991); "Salvaging the Impaired Physician," Felter, Edwin L., Jr.; 34 *Trauma* 55 (No. 1, June, 1992); "The Physician's Duty to Assist Patients in the Legal Process," 35 *Trauma* 81 (No. 5, Feb. 1994); Felter, Edwin L., Jr.; "The Physician's Duty to Testify," Felter, Edwin L., Jr.; 36 *Trauma* 69 (No. 5, Feb. 1995); "Life After S.B. 218," Felter, Edwin L., Jr.; 21 *Colorado Lawyer* 1425 (No. 7, July, 1992); "Administrative Law Adjudication For the Twenty-First Century," Felter, Edwin L., Jr.; 24 *Colorado Lawyer* 993 (No. 5, May 1995); and, "Litigants Without Lawyers" Felter, Edwin L. Jr.; which will appear in *The Colorado Lawyer* in June, 1996.

In 1995, Chief Judge Felter was elected as a member of the Executive Committee of the National Conference of Administrative Jaw Judges, American Bar Association. Judge Felter is the winner of the 1994 Fellowship in Administrative Law, National Association of Administrative Law Judges, for his paper, "Adjudication Quality: The Only Way to Reduce Costs in Delays," 15 *Journal of the National Association*

of Administrative Law Judges 5 (No. 1, Spring 1995). Judge Felter developed a Model Code of Judicial Conduct for State A.L.J.s, endorsed by the National Conference of Administrative Law Judges, A.B.A., in August 1995.

On balance, the centralized panel in Colorado has developed administrative law judges with more expertise in certain areas, *e.g.,* medical board matters, than state district judges or federal district judges; and, the Central Panel, because of its independence, has created a high degree of professionalism which, in turn, has fostered considerable respect for the Division among members of the Bar. As mentioned earlier, the most recent Administrative Law Judge Evaluation Survey reveals that the Division of Administrative Hearings, as whole, functions at a 97% approval rate, as opposed to 88% at the end of 1992. Besides speaking and publishing extensively, the administrative law judges are recognized experts in their fields.

The Central Panel system has had an enormously positive effect on the State of Colorado. The old perception (involving agency Hearing Officers) that the outcome of a case would be agency-oriented, since the agency Hearing Officer generally reported to the same agency director who supervised the investigation and prosecution of the case, no longer exists in Colorado. Citizens and attorneys have a strong perception they will receive a fair, professional, efficient and impartial hearing from the Division of Administrative Hearings. The most compelling evidence of this is that the organized Bar is consistently advancing initiatives to strengthen the Central Panel system in Colorado. One specific example involves an initiative of the Colorado Bar Association Administrative Law Committee in 1994, to make the use of the Division of Administrative Hearings, by agencies, mandatory without exception. The same committee also advanced an initiative to give the administrative law judges in the Division final agency action authority in all cases. The Division of Administrative Hearings resisted these initiatives because the initiative involving "mandatory use" is politically unrealistic; and, the initiative involving "final agency action authority" is not appropriate since agencies should maintain control over final agency action authority because of their specific expertise.

PERFORMANCE MEASUREMENTS OUTCOMES AND PROGRAM EFFECTIVENESS

Determining Customer Requirements and Expectations

How the Division Determines Current and Future Customer Requests and Expectations.

Determining customer requirements and expectations involves three critical performance measurements: (1) direct solicitation of customer requirements and expectations up front; (2) specific customer surveys concerning requirements and expectations; and (3) an objective assessment of customer praises and customer complaints followed by implementation of improvements based upon customer complaints and continuation of actions, based upon customer praises.

Formal data collection entails the use of judge evaluation surveys and client evaluation surveys. The information sought involves timeliness of hearings and decisions; quality of adjudications regardless of whether or not the survey respondent won or lost the case; and, satisfaction with the way individuals were treated, in the process, by all Division of Administrative Hearings' personnel. Client surveys are designed to measure overall client satisfaction in legitimate areas of expectation, *e.g.*, timeliness and quality of adjudications (regardless of whether or not the party won or lost) with some control questions to rule out the "sour grapes" or "walk-on-water" factors. At a more informal level, a detailed system of handling complaints is in place to the end of assessing these complaints and using legitimate customer complaints to improve the procedures, processes and performance of the Division. The underlying philosophy of complaint resolution in the Division is that the Division takes all complaints very seriously. So seriously that the "CEO of the Division" personally resolves these complaints. Complaints pointing to the need for improvement in the delivery of services are discussed by action teams in the Division and result in recommended and implemented improvements in policies and procedures involving the delivery of services.

The Division strives to communicate realistic, but effective, time expectations to clients; while, at the same time, maintaining much tighter internal standards concerning timeliness so that users of the Division's adjudication services will have their expectations concerning timeliness, as a rule, met ahead of time to further the "delight" factor as opposed to the mere "satisfaction" factor.

At an informal level, supervisory personnel maintain weekly, and sometimes daily, contact with client agency personnel, generally by telephone, concerning the quality of services being provided (contacts with a representative sample from the public sector are less frequent than agency contacts; however, these are done on approximately a weekly basis and the Division is constantly striving to open channels of communication between members of the public and Division staff in order to spot any problems with the delivery of services). The Division strives to correct problem areas in a timely fashion and communicate this to clients of the Division in a timely fashion in order to maintain a high confidence level among members of the public.

All data from the formal surveys, the complaint-praise process and person-to-person contact with clients are compared in order to detect any trends in customer dissatisfaction, further investigate the same, and promptly correct areas of dissatisfaction in order to maintain a high level of customer satisfaction and, preferably, to achieve customer "delight."

a. Each market segment (of Division clients) has a set of different expectations and requirements. Therefore, customer satisfaction in workers' compensation cases is gauged differently from customer satisfaction in social services' cases; and, it is gauged entirely differently in regulatory law and other-type cases. The Division has adopted a flexible approach to meet different customer expectations requirements. The Division's approach is "tell us what you need in terms of turnaround time and we will meet it one way or another." Time lines have been met in all but the rarest of exceptions. Besides telephonic contacts with agency personnel, the Division conducts "town meetings" with key agency personnel to give the agencies a forum to air, and in many cases have resolved, their concerns about the delivery of adjudication services by the Division.

b. **Process for determining product and service features and relative importance of these features to customers and/or customer groups.**

The critical features of adjudication services involve quality and timely adjudications that are designed to be respected by the parties and appellate tribunals. Realistic expectations concerning timeliness of hearings and decisions are communicated to clients while, at the same time, the Division maintains tighter internal timeliness standards in order to frequently meet client expectations ahead of time, thus, striving to achieve the "delight" factor as opposed to the mere "satisfaction" factor. An analysis of appellate decisions, dealing with Division decisions at the lower level, is made and communicated to clients, first, by the appellate tribunals themselves and, second, through contact with clients of the Division.

The support staff of the Division exists to further the goal of quality and timely adjudications. The product feature of the support services involves courteous, prompt and helpful dealings with all clients of the Division's adjudication services. This is measured through surveys, contacts and an analysis of communications (from clients) of praise and complaint.

Public clients and client agencies expect timely resolutions of disputes, regardless of outcome, that will generally stand up on appeal. An analysis of the Division's timeliness and quality of adjudications is matched with these client expectations; and, the matching is communicated to client agencies and feedback is received from them concerning areas for improvement. The feedback is analyzed, reported and reproduced, in objective form, in reports issued by the Division in order to measure outcomes and program effectiveness.

c. **How the Division evaluates and improves its processes for determining customer requirements and expectations as well as the key product and service features.**

The data collected above is analyzed by Division teams and recommendations for the implementation of improvement steps are made. Thereafter, the teams embark on implementing the improvement of processes to meet customer requirements and expectations in the delivery of adjudication services.

ACCOUNTABILITY OF CENTRAL PANELS

"Accountability" of adjudication organizations is the byword of the 1990s; no doubt, it will also be the byword of the early part of the 21st century. "Accountability" of administrative law adjudication organizations is a reality. In the judicial branch in Colorado, there are now judicial performance commissions whose mission is to evaluate the performance of State District Judges. In 1994, one District Judge was voted out of office because the regional Judicial Performance Commission issued a negative report on the judge. The Judicial Branch will be seeing more of judicial performance commissions, or their counterparts, as the 21st Century approaches. Since administrative law adjudication organizations are not constitutional organizations, insulated from accountability measures demanded of other governmental organizations and private businesses, they are challenged to constantly meet customer demands. If they are not accountable, they will disappear from the legal landscape and fade back into the agencies from which they came. Also, if they do not develop better performance measurements, a combination of non-lawyer interest groups and non-lawyer legislative analysts may make these determinations in the future.

Measurements

Courts have traditionally measured output of processes; for example, the number of cases handled or referred and the turn around time when the case is handled. To prove they are, in fact "accountable," adjudication organizations must concentrate more on measuring program effectiveness. This concerns the level of customer satisfaction with quality of adjudication and policy effectiveness: "Would customers want a higher volume of adjudications turned around in a more timely fashion?; or, would they want more alternative dispute resolution activities?"

For years, the Colorado Division of Administrative Hearings was measured by the number of cases referred by the agencies (docketed). Subsequently, the cost per case referred was added as a measurement. Both measurements are not relevant to the amount of work done by any administrative law judge. In fact, these measurements have a tendency to misstate the actual work load and to not be that helpful to client agencies when they plan their own adjudication needs.

The Division considers the most relevant measurement factor to be "cost per decision issued". When carefully analyzed, cases referred may never be seen by a judge, much less handled. "Cases heard" as a measurement factor is better, but not the best reflection of all the work done by an administrative law judge. On the other hand a "decisions rendered" measurement reflects the ultimate product of cases heard, substantial motions handled and settlement conferences conducted. Decisions are the end product of an adjudication organization. They are the ultimate reflection of the work actually done by the judges from which quality and quantity can be most objectively measured.

In fiscal year 1992/93, the overall average cost per decision rendered by the Division was $170. For fiscal year 1993/94, the average cost per decision rendered dropped to $160. This occurred at a time when the hourly billing rate went up from $67 an hour in 1992/93 to $77 an hour in 1993/94. In fiscal year 1994/95, the cost per decision rendered dropped to $153. These figures establish substantially increased efficiency by Colorado's Central Panel, and there is not the slightest hint of improper incursion on judicial independence.

A most effective indicator of "accountability" involves a measurement of public perceptions by the knowledgeable principal players in the system. As indicated earlier, the OSP & B Judge and Support Staff Evaluation Survey for 1996 reflected an overall approval rate of 97% for judges and 96% for support staff. The approval rate for judges went up nine points since December 31, 1992, when it was 88%.

Another way the Division measures customer satisfaction, in addition to the Judge Evaluation Survey, is the use of appropriately designed surveys of parties and members of the public, using relevant control questions. It is important for an adjudication organization to know how it is perceived by non-lawyer

customers. To wait for the non-lawyer customer to find out the name of the Chief Judge and write a letter of complaint, after suffering an indignity, will give a lop-sided view of customer perceptions.

It does not take a lengthy litany of questions to survey effectively. Without effective instruments to receive anonymous feedback it would be difficult for an adjudication organization of the future to know whether it is continuing to do the right thing. It would even be difficult for it to realize whether or not it was doing things right.

Total Quality Management or Citizen Focused Quality – Where We Are

Judge Jerome Frank, who first published *Courts on Trial* 50 years ago, observed that courts often do their jobs, with tragic results, in ways that need reform. This is no less true today. Judge Frank's philosophy of judicial realism involves a simple proposition "Let's not kid ourselves about what we really do." He makes it clear that judges are not involved in mystically ascertaining the divine will concerning justice. Judges are involved with processes, the most important of which is resolving disputes. Processes can be continuously improved, or even re-engineered, if they are not meeting current market demands. This includes current market demands by the consumers of judicial products.

Administrative law is in the beginning stages of embracing total quality management. Other central panels have shown a keen interest in TQM and many have embarked on full-blown programs. What is TQM? Perhaps a better way to describe it is citizen-focused-quality or CFQ.

CFQ involves a shift in the way we think about things. It involves a "paradigm shift." Businesses and government agencies have been changing processes for a long time -- to meet their internal needs. In the 1980s, businesses began undergoing significant paradigm shifts to deal with processes to meet their customers' needs and demands. By the late 1980s and early 1990s, government agencies began undergoing the same paradigm shift, with the customer being the paramount consideration.

Central panel adjudication organizations are ideal laboratories for the development of CFQ. If anything, an administrative law adjudication organization is stocked with numerous processes. The primary focus of a quality approach is to attack the processes and not the people in the organization. After attacking the processes, the focus shifts to improving those processes continuously and to being able to measure the improvements objectively. The purpose for doing all of this is to deliver greater customer satisfaction. Underlying all quality efforts is the philosophy that all is for naught unless the customer is fully satisfied.

Adjudication organizations of the 21st Century must be proactive in developing full blown quality programs. It is no longer merely nice to anticipate the needs of tomorrow's litigant, it is *indispensable* for survival. Administrative law adjudication organizations are in the forefront to implement quality programs.

Leadership and Empowered Support Staffs

Once launched, leaders of a quality organization must not only believe in a quality program but must "walk-the-talk" (do as they say). If leaders do not walk-the-talk, the organization might as well forget about a quality program and concentrate on refining the 19th Century Frederick Taylor-style assembly line. According to Peter F. Drucker, one of the management gurus of our times, "Management's job is not to command . . . it is to direct." True leaders do not make people do what they want them to do. True leaders are those who make people want what they want.

Regardless of the terminology, what counts with empowered support staffs is how members of the organization are treated. Are they treated as servants or as associates who carry out their respective missions for the greater good of the organization so that they can deliver value to the customers. The real key to empowerment is the leader *letting go!* Leadership must proceed from the premise that it can

trust at least 90% of those in the work force. If it cannot, leadership has a serious judgmental problem stemming back to the hiring process.

Some factors have been developed to distinguish genuine teams from task forces: (1) shared leadership roles rather than a single leader; (2) individual and mutual accountability rather than individual accountability; (3) a team purpose that the team delivers rather than a group purpose which is the same as the organization mission; (4) collective rather than individual work products; (5) open-ended discussion and active problem solving meetings rather than "efficient" meetings; (6) performance measurements that assess collective work products rather than to concern themselves with influencing the larger organization; and, (7) discussions, decisions and real teamwork rather than delegating to others. Effective teams develop a strong commitment to a common approach.

Privatization of adjudications is a real possibility. Rent-a-Judge organizations are cropping up throughout the United States. If prisons can be privatized, one might argue why can't courts be privatized. Administrative law adjudication organizations are constantly under scrutiny for fairness, cost-effectiveness and speedy resolution of disputes. It is legitimate to consider that privatization may be a way to accomplish these objectives. From a philosophical standpoint, privatization of adjudication services would appear to be contraindicated to the need for an established, experienced and centralized group of decision makers which, among other things, has established credibility in the community. The Colorado Division of Administrative Hearings is constantly benchmarking its activities to other Central Panel adjudication organizations, to the courts and to imagined competitors. When quality culture exists in an adjudication organization, its accomplishments can be measured and its successes proven, the organization will survive and prosper in the 21st Century. All of this is based on the assumption that the changing demands of the market place will continue to be met. At present, a demand for alternative dispute resolution is paramount. Those organizations that do not offer a meaningful ADR program will "eat dust." Those that do, will "make dust."

REGULATORY AGENCIES/OTHER
FY 94/95

		Hearings		Decisions		
	Docketed	Merits	Procedure	Merits	Procedure	Mediations
Accountancy Bd.	2	0	0	3	11	0
AdultParole	63	19	0	0	0	0
Agriculture	1	4	3	1	7	0
Anti-CC. Bd.	1	0	4	0	9	0
Architect Bd.	1	0	1	0	3	0
Barber/Cosmet. Bd.	4	0	0	3	8	0
Chiropractic Bd.	3	0	8	0	17	0
Civil Rights	7	0	3	2	22	0
Collection Agency Bd.	5	0	0	1	6	0
DBE	12	1	1	2	12	0
Dental Bd.	5	0	5	2	16	2
Education	13	0	3	3	14	0
Electrical Bd.	3	2	0	1	5	0
Enginrs/Land Sur. Bd.	6	0	0	2	12	0
GJTO	0	1	0	1	0	0
Grievance Bd.	1	0	0	0	8	0
Health Dept.	1	1	3	1	6	0
Highways	3	1	2	0	9	0
Insurance Div.	79	2	10	19	90	0
Labor Relations	1	0	0	0	1	0
Lottery	2	1	0	0	2	0
Medical Bd.	19	3	15	9	59	0
Midwives Bd.	1	0	1	0	1	0
Nursing Bd.	82	11	19	64	175	0
NH Administrator Bd.	3	0	0	0	3	0
Optometric Bd.	1	0	0	0	0	0
Outfitters & Guides	6	1	2	2	1	0
Pharmacy Bd.	5	1	2	2	13	0
Physical Therapy Bd.	4	0	2	1	7	0
Podiatry Bd.	2	1	3	0	3	0
Psychology Bd.	5	4	2	2	13	0
Real Estate Apprs. Bd.	3	1	1	2	11	0
Real Estate Div.	18	3	7	8	24	0
Securities Div.	2	0	2	1	9	0
Teacher Tenure	1	2	0	1	3	0
UCCC	1	0	0	0	1	0
TOTALS	375	62	106	139	605	2

DIV. OF ADMINISTRATIVE HEARINGS
SOCIAL SERVICES CASE COUNTS
FY 94/95

	DOCKETED	HEARINGS		DECISIONS	
		MERITS	PROC.	MERITS	PROC.
AFDC - FRAUD	197	97	18	106	25
AFDC	217	84	33	123	105
Aid to the Blind	0	0	0	0	0
AND	94	31	12	50	67
ChildCare/DayCare	13	10	1	11	6
C.R.S.P.	6	2	0	2	2
Day Care Licensing	41	10	4	11	31
Expungement	65	17	38	40	73
Food Stamp Fraud	468	274	41	318	124
Food Stamp	285	76	73	124	127
Foster Care Lic.	5	2	0	2	0
Foster Care Fee	2	8	3	10	17
Funeral/Burial	0	0	0	0	0
HCA	13	11	4	10	16
HCBS (PRO)	43	20	10	20	15
LEAP	25	13	11	18	4
Medicaid	157	89	33	134	98
Merit System	33	19	6	13	16
Old Age Pension	58	24	11	34	35
Frovider - Appeals	80	3	11	4	35
Subsidized Adoption	20	3	0	2	0
Tax Intercept/State	102	28	16	30	23
Tax Intercept/Fed.	0	0	0	0	0

	DOCKETED	HEARINGS	DECISIONS
TOTALS	1924	1146	1881

Division of Administrative Hearings
FY 95/96

APPROPRIATION BY JBC

AGENCY	APPROPRIATED HOURS	RATE - ALJ PARALEGAL	APPROPRIATED
PUBLIC HEALTH	170	$89.35/ $35.27	$15,189
HCP & F	1,993	"	$178,075
HUMAN SVCS.	6,983	"	$557,088
WORKERS' COMPENSATION	17,037	"	$1,430,104.
LABOR RELATIONS	108	"	9,650
REGULATORY AGENCIES	5,318	"	417,622
SEC'Y. OF STATE	611	"	54,593
TOTALS	**32,220**		**2,662,321**

DIVISION OF ADMINISTRATIVE HEARINGS

STAFFING SUMMARY COMPARISONS

	91/92	95/96
ALJ IV (Director)	1.0	1.0
ALJ III (Supervisory)	2.0	2.5
ALJ II (Grand Junction)	0	1.0
ALJ I	12.0	10.5
Adm. Prog. Specialist IV	1.0	1.0
Legal Assistant II	2.0	2.0
Legal Assistant I	1.0	1.0
Hearings Reporters	5.0	5.0
Program Assistants	1.0	4.0
Adm. Assistant II	0	3.75
Adm. Assistant III	0	3.6
Word Processors	5.0	0
Sr. Secretary	1.0	0
Secretary	1.0	0
Sr. Adm. Clerk	3.0	0
Clerical Assistant	1.0	0
Adm. Asst. Intern	0	1.0
TOTALS	36.0	36.35

Note: Forty-one individuals, statewide, equal 36.35 FTEs. In Denver, there are 30 individuals who equal 27.0 FTEs. 17 A.L.J.s equal 15.0 FTEs. Workers' compensation is handled by 12 individual A.L.J.s who equal 8.7 FTEs. 7 Hearings Reporters equal 5.0 FTEs.

ANALYSIS OF WORKERS' COMPENSATION ADJUDICATION STATISTICS FOR LAST THREE FISCAL YEARS

- Attached are adjudication statistics for workers' compensation, social services and all other (including regulatory law) cases for the last three fiscal years. In fiscal year 92/93, 9.0 judges rendered 11,265 decisions for a cost of $112 per decision. The hourly billing rate in FY 92/93 was approximately $67 per hour for judge services.

- In FY 93/94, 21% of all workers' compensation cases docketed with the Division of Administrative Hearings resulted in hearings on the merits. 8.2 judges rendered 11,408 decisions for a cost of $113 per decision. In FY 93/94, it was approximately $77 per hour for judge services.

- In FY 94/95 19% of all workers' compensation cases docketed with the Division of Administrative Hearings resulted in hearings on the merits. 8.7 judges rendered 12,211 decisions. The cost per decision in FY 94/95 was $112. The hourly billing rate in FY 94/95 was approximately $76 per hour for judge services.

- The decreasing ratio of hearings held to cases docketed indicates that the Division of Workers' Compensation prehearing mechanism has been successful in streamlining cases, and catalyzing some settlements, thus, a lower percentage of cases docketed result in hearings.

- In FY 93/94, there was a 14% decrease in the number of hearings on the merits held. In FY 94/95, there was a 1% increase (from FY 93/94) in the number of hearings on the merits held. The number of cases docketed has not risen dramatically. In FY 93/94, there was a 4.5% decrease in the number of cases docketed (from the previous year, FY 92/93), however, there was only a 4% increase in the number of cases docketed over three fiscal years. Considering Colorado's increasingly full employment picture and escalating economic prosperity from three years ago, increase in cases docketed is very low and can be attributed, in part, to an increase in the number of cases being resolved before hearing.

- In FY 92/93, 23% of cases docketed resulted in merits hearings and 27% resulted in merits decisions. In FY 94/95, 19% of cases docketed resulted in merits hearings and 26% of cases docketed resulted in merits decisions.

FY 92/93 (ACTUAL)

CASES DOCKETED	HEARINGS HELD	DECISIONS RENDERED	#0F FTE ALJs HEARING CASES	HEARINGS PER FTE	DECISIONS PER FTE	DOCKETED PER FTE	COST PER DECISION
11,211 (WC)	5,213 (WC)	11,265 (WC	9.0 (W.C.)	580 (W.C.)	1,252 (W.C.)	1,246 (W.C.)	$112
1,252 (S)	784 (S)	784 (S)	3.7 (S)	212 (S)	212 (S)	338 (S)	$621
348 (O)	154 (O)	160 (O)	2.25 (O)	68 (O)	71 (O)	155 (O)	$2,064
Totals:12,811	6,151	12,209	14.95	411	816	857	$170

W.C. MERITS HEARINGS	W.C. MERITS DECISIONS	# 0F FTE ALJs HEARING WC CASES	MERITS HEARINGS PER A.L.J.	MERITS DECISIONS PER A.L.J.
2,598	3,049	9.0	289	339

Note: WC = Workers' Comp.
S = Social Services
O = All Other

23 % OF W.C. CASES DOCKETED HEARD ON MERITS IN FY 92/93

FY 93/94 (ACTUAL)

CASES DOCKETED	HEARINGS HELD	DECISIONS RENDERED	#0F FTE ALJs HEARING CASES	HEARINGS PER FTE	DECISIONS PER FTE	DOCKETED PER FTE	COST PER DECISION
10,600 (WC)	5,410 (WC)	11,408 (WC	8.2 (W.C.)	660 (W.C.)	1,391 (W.C.)	1,293 (W.C.)	$113
1,578 (S)	754 (S)	1,440 (S)	3.8 (S)	198 (S)	379 (S)	415 (S)	$357
275 (O)	148 (O)	548 (O)	2.6 (O)	57 (O)	211 (O)	106 (O)	$644
Totals:12,453	6,312	13,396	14.6	432	918	853	$161

W.C. MERITS HEARINGS	W.C. MERITS DECISIONS	# 0F FTE ALJs HEARING WC CASES	MERITS HEARINGS PER A.L.J.	MERITS DECISIONS PER A.L.J.
2,224	2,297	8.2	271	280

21 % OF W.C. CASES DOCKETED HEARD ON MERITS IN FY 93/94

FY 94/95 (ACTUAL)

CASES DOCKETED	HEARINGS HELD	DECISIONS RENDERED	#0F FTE ALJs HEARING CASES	HEARINGS PER FTE	DECISIONS PER FTE	DOCKETED PER FTE	COST PER DECISION
11,662 (WC)	6,035 (WC)	12,211 (WC	8.7 (W.C.)	694 (W.C.)	1,444 (W.C.)	1,300 (W.C.)	$112
1,924 (S)	1,146 (S)	1,881 (S)	3.8 (S)	302 (S)	495 (S)	302 (S)	$311
327 (O)	170 (O)	778 (O)	2.6 (O)	65 (O)	299 (O)	126 (O)	$410
Totals:13,913	**7,351**	**14,870**	**14.6**	**503**	**1,018**	**953**	**$153**

W.C. MERITS HEARINGS	W.C. MERITS DECISIONS	# 0F FTE ALJs HEARING WC CASES	MERITS HEARINGS PER A.L.J.	MERITS DECISIONS PER A.L.J.
2,250	3,052	8.7	259	351

19 % OF W.C. CASES DOCKETED HEARD ON MERITS IN FY 94/95

FY 95/96 (PROJECTED, Based on 3/4 of Fiscal Year)

CASES DOCKETED	HEARINGS HELD	W.C. MERITS HEARINGS HELD	DECISIONS RENDERED	#OF FTE ALJs HEARING CASES	HEARINGS PER FTE	DECISIONS PER FTE	W.C. MERITS HEARINGS PER ALJ	DOCKETED PER FTE	COST PER DECISION
11,556 (WC)	5,659 (WC)	2,025 (WC)	11,403 (WC)	8.7 (WC)	650	1311	233	1328	$125**
1,692 (S)	1,164 (S)		1,728 (S)	3.8 (S)	306	455		445	$425**
348 (O)	144 (O)		708 (O)	2.6 (O)	55	272		134	$702**
Totals:13,596	**6,967**		**13,839**	**14.6**	**477**	**948**		**931**	**$192****

W.C. MERITS HEARINGS	W.C. MERITS DECISIONS	# 0F FTE ALJs HEARING WC CASES	MERITS HEARINGS PER A.L.J.	MERITS DECISIONS PER A.L.J.
2,025	4,141	8.7	233	476

** Beginning on July 1, 1995, Division of Administrative Hearings assumed full costs of rent and operating costs for W.C. adjudications - Before, Division of Labor and Employment bore these costs - an increase of $175,000 per year took effect.

WORKERS' COMPENSATION BACKLOG COMPARISON

6-30-91

UNDER 20 DAYS	100
20-30 DAYS	37
30-60 DAYS	9
60-90 DAYS	0
OVER 90 DAYS	1
TOTAL	147

12-31-92

SUMMARY ORDERS

UNDER 15 WORKING DAYS	21
OVER 15 WORKING DAYS	0

SPECIFIC FINDINGS

UNDER 25 CALENDAR DAYS	14
OVER 25 CALENDAR DAYS	0

GRAND TOTAL	35

6-30-95

SUMMARY ORDERS

UNDER 15 WORKING DAYS	29
OVER 15 WORKING DAYS	0

SPECIFIC FINDINGS

UNDER 25 CALENDAR DAYS	13
OVER 25 CALENDAR DAYS	0

GRAND TOTAL	42

3-31-96

SUMMARY ORDERS

UNDER 15 WORKING DAYS	24
OVER 15 WORKING DAYS	0

SPECIFIC FINDINGS

UNDER 25 CALENDAR DAYS	14
OVER 25 CALENDAR DAYS	0

GRAND TOTAL	38

COURT REPORTER TRANSCRIPTS

The 1988 John Lewis study of the workers' compensation system noted that court reporter transcripts, in workers' compensation cases, were lodged, on the average, within 99 days from the date of request for transcript. The Division of Administrative Hearings has 5.0 FTE staff court reporters. All of the staff court reporters exclusively serve the workers' compensation adjudication system. [The Division contracts court reporter services in regulatory law cases and electronically records most social services cases]. As of October 20, 1992, court reporters were lodging transcripts, on the average, within 35 days from the date of request for transcript. As of March 31, 1996, the court reporters were lodging their transcripts, on the average, within 68 days from the request for transcripts. The explanation for the increased transcript backlog is that the A.L.J.s are spending much more time in the hearing room now, as opposed to 1992, thus, longer transcripts. Average time for lodging transcripts, by anonymous court reporter, is as follows:

COURT REPORTER #1 -	39 DAYS
COURT REPORTER #2 -	107 DAYS
COURT REPORTER #3 -	45 DAYS
COURT REPORTER #4 -	28 DAYS
COURT REPORTER #5 -	105 DAYS
COURT REPORTER #6 -	85 DAYS
COURT REPORTER #7 --	Inadequate Information available.
OVERALL AVERAGE	68 DAYS

NOTE: Included in the average time for lodging transcripts are requests for extension of time, made by the court reporters to the merits Administrative Law Judge.

COMPLAINT HANDLING SYSTEM/ DOCUMENTED COMPLAINTS AND PRAISES IN FY 94/95 AND 95/96

Complaints:

The complaint handling system of the Division of Administrative Hearings is designed to encourage formal written complaints when serious allegations are made. The Division Director either personally handles formal written complaints or is involved in the handling of a complaint by a supervisor in the Division. A telephone complaint log is maintained by the Division Director; a written workers' compensation complaint file is maintained; a written regulatory agency and social services complaint file is maintained; and, in cases of serious complaints, a separate file, concerning the specific complaint, is maintained by the Division Director.

The public is made aware of the complaint handling system through trade news releases, posting on Division bulletin boards, speaking engagements by administrative law judges and other support personnel and customer satisfaction postcards available at the Division counters where the public comes for service.

All formal complaints are investigated thoroughly. Complainants are kept posted concerning the progress of the investigation and a written response resolving the complaint is sent to the complainant. The Division Director or a supervisor handles formal complaints. At the outset, the complainant is specifically advised that a full investigation will be done and the complainant will be notified of the resolution in 30 days. If a complainant is not satisfied with the Division Director's resolution of the complaint, the complainant is advised that this may be appealed to the Executive Director of General Support Services. In a case of an ethics complaint against an administrative law judge, the complainant is advised that the provisions of the Division of Administrative Hearings' statute, C.R.S. 24-30-1001 *et seq.*, provide that the Executive Director's disposition of a complaint may be appealed to the Governor's Ethics Commission.

There were 14 written complaints against administrative law judges in FY 94/95: 12 in workers' compensation; 1 in social services; and, 1 involving regulatory agencies. There was one telephone complaint which was not followed up by a written complaint. This was satisfactorily resolved by expediting a decision that had "fallen in the cracks." Of the 14 complaints filed, two were meritorious and two others had enough merit to warrant cautioning and counseling the A.L.J.s.

The two meritorious complaints involved timeliness of decisions. One involved a workers' compensation case wherein the file "fell in the cracks" between the Division of Workers' Compensation and the Division of Administrative Hearings. The fact that the matter was ready for an order in late July 1995 and was not brought to the attention to the administrative law judge until late September, 1995, involved a process problem of movement of files between the Division of Workers' Compensation and the Division of Administrative Hearings. The Division of Administrative Hearings accepted full responsibility for the problem and resolved the matter with a sincere apology to the party and the prompt issuance of an order within a week from the time the problem was first discovered. The other complaint involved a regulatory law matter; specifically, two securities cases wherein decisions were rendered in excess of the Division's internal 60 day standard (as well as in excess of the Division's internal 90-day standard for complex cases). The judge against whom the complaint was made has a solid record of extremely high quality and conscientious decisions. The complaint was resolved by the Chief Judge cautioning the A.L.J. in question and counseling the A.L.J. to strike a better balance between quality and timeliness in order that internal time standards not be exceeded.

Representative unmeritorious complaints, generally, involve outcomes. In many instances, the Division Director must counsel the complainant that the proper recourse involves an appeal. In one workers' compensation case, the complainant, a former police officer, concerning whom the Division received information indicating a security risk, complained that the administrative law judge had a police officer in the courtroom (for courtroom security), thus, prejudicing the complainant's case. The matter was thoroughly investigated, appropriate security was warranted under the circumstances, and the Chief Judge found no prejudice to the complainant by virtue of an armed police officer being present in the courtroom.

Another workers' compensation complaint involved an injured worker who complained that the judge was prejudiced against him because the judge denied his claim for permanent total disability benefits. Complainant further complained because the judge refused to reopen his case, indicating that a "reopening" in workers' compensation cannot be used as a substitute for an appeal on the merits. The complaint was resolved by the Chief Administrative Law Judge advising the complainant that his only legal recourse, under the circumstances, would have been a timely appeal; also, that there was no evidence the judge was prejudiced against him.

One workers' compensation complaint involved an injured worker who complained that the judge only awarded him three months of temporary total disability when, in fact, "the complainant was severely disabled." At the time of the complaint, the case was pending before the Colorado Court of Appeals. The matter was resolved by the Chief Administrative Law Judge advising the complainant that he (the Chief Judge) could not comment on the case because it was pending before the Court of Appeals. One workers' compensation case, referred by the Judicial Discipline Commission to the Chief Judge of the Division of Administrative Hearings was that an A.L.J. ruled against the injured worker based on nonexistent medical reports and subsequently dismissed his petition to review because the same was not timely (not received in 20 days). The complainant complained that he had timely mailed the petition and the judge must have misplaced it. The Chief Judge discussed this with the judge in question and, ultimately, determined that the petition to review was not timely. Also, the Chief Judge determined that there was an adequate legal basis for the judge's determination against the complainant. The matter was resolved by the Chief Judge writing the complainant and informing him that a timely appeal would have been the only legal recourse for the complainant.

Another workers' compensation complainant complained that all of the witnesses had perjured themselves in her hearing and the Division's paralegal would not let the complainant communicate *ex parte* with the merits judge. The paralegal resolved the matter with a letter to the complainant outlining the legal and ethical implications of *ex parte* communication and the necessity for the complainant to file a timely appeal. Another complainant, in another workers' compensation case, complained that the A.L.J. was conducting unlawful hearings and she expected the Director of the Division of Workers' Compensation and the Chief Judge to intervene and prohibit that judge from continuing to conduct unlawful hearings. Since the hearings were allegedly unlawful, the complainant refused to appear at these hearings and the judge proceeded to take evidence and make a ruling despite the complainant's nonappearance. The issue involved the insurance carrier's motion to change the complainant's physician. The matter was resolved by a letter to the complainant advising her that if she chose not to appear at a hearing, she would have to be prepared to accept the legal consequences of that nonappearance.

Another workers' compensation complaint, by a losing party, was that the A.L.J. showed bias against the party. After a thorough investigation, including discussion with attorneys and parties present in the courtroom during the hearing plus a review of the transcripts, the Chief Judge determined that the A.L.J. had made an adverse credibility determination against the complainant. One small part of the complaint was that the judge tolerated the opposing party's attorney snickering in court. The complaint was resolved with a letter to the complainant advising of the investigation, the facts discovered and the resolution of the matter. The complaint was dismissed but the A.L.J. was cautioned not to tolerate any party's snickering in the courtroom and the complainant was so advised.

Another representative workers' compensation complaint involved judicial demeanor. Specifically, the attorney complainant alleged that the judge was "arrogant, rude, condescending, overly critical, mean spirited and impatient. . . ." The attorney complainant indicated that he had no problem with the judge's rulings or legal skills. The Chief Judge checked with other lawyers present in the courtroom at the time and these lawyers did not corroborate the complainant's complaint. As a matter of fact, the lawyers questioned felt the judge had been courteous and patient but hurried because of the enormous caseload at the time in question. The matter was resolved with a letter to the complainant advising of the resolution of the matter, specifically, that the judge had been cautioned about exhibiting greater temperance and more patience. The judge had also been cautioned to take extra pains to exhibit courtesy to attorneys even if the attorneys appear to be using courtroom time inappropriately.

Another representative workers' compensation complaint by an attorney was that the judge was disruptive and insulting to the attorney to the point that the judge was so intimidating, the attorney chose not to put on rebuttal evidence. The Chief Judge thoroughly investigated this complaint and learned that the complaining attorney rarely, if ever, appeared in workers' compensation cases and was not aware of the short time limits available for proceeding in these cases. In any event, the complaining attorney offered the complaint in a developmental sense, not in a punitive sense. The complaint was resolved by the Chief Judge counseling the A.L.J. in question to show greater patience with lawyers who do not frequently try workers' compensation cases and to be more judicious in interruptions of counsel.

One social services complaint, which was determined to be without merit, involved a complainant "who asked the Chief Judge to disqualify the social services judge because he was "rude, obnoxious and bias *(sic)*." The investigation revealed that the judge had ruled against the complainant on credibility, the complainant was somewhat disruptive in the hearing and the judge was required to exhibit more firmness than normal in order to maintain control of the hearing room. The matter was resolved with a letter to the complainant, outlining the appropriate legal recusal procedures (a motion for recusal should be addressed to the judge sought to be recused) and politely indicating that the complaint was without merit.

Praises:

Representative communications of praise involve a returned service questionnaire, postmarked April 22, 1996, wherein the respondent, to the question "Were you treated courteously?" responded "Very much so." To the question, "Were your questions satisfactorily answered?" the response was "And then some." A letter of August 1994 from a lawyer, ruled against by a judge, stated "I applaud your excellent decision . . . even though you ruled against my claim for costs. It is nice to see truth and justice in the area of workers' compensation law. . ."

A letter of May 1995, involving support staff of the Division, reads as follows: "Thank you for continually providing attention to service above and beyond the call of duty. On May 3, 1995, it came to my attention that a deposition which was supposed to have been filed in Colorado Springs for use in an immediate hearing was delivered to Denver and vice-a-versa. I greatly appreciate your efforts to swap these depositions. This constitutes exemplary service on the part of yourselves and the Division of Administrative Hearings." This letter was signed by an insurance defense lawyer, commending the paralegal in Denver and the program assistant in Colorado Springs for swapping the depositions half-way between Colorado Springs and Denver, after business hours.

1996 ADMINISTRATIVE LAW JUDGE AND SUPPORT STAFF EVALUATION SURVEY

The Governor's Office of State Planning and Budgeting, the executive branch oversight agency, conducted the 1996 Survey. The overall approval rate for A.L.J.s was 97%, 9 points higher than the 88% reflected in the 1992 survey results. For A.L.J.s handling workers' compensation cases, the 1995 approval rate was 91%, 6 points higher than the 1992 survey results. The support staff, surveyed for the first time in 1996 functions at a 96% approval rate.

Reported in full is the April 8, 1996 report of Marcelo Kort, Deputy Director of the OSP&B.

STATE OF COLORADO

OFFICE OF STATE PLANNING AND BUDGETING

114 State Capitol Building
Denver, CO 80203
Phone (303) 866-3317

Roy Romer
Governor

George H. Delaney
Director

MEMORANDUM

TO: **Edwin L. Felter**
Chief Administrative Law Judge

FROM: **Marcelo Kort** MK
Deputy Director

RECEIVED BY
DIVISION OF ADMIN. HEARINGS
APR 10 1996
APR 10 1996
EDWIN L. F...

DATE: **April 8, 1996**

SUBJECT: **Administrative Law Judge Evaluation Survey**

The Governor's Office of State Planning and Budgeting (OSPB) has analyzed the results of the 1996 Administrative Law Judge Evaluation Survey. OSPB acted as an objective third party in implementing this year's survey by verifying the random selection of respondents and collecting and analyzing all surveys independent of the Division of Administrative Hearings.

This year's survey examined the performance of 17 Administrative Law Judges. Overall the judges in the division are functioning at a 97% approval rate as shown in Table 1. Those administrative law judges assigned to workers' compensation cases functioned at a 91% approval rate, as shown in Table 2.

In addition to the administrative law judge survey, a support staff survey was also sent. The results of this survey show that overall, the support staff is functioning at over a 96% approval rate. The categories and results for each area are shown on Table 3.

The individual performance of judges, in terms of approval rate, ranged from 74% to 100%.

The 1996 survey was returned by 355 attorneys, randomly chosen, who had some contact with at least one of the judges being surveyed within the last year. The approval rate encompasses both the "Outstanding" and "Satisfactory" ratings for 14 different categories shown on the accompanying tables.

The support staff survey was returned by 149 attorneys. The approval rate encompasses both the "Outstanding" and "Satisfactory" ratings for four different offices (Denver, Colorado Springs, Grand Junction, and Fort Collins) and four categories.

TABLE 1

	Outstanding	Satisfactory	Unsatisfactory
1. Promptness in Appearing for Hearing	86%	13%	0
2. Attentiveness to the Proceedings	81%	19%	0
3. Courtesy to Witness and Unrepresented Parties	76%	21%	3%
4. Courtesy to Counsel	70%	25%	5%
5. Familiarity with the File and Adequacy of Preparation	65%	34%	1%
6. Ability to Preside, that is, Control the Hearing Process in a Firm but Fair Manner	59%	38%	3%
7. Ability to Conduct Prehearing Conferences	44%	53%	3%
8. Ability to Conduct Settlement Conferences	45%	50%	5%
9. Ability to Conduct Mediations	39%	56%	5%
10. Knowledge of General Areas of the Law, Rules of Evidence, and Procedure	52%	46%	2%
11. Knowledge of Specific Areas of Law Applicable to the Hearing	58%	41%	1%
12. Promptness in Deciding Cases	45%	41%	14%
13. Completeness and Clarity of Decisons: Legal Reasoning	49%	48%	2%
14. Conscientiousness in Finding Facts and Interpreting the Law Without Regard to Possible Public Criticism	61%	34%	5%
OVERALL	62%	35%	3%

TABLE 2

	Outstanding	Satisfactory	Unsatisfactory
1. Promptness in Appearing for Hearing	67%	30%	3%
2. Attentiveness to the Proceedings	64%	28%	8%
3. Courtesy to Witness and Unrepresented Parties	61%	32%	7%
4. Courtesy to Counsel	56%	30%	14%
5. Familiarity with the File and Adequacy of Preparation	56%	35%	9%
6. Ability to Preside, that is, Control the Hearing Process in a Firm but Fair Manner	56%	32%	12%
7. Ability to Conduct Prehearing Conferences	56%	42%	2%
8. Ability to Conduct Settlement Conferences	59%	38%	3%
9. Ability to Conduct Mediations	53%	40%	7%
10. Knowledge of General Areas of the Law, Rules of Evidence, and Procedure	51%	40%	9%
11. Knowledge of Specific Areas of Law Applicable to the Hearing	54%	38%	8%
12. Promptness in Deciding Cases	65%	30%	5%
13. Completeness and Clarity of Decisons: Legal Reasoning	47%	40%	13%
14. Conscientiousness in Finding Facts and Interpreting the Law Without Regard to Possible Public Criticism	62%	24%	14%
OVERALL	58%	33%	9%

TABLE 3

	Outstanding	Satisfactory	Unsatisfactory
1. **COURTESY**			
Denver			
Legal Assistants	60%	39%	1%
Admin. Officer	41%	52%	7%
Secretarial Support	47%	52%	1%
Court Reporters (WC Only)	59%	40%	1%
Colorado Springs			
Secretarial Support	71%	26%	3%
Court Reporters	77%	20%	3%
Grand Junction			
Secretarial Support	67%	26%	7%
Court Reporters	76%	22%	2%
Fort Collins			
Secretarial Support	74%	26%	---
Court Reporters	76%	24%	---
2. **RESPONSIVENESS**			
Denver			
Legal Assistants	57%	38%	5%
Admin. Officer	39%	56%	5%
Secretarial Support	46%	51%	3%
Court Reporters (WC Only)	48%	44%	8%
Colorado Springs			
Secretarial Support	69%	29%	2%
Court Reporters	65%	26%	9%
Grand Junction			
Secretarial Support	72%	22%	6%
Court Reporters	72%	24%	4%
Fort Collins			
Secretarial Support	64%	36%	---
Court Reporters	67%	33%	---
3. **SERVICE DELIVERY**			
Denver	37%	58%	5%
Colorado Springs	58%	38%	4%
Grand Junction	61%	39%	---
Fort Collins	37%	57%	6%
4. **TIMELINESS OF CASE PROCESSING**			
Denver	41%	54%	5%
Colorado Springs	42%	48%	10%
Grand Junction	66%	31%	3%
Fort Collins	51%	43%	6%
OVERALL	55%	41%	4%

ORGANIZATION CHART

Division of Administrative Hearings -- Denver, Colorado (303) 894-2500

Edwin L. Felter, Jr.

Director & Chief Administrative Law Judge IV -- Pos. No. 14

J. Schulman A.L.J.* I #40	M. Rumler A.L.J. III #3 (W.C.) (See Pg. 2 For Details)	J. Wells A.L.J. III #51 (Colorado Springs)	J. Heitzmann Admn. Prog. Spec. IV #20	D. Sorenson A.L.J. III #45 (Soc. Serv.)	E. Martinez A.L.J. II #4 (Grand Junction)
M. Snider A.L.J. I #36		C. Wheelock A.L.J. I #10	S. Brown Admn. Asst. III #39	D. Stimmel A.L.J. I #2	M.A. Williams Prog. Asst. I #94
N. Connick A.L.J. I #35		M. Goodenough Hrgs. Rptr. #93	P. Buyaki Program Asst. I #66	T. Moeller A.L.J. I #19	R.E. Chenoweth Hrgs. Rptr. #87
N. Hopf A.L.J. I #16		C.A. Newton Prog. Asst. I #95	P. Lopez Admn. Asst. III #38		
H. Conway Gandy A.L.J. I #34 (Fort Collins)	E. Hudson Admn. Asst. III #108	B. Henk A.L.J. I #44	D. Garcia Admn. Asst. III #24		
R. Walker Leg. Asst. II #70		S. Baldwin Admn. Asst. II #102	D. Smith Leg. Asst. I #107		
D. Chenoweth Hrgs. Rptr. #83					
N. Dorland Hrgs. Rptr. #96					
T.E. McGinn Hrgs. Rptr. #81					
P. Nye Hrgs. Rptr. #88					
T. Koehler Hrgs. Rptr. #110					

* A.L.J. = Administrative Law Judge

(Cont. on Pg. 2)

(Rev. Eff. 2/96)

ORGANIZATION CHART

Division of Administrative Hearings -- Denver, Colorado (303) 894-2500

Edwin L. Felter, Jr.

Director & Chief Administrative Law Judge IV -- Pos. No. 14

MORGAN RUMLER, A.L.J. III
(W.C.) #3

B. Friend A.L.J. I #5	M. Decker Admn. Asst. II #80
R. Erickson A.L.J. I #12	M. Fischer Admn. Asst. II #91
M. Stuber A.L.J. I #18	S. Lieber Admn. Asst. II #101
	J. Perry Leg. Asst. II #92
	T. Rivera Admn. Asst. Intern #85
	D. Smart Prog. Asst. I #89

(Rev. Eff. 2/96)

CENTRAL HEARING AGENCY STATES BY YEAR CREATED

State	Year Created	Name	Appointing Authority	Jurisdiction	ALJs
CA	1945	Office of Admin. Hearings w/i Dept. of General Services	Govenor 4 years coterminous	List in	38 & 20 Cont.
FL	1974	Div. of Admin. Hearings w/i Dept. of Administration	Governor & Cabinet as Admin. Commission	Exclude	32
MA	1974	Admin. Law Appeals Div.	Sec. of Admin. & Finance	Exclude	8
TN	1974	Admin. Procedures Div.	Sec. of State	List in	10
CO	1976	Div. of Admin. Hearings w/i General Support Services	Exec. Director of GSS/ Personnel	Exclude	17
MN	1976	Office of Admin. Hearings	Governor - 6 years	List in	67
MO	1978	Admin. Hearings Commission	Governor - 6 years	Tax, Medicaid Licensing, Insurance	2
NJ	1978 - 79	Office of Admin. Law	Governor - 6 years	Exceptions	45
WA	1981 - 82	Office of Admin. Hearings	Governor - 5 years	Exceptions	64
WI	1983	Div. of Hearings & Appeals w/i Dept. of Administration	Governor	List in	15
IA	1986	Appeals & Fair Hearings Div w/i Dept. of Inspect's & Appeals	Governor - 4 years	List in	16
NC	1988	Office of Admin. Hearings	Chief Justice - 4 years	Exceptions	9
MD	1989	Office of Admin. Hearings	Governor - 6 years	List in	55
HI	1990	Office of Admin. Hearings	Governor	List in	4
ND	1991	Office of Admin. Hearings	Governor - 6 years	Exceptions	4
TX	1991	Office of Admin. Hearings	Governor - 2 years	Originally all agencies w/o fulltime ALJs, others added	70
WY	1992	Office of Admin. Hearings	Governor - 4 years coterminous	List in	11
SC	1993 - 94	Office of Admin. Hearings	Legislature	List in	6
SD	1993 - 94	Office of Admin. Hearings	Governor	Opt out, but none did	12
GA	1994	Office of State Admin. Hearings	Governor	All w/i APA except Labor & Workers' Compensation	33 + 25 on Contract
KY	1994	Div. of Admin. Hearings w/i Office of Attorney General	Attorney General	Exceptions	4
LA	1995	Div. of Admin. Hearings w/i Dept. of State Civil Service	Governor	Exceptions	

Chart prepared by Administrative Law Judge Edward J. Schoenbaum, Editor-in Chief, *Journal of the National Association of Administrative Law Judges*, 1108 South Grand West, Springfield, Illinois 62704 (217) 524-7836 or fax 524-7824 for updates.

Legislation has also been introduced in: Illinois, Indiana, Ohio, New York, Arizona, Connecticut, and the District of Columbia.

STATE CENTRAL HEARING AGENCY JURISDICTION

Jurisdiction	CA	CO	FL	GA	IA	KY	LA	MD	MA	MN
Agriculture			P F	PP	P			F		P
Alcohol	Lic.P		P' F	Lic P	P			F	Lic. P.	Lic.
Audit/Pensions				P				F		
Child Support										P
Commerce/Ins.	Lic.P	P	P F		P			F		P
Comm. Affairs			P F							
Comm. Colleges			P F	Grants						Pro
ConsumerAffairs				P				P	Lic.P.	
Contracts	LicP		P F	P						
Corrections			P F	Griev.P						
CrimeVict.Comp.				P P						P
Education	T F	P	P F	C F	P			F		P
Education/Special		P	F					F		
Empl. Security								F		
Environmental	P		Perm.P	Perm.P	Perm.P			P F		P
Fair Empl.Housg	Emp.P		P F		P					
Health		P	P F		P			P F		P
Human Relations			P F		P			Discrim		P F
Justice	Lic.P		F	Lic P	P					
Labor		P	P F	Lic.P	P					
Motor Vehicles	Lic.P		P F	P	P			F		
Natrl. Resources			P F		P			Lic.P.		
Pension			P F		P			F		
PersonDisab&Retire	P			P				P F	Ben.P	
Pers. Discipline		Pro		P	P			P F		
Police Discip&Disabl			P		P					
Professional Registr.	Lic.P	Lic.P	Lic.P		P			P		
Probation & Parole			P F							
Public Utilities			P F							P
Rule Challenges			F							
SaftyPropertyForfeit										
Social Servs. Benefit		P F		P	P			F		P
Social Servs. License	Lic.P	P		P	P			P		P
Tax	F		P F							
Taxi-Limo										
Transit Authority					P					
Transport. Contract					P					P
Veterans										P
Workers' Comp.		F								F

P = Proposed Decision F = Final Decision Lic. = Licensing Griev. = Grievance Bene = Benefits

STATE CENTRAL HEARING AGENCY JURISDICTION

Jurisdiction	MO	NJ	NYC	NC	ND	SC	SD	TN	TX	WA	WI	WY
Agriculture		P		P	P			P	P	P		
Alcohol		Lic.		Lic. P.	P	Lic.&Vio.		P	Lic. P.	Lic.		
Audit/Pensions		P		P								
Child Support				P						P		
Commerce/Insur.	In				P	Ins.& Lic		P	P	P		
Comm. Affairs		Lic.						Lic.	P			
Comm. Colleges				Grant				P		P		
ConsumerAffairs		Lic.		P				P	Lic.P			
Contracts		Lic.	Deb	P								
Corrections			D P	Griev.								
CrimeVict.Comp.				P							F	
Education		P P		C F	P			P		F		
Education/Spec.		F			F					F		
Empl. Security										Ben	F	
Environmental		Lic.		P		Lic.		P F	P			
Fair Empl.Housg												
Health					P	Coj		P F	P	P		
Human Relations								P				
Justice				Lic. P.								
Labor			P	Lic. P.	P	Lic. W.				P		
Motor Vehicles		Lic.		P	P							
Natrl. Resources				P		Lic.			P	P	F	
Pension		Ben		P						P		
PersonDisab&Retire				P					Ben.P	P		
Pers. Discipline		Pro	P	P	P			P				
Police Discip&Disabl			P									
Professional Registr.	F		P	P	P				P			
Probation & Parole					P							
Public Utilities					P				P		F	
Rule Challenges												
SaftyPropertyForfeit								P		F		
Social Servs. Benefit	F	P		P	P	Limited				P		
Social Servs. License	F			P	P	Lic Appeal				P		
Tax	F				P	Tax&Proprty						
Taxi-Limo			Lic.		P							
Transit Authority			P									
Transport. Contract			P	P							P	
Veterans					F					P		
Workers' Comp.					P							

FISCAL NOTE

STATE OF ALASKA
2000 LEGISLATIVE SESSION

BILL NO. CSHJR 18(STA)

Revision Date/Time (Note if correction) _____ Dept. Affected Office of the Governor

Title Constitutional Amendment: relating to an office of administrative hearings

BRU Elective Operations

Component Elections

Sponsor Representative Ogan

Requester House Judiciary Committee

Component No. 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006
Personal Services						
Travel						-
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	1.5	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	1.5	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2000) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58. However, only six measures can be printed on an 8-1/2 by 14 inch ballot. If this measure requires printing an 8-1/2 by 18 inch ballot, the cost will increase by $22.0.

Prepared by: Gail Fenumiai

Phone 465-3935

Division Division of Elections

Date/Time 2/25/00 10:05 AM

Approved by for Lt. Governor Fran Ulmer

Date 02/25/2000

Agency Office of the Lieutenant Governor

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

REPRESENTATIVE SCOTT OGAN Alaska State Legislature

House District 27 • Palmer • Greater Palmer • Sutton • Chickaloon • Sheep Mountain

SPONSOR STATEMENT

HJR 18

To Separate Administrative Hearing Officers from Agencies

- This constitutional amendment, if approved by voters, will establish an office of administrative hearings apart from and separate from state agencies.

- All research shows significant cost savings, efficiency of process, and a re-establishment of fairness, when hearing officer functions are consolidated, held to due process standards, and politically insulated from agencies.

- Benefits to the public, in addition to saving money, are extremely positive. They include less litigation, stable investment climate, comfort for small entrepreneurs, and an increase in public confidence in fair hearings.

- Perhaps most importantly, full time independent hearing officers provide a level playing field for those challenging regulations. They also hold those who develop, promulgate, and enforce regulations to a higher standard. All data shows regulations become less onerous when unbiased hearing officers, governed not by commissioners, but due process, scrutinize them.

- HJR 18, like due process reforms in 25 other states, will correct inefficiency, increase professional standards, save money, restore public confidence, stimulate development and restore the proper balance between the adjudicatory and prosecutorial functions of executive branch.

Interim: 600 E. Railroad Ave. #1, Wasilla, AK 99654 • **Session:** State Capitol, Juneau, AK 99801 465-3878
(907) 376-4866 Fax (907) 373-4724 1 (800) 862-3878 Fax (907) 465-3265

No: 1

FISCAL NOTE

BR Version: CSHJR 18(STA)

(H) Publish Date: 3/17/99

STATE OF ALASKA
1999 LEGISLATIVE SESSION

Revision Date/Time (Note if correction) _____ Dept. Affected Office of the Governor

Title Constitutional Amendment relating to an office of administrative hearings BRU Elective Operations

Component General and Primary

Sponsor Representative Ogan

Requester House State Affairs Committee Component Serial No. 22

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	1.5	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	1.5	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY99) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This figure includes the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58. However, only six measures can be printed on an 8-1/2 by 14 inch ballot. If this measure requires printing an 8-1/2 by 18 inch ballot, the cost will increase by $22.0.

Prepared by Gail Fenumiai Phone 465-3935

Division Division of Elections Date/Time 2/26/99 10:05 AM

Approved by Lt. Governor Fran Ulmer Date 2/26/99

Agency Office of the Lieutenant Governor

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(Rev 10/98) 99fnform xls/OMB

Information from the Maryland Office of Administrative Hearings

- Office of Administrative Hearings' Brochure
  Background, OAH Mission, and Organization

- Information handout on Maryland Office of Administrative Hearings
  Operations, Where cases are heard, Judges and other employees

- Chief Administrative Law Judge ("CALJ") John W. Hardwicke's July 26, 1995 testimony before the Committee on the Judiciary in the House of Representative in support of HB 1802, Reorganization of the Federal Administrative Judiciary Act. Addresses Cross Training, Savings and Efficiencies

- Administrative Law Judge Guy J. Avery's October 18, 1993 testimony before the Committee on the Judiciary of the Council of the District of Columbia in support of Bill 10-25, Office of Administrative Appeals Establishment Act of 1992.

- November 21, 1997 " 'White Paper' for Central Hearing Agency Presentation" developed by CALJ John Hardwicke.
  Model Act

- "Questions for Consideration" for the development of a central panel system. This "checklist" was developed by CALJ Hardwicke for a District of Columbia site visit on July 21, 1999.

- Maryland Office of Administrative Hearings' Organizational Chart.

DESCRIPTION OF INSERTS

Insert A:
What is an Administrative Hearing?

A brief description of what an administrative hearing involves.

How the Administrative Hearings Process Works

A brief summary of what happens at an administrative hearing.

Insert B:
The OAH Caseload

Statistics or the number of cases received by the OAH.

Who the OAH works with:

Insert C:
Motor Vehicle Administration

Insert D:
Health and Mental Hygiene

Insert E:
Human Resources

Insert F:
Labor, Licensing and Regulation

Insert G:
Personnel

Insert H:
Natural Resources

Insert I:
Commission on Human Relations

Insert J:
Environment

Insert K:
Inmate Grievance Office

Insert L:
Department of Education and
Maryland Insurance Administration

Insert M:
Misc. Agencies

"The highest priority of state government is making sure that citizens of Maryland receive the best possible services from their government. Unfortunately, there are many instances when citizens disagree with the way in which a service is provided, regulations relating to state laws, or other actions taken by the state.

When this happens, it is important that Marylanders have a chance to present their disputes and receive fair decisions by an unbiased authority. Maryland's Office of Administrative Hearings was established to ensure an efficient and impartial process to resolve differences and maintain citizens' rights.

The Office of Administrative Hearings gives Marylanders an important opportunity to participate in their government and to receive the responsive service they deserve."

Parris N. Glendening
Governor

Office of Administrative Hearings
Administrative Law Building
11101 Gilroy Road
Hunt Valley, Maryland 21031
(410) 229-4100

State of Maryland

OFFICE OF ADMINISTRATIVE HEARINGS
Scuto Legis Principiorum
1990
MARYLAND

Parris N. Glendening
Governor
John W. Hardwicke
Chief Administrative Law Judge

THE OFFICE OF ADMINISTRATIVE HEARINGS

Background

Many of Maryland's government agencies regulate certain actions of businesses and citizens. Some of these agencies are also involved in determining the rights of citizens, such as the right to drive.

Maryland's businesses and citizens may not always agree with the actions taken by state government. Maryland law, through the Administrative Procedure Act of the State Government Article, Maryland Annotated Code, provides that contested decisions may be resolved through an impartial administrative hearing. It also requires that impartial administrative hearings be held to determine the rights of citizens.

Prior to 1990, many executive branch agencies employed hearing examiners to adjudicate administrative cases. However, in recognition of the increasing volume and complexity of administrative hearings, it was determined that a centralized office would better serve people involved in the hearings process. Legislation proposing the establishment of a central hearings agency was enacted as Chapter 788 of the Acts of 1989, and on January 1, 1990, the Office of Administrative Hearings (OAH) formally came into existence.

OAH Mission

The mission of the OAH is to provide flexible due process for any person affected by the action or proposed action of State agencies. Additionally, the OAH has a responsibility to provide this due process in a prompt and efficient manner. Flexible due process means that each person has a fair opportunity to be heard and the complexity of the hearing varies according to the nature of the case.

Prior to the creation of the OAH, citizens and businesses dissatisfied with an action by an agency of the State government could contest that action before a hearing examiner, who was an employee of that agency. With the creation of the OAH, these citizens and businesses now have their cases heard by Administrative Law Judges, who are independent of the agency whose action is being contested.

OAH Organization

The Office of Administrative Hearings (OAH) is an independent agency within the Executive Branch of government, reporting directly to the Governor. It is headed by a Chief Administrative Law Judge. In addition, the State Advisory Council on Administrative Hearings advises the OAH on policy matters.

The OAH is responsible for hearing all state administrative law contested cases, unless an exemption is provided by law. In calendar year 1996, the Office docketed 43,345 cases, of which 27,571 actually resulted in a hearing. The remaining cases were either settled or otherwise resolved prior to the hearing. All contested cases are heard by Administrative Law Judges (ALJs).

The OAH is headquartered in the Baltimore metropolitan region but cases are heard statewide. ALJs are trained to hear many different types of cases, and the OAH schedules regional dockets in which an ALJ conducts a variety of different hearings at the local level. This is cost effective as well as convenient for the citizens and businesses involved in contested hearings.

To find out more about the Office of Administrative Hearings, contact:

Jeanne R. Weaver
Office of Administrative Hearings
Administrative Law Building
11101 Gilroy Road
Hunt Valley, Maryland 21031
(410) 229-4100

Insert A

THE OFFICE OF ADMINISTRATIVE HEARINGS

What is an Administrative Hearing?

State Government is responsible for administering many laws that have an impact on Maryland's businesses and citizens. Workers must satisfy the licensing requirements of Occupational and Professional Licensing Boards. Drivers who accumulate too many points may face suspension or revocation of their license. Manufacturing firms must apply for special permits to cover waste-water and other types of emissions.

Many times Maryland's citizens or businesses will disagree with the administrative action of a state government agency. A business may disagree with the findings of an inspection by the Maryland Occupational Safety and Health Administration. A citizen may feel that the Department of Social Services is unfairly denying the citizen access to services or benefits.

A citizen or business that wishes to protest the results of an administrative action by state government is, under certain circumstances provided by law, entitled to an administrative hearing to resolve such a disagreement.

An administrative hearing provides the opportunity to appear before an Administrative Law Judge (ALJ) to obtain an unbiased and objective review of the action in question.. The ALJ is responsible for reviewing the facts relating to an administrative action and making a determination as to whether or not the administrative action was correct and in compliance with existing law and regulations, based on evidence submitted at the hearing. The ALJ issues a proposed or final decision depending on the authority given to the OAH by the Agency.

How the Administrative Hearings Process Works

Whenever a state government agency takes an administrative action, the citizen or business affected receives notice. This notice contains a paragraph or section that explains the citizen's or business' right to request a hearing to contest the action in question. If the citizen or business decides to contest the action, a request for a hearing must be completed and returned to the agency.

A copy of this request is then sent to the Office of Administrative Hearings (OAH). The OAH schedules the hearing, and notifies all specified parties of the hearing date, time and location. If the citizen or business is unable to appear for the hearing on the scheduled date, a written request for the postponement of the hearing must be sent to the OAH.

At the hearing, each party presents his or her case to an Administrative Law Judge. In most cases, each party may be represented by counsel, may bring in witnesses, or may ask that witnesses be subpoenaed. Either a written or recorded (magnetic tape) record is kept of the proceedings at the hearing.

OAH has promulgated Rules of Procedure which govern the conduct of hearings. Included are rules regulating discovery, requests for postponements, requests for subpoenas, and rules of evidence. These rules are available upon request.

Once the hearing is concluded, the ALJ then reviews all evidence and testimony, and issues either a proposed or final decision in accordance with the applicable law. This decision is based only on evidence and testimony presented at the hearing. A final decision is binding on both parties. If a proposed decision is issued, the agency in question makes the final decision based upon the record developed in the OAH hearing.

The citizen or business receives a copy of the decision, and information on how to file an appeal or exceptions if they disagree with the final decision.

Insert B

THE OFFICE OF ADMINISTRATIVE HEARINGS

The OAH Caseload

The OAH hears cases on behalf of more than twenty different state agencies for over 200 different programs. This table lists the primary agencies which have hearings before the OAH and the estimated caseload volume for FY 1996.

Agency	Caseload Volume	
	Scheduled	Heard
Motor Vehicle Administration	37,663	32,305
Health & Mental Hygiene	11,026	3,244
Human Resources	14,530	4,573
Labor, Licensing & Regulation	775	308
Personnel	4,268	2,066
Environment	19	19
Natural Resources	65	65
Insurance Administration	1,406	947
Inmate Grievance Office	899	825
Human Relations Commission	20	20
Misc. Agencies	319	266
TOTAL OAH	70,990	44,638

Miscellaneous agencies include: Department of Education, Retirement & Pensions, Board of Public Works, Higher Education Commission, Office of the Attorney General, Secretary of State, Department of Agriculture, Budget and Fiscal Planning, Nursing Home Appeal Board, Office on Aging, and Department of Transportation-Minority Business Enterprise.

The OAH has created greater efficiency in the hearing process by offering settlement conferences and mediation to resolve disputes. These techniques not only reduce the number of cases requiring a full adjudicatory hearing, but also enable the parties to reach a mutually acceptable agreement.

Insert C

THE OFFICE OF ADMINISTRATIVE HEARINGS

Motor Vehicle Administration

The agency with the largest caseload volume (56%) before the OAH is the Motor Vehicle Administration (MVA) of the Department of Transportation. Most MVA cases result in bench decisions (rather than lengthy written decisions), and hearings last approximately one-half hour. Consequently, MVA represents only 20% of OAH's total workload.

The types of cases for which hearings are held include:

Driving With Alcohol Concentration of .10 or more: The MVA is authorized by law to suspend the drivers license or privilege of anyone who drives with an alcohol level of .10 or more. This is a separate and distinct offense from Driving Under the Influence and Driving While Intoxicated. Under certain circumstances or conditions, the driver may be eligible for a restricted license.

Refusal to Submit to a Chemical Test for Alcohol: Under Maryland law, a person who drives on any Maryland road or highway is deemed to have consented to submit to an alcohol concentration test. A driver who refuses to submit may have his or her license suspended for a substantial period of time set by law.

Violation of License Restrictions: A person who violates a license restriction is subject to suspension or revocation. Any driver under 21 years of age who drives after consuming alcohol is subject to suspension or revocation for violation of an automatic alcohol restriction.

Medical Advisory Board: The Medical Advisory Board (MAB) makes determinations as to whether or not a person suffers from a medical condition that may impair his or her ability to drive, or may require some type of driving restriction such as mandatory use of eye glasses or a prohibition against drinking alcohol and driving. The OAH hears cases in which a driver appeals a MAB determination denying a drivers license due to a medical condition.

False Certification of Insurance Coverage: Maryland law requires that all drivers maintain automobile insurance coverage. False certification of insurance coverage may result in suspension or revocation of a license.

Post Conviction Cases: In addition to the penalties that may be assessed by the courts, persons convicted of certain traffic offenses, or of accumulating points are subject to license suspension or revocation. Examples of these cases are listed below:

Driving Under the Influence: A person found to have a blood alcohol content of .07% is presumed, under Maryland law, to be guilty of driving under the influence of alcohol (DUI). A person guilty of DUI is subject to an administrative hearing for possible suspension of driving privileges.

Driving While Intoxicated: A person with a blood alcohol content of .10% or more is presumed, under Maryland law, to be guilty of driving while intoxicated (DWI). Conviction of such an offense automatically results in the assignment of 12 points to a person's driving record, and subjects that person to a revocation of his or her driver's license or privilege to drive in Maryland. This individual is given the option of requesting a hearing prior to the imposition of those sanctions or accepting them without a hearing.

Points Assessed Against License: Under Maryland Law, points are assessed against a driver's record for most traffic offenses. A driver who has a total of 8 to 11 points assessed against his or her record during a two-year period is subject to a license suspension hearing. A driver who has had 12 points assessed during the same time period is subject to a license revocation hearing.

Miscellaneous Cases: Administrative hearings are also held for accidents involving fatalities, and complaints involving dealers and tradesmen.

Insert D

THE OFFICE OF ADMINISTRATIVE HEARINGS

Health and Mental Hygiene

The State of Maryland, through the Department of Health and Mental Hygiene (DHMH), is actively involved in the field of health care. DHMH serves as a service provider, program administrator, and regulator of the health care industry in Maryland. The OAH adjudicates cases ranging from disputes over eligibility for medical assistance to the licensing of physicians and health care institutions. These cases involve all aspects of the health care industry, including public and private health care providers. The primary types of hearings include:

Involuntary Admissions to Mental Health Care Facilities: The issue in these cases is whether or not a person should be committed to in-patient care at a mental health facility. These cases represent the largest volume of health-related hearings.

Medical Assistance Programs: OAH adjudicates disputes concerning eligibility for medical assistance, the right of recipients to certain benefits under the Program, and the right of health care providers to reimbursement under the Program. These cases are the second largest volume of health related hearings.

Not Criminally Responsible - Release or Revocation: Hearings are conducted on the issue of whether a court-committed individual should be released from a mental institution, or if already conditionally released, returned. A recommendation is made by the Administrative Law Judge (ALJ) to the appropriate court.

Developmental Disabilities: These cases involve hearings for admission to, or transfer between, state residential treatment centers for developmentally disabled persons.

Board of Physician Quality Assurance: These hearings often involve the denial, suspension, or revocation of a license to practice medicine for physicians, cardiac technicians, and other specified medical professionals. These are among the most complex of cases brought for hearing.

Cont.

D - cont.

Professional Licensing Boards: In addition to the Board of Physician Quality Assurance, the OAH conducts hearings for a variety of other licensing boards, including the Board of Social Work Examiners, the Board of Nursing Home Administrators, and the Board of Dental Examiners.

Institutional Licensing: OAH conducts hearings to determine whether certain institutions such as nursing homes and domiciliary care facilities should continue to be licensed.

Miscellaneous Cases: There are many other health related issues that result in requests for hearings. The more common ones include: Patient's Bill of Rights - determining whether a long term care patient may be discharged from a nursing home; hearings under the Women, Infant, and Children food distribution program; and, Reimbursement hearings - appeals of monetary charges levied against patients or their families for services provided in DHMH facilities.

Insert E

THE OFFICE OF
ADMINISTRATIVE HEARINGS

Human Resources

The Maryland Department of Human Resources (DHR) is the implementing agency for a number of federal and state welfare assistance programs, including Food Stamps, Family Investment Program, Temporary Cash Assistance, and those under the Social Services Administration.

The OAH hears contested cases relating to these various programs. In addition, the OAH hears contested cases for the DHR's Child Support Enforcement Administration's federal and state tax intercept and lottery intercept cases, and oral arguments relating to findings of child abuse and neglect.

Details on these types of hearings are presented below:

Tax Intercept and Lottery Intercept Appeals: The DHR's Child Support Enforcement Administration is entitled by law to intercept federal or state income tax refunds and winnings from the state lottery to meet child support requirements. These intercepts are done for both AFDC and non-AFDC cases, with intercepts for AFDC cases used to off-set program costs. The OAH becomes involved when a person who has had his or her tax refunds or lottery winnings intercepted files an appeal and requests a hearing before an Administrative Law Judge (ALJ).

Child support collection agencies are also entitled by law to report delinquent accounts to consumer reporting agencies and to the Motor Vehicle Administration for suspension of an obligor's Maryland driver's license. The OAH conducts hearings pursuant to appeal requests in these matters.

The Family Investment Program (FIP): FIP provides assistance for families with children while preparing program participants for independence. The FIP assistance consists of services and cash assistance to eligible individuals. The assistance program components under FIP include Welfare Avoidance Grants, Child Care and Medical Assistance, Temporary Cash Assistance, and alternative programs.

Food Stamps: The Food Stamp program is a federally-funded program to ensure proper nutrition for low income households. The OAH holds hearings for contested cases in which an application for benefits has been denied, an allotment has been reduced or discontinued, or a restoration of benefits is being sought.

Social Services: The Social Services Administration offers a number of public assistance programs, including family services, legal services, respite care, foster care and adoption, and adult and child protective services. The OAH hears contested cases involving eligibility for, or denial of, services.

Child Care Licensing: Maryland law requires that child care providers be licensed by the state. The OAH hears contested cases involving licensing and registration issues, as well as eligibility for day care subsidies (Purchase of Care).

Child Abuse and Neglect: Under Maryland law, an individual named by the local Department of Social Services in a finding of indicated or unsubstantiated child abuse or neglect has a right to request an oral argument or record review before an ALJ.

Insert F'

THE OFFICE OF
ADMINISTRATIVE HEARINGS

Labor, Licensing & Regulation

The Maryland Department of Labor, Licensing & Regulation (DLLR) is charged with the occupational and professional licensing of individuals under DLLR jurisdiction, and regulating certain industries (banking, consumer credit) as required by statute.

The OAH conducts hearings on certain contested cases involving the Home Improvement Commission, the Real Estate Commission and other DLLR boards responsible for occupational and professional licensing.

Details on these hearings are presented below:

Occupational and Professional Licensing: The Division of Occupational and Professional Licensing within DLLR regulates 17 trades and professions, ranging from barbers and cosmetologists to foresters, bay pilots, and plumbers. Hearings referred to OAH involve regulatory charges brought against a licensee which can involve suspension or revocation of a license.

Home Improvement Commission: Maryland Home Improvement Commission (MHIC) cases involve regulatory actions against contractors who fail to obtain necessary licenses, perform work of unworkmanlike quality, abandon or fail to perform a contract, deviate from contract specifications, or violate the home improvement law in some other manner. Homeowners filing claims for poor workmanship may file a claim against the Home Improvement Guaranty Fund. This is a fund established by the MHIC to make monetary awards to homeowners to off-set the cost of repairing poor work performed by a contractor.

Real Estate Commission: Real Estate Commission cases involve claims against a licensed broker or salesperson for violations of the law regulated by the Commission. As with the MHIC, the Commission has established a Guaranty Fund against which claims can be filed to compensate for losses suffered.

Maryland Occupational Safety and Health Commission (MOSH): MOSH is responsible for monitoring and ensuring work place safety conditions throughtout the State. The OAH hears cases in which MOSH has made a work place inspection and has charged an employer with violations of work place safety and health codes.

Insert G

THE OFFICE OF
ADMINISTRATIVE HEARINGS

Personnel

The State of Maryland employs about 60,000 people state-wide in a variety of jobs, both professional and clerical. The Department of Budget and Management (DBAM), Office of Human Resources (OHR) is responsible for formulating and administering policies relating to the state government work force. Separate personnel systems are maintained by the Department of Transportation (Transportation Service Human Resources System or TSHRS), the University of Maryland System (UMS), and Morgan State University (MSU). The OAH is required by statute to hear certain contested cases involving actions taken by an employee's appointing authority or management. Details on the types of cases heard are presented below:

Suspensions: State employees may be temporarily suspended as a disciplinary action, or may be suspended pending final termination of employment. State employees who protest such actions are entitled to a hearing before an Administrative Law Judge (ALJ).

Grievances: An employee who has a complaint with his or her employer over the interpretation and application of State employee personnel rules, regulations, and policies, or any other rules, regulations, or policies over which management has control, may file a grievance. A state agency must first try and resolve an employee grievance internally, but if this is not possible, then a hearing is held before an ALJ to resolve the grievance.

Removals: A state agency may file a notice of termination against an employee for disciplinary reasons. Any employee who contests such an action is entitled to a hearing before an ALJ.

Rejections on Probation: State employees are required to serve a probationary period when they first enter state employment. Any employee who does not perform up to adequate standards may be released from state service before the probationary period expires. "Cont"

G - "Cont"

Rejection on Probation contested cases are heard by an ALJ. Additionally, employees not within the state's skilled or professional services who are terminated may request a limited hearing before an ALJ.

Denial of Increments and Involuntary Demotions: State employees receive an annual performance evaluation. The results of this evaluation are used to determine if an employee is entitled to an annual salary increment (known as a step increase) as a reward for good job performance. Employees who are denied a salary increment may request a hearing before an ALJ. Additionally, employees who receive involuntary demotions may also request hearings.

Insert II

THE OFFICE OF ADMINISTRATIVE HEARINGS

Natural Resources

The commercial and recreational uses of Maryland's natural resources are regulated by the Department of Natural Resources (DNR). The OAH hears licensing, permitting and regulatory action cases involving DNR. Details on the types of cases heard are presented below:

Boat Excise Tax Assessments: DNR, by law, assesses a boat excise tax on vessels used primarily in Maryland. The OAH hears cases contesting whether Maryland is the state of principal boat use, thus bringing into question whether a vessel is covered by the excise tax, and cases contesting the valuation of a vessel for tax assessment purposes.

Tidal Fish License Revocation: Commercial tidal fishing in Maryland requires a license from DNR's Tidewater Administration. The OAH hears cases involving the suspension or revocation of such licenses.

Master Hunting Guide Licensing: Maryland requires that master hunting guides be licensed by DNR's Wildlife Service. The OAH hears cases involving the denial, revocation or suspension of a master hunting guide license.

Oyster Bottom Leasing: DNR is empowered to lease submerged state land to private individuals for the cultivation of shellfish. The OAH hears citizen protests pertaining to the issuance of such leases.

Insert I

THE OFFICE OF ADMINISTRATIVE HEARINGS

Human Relations Commission

The State of Maryland's Commission on Human Relations (CHR) is responsible for investigating allegations of discrimination on the basis of age, sex, religion, race, color, national origin, marital status, family status, and physical or mental handicap.

When the CHR receives a complaint, an investigation is conducted to determine if probable cause for the complaint exists. If probable cause is found, the parties involved are then required to attempt conciliation of the complaint. If the parties are unable to do so, the case then goes to hearing before an Administrative Law Judge.

At the hearing, all testimony is under oath, and is transcribed by a court reporter. The case in support of the complaint is presented by the CHR's General Counsel.

The most common types of discrimination cases involve public accommodations, employment, and housing.

Insert J

THE OFFICE OF
ADMINISTRATIVE HEARINGS

Department of the Environment

The Maryland Department of the Environment (MDE) regulates activities affecting the environment in Maryland. This includes air and water pollution, hazardous and solid waste management, radiation, and toxic substances. OAH hears both environmental enforcement and permit cases, and its Administrative Law Judges have the authority to issue proposed orders including recommended sanctions consisting of monetary penalties. The types of hearings held include:

Hazardous & Solid Waste Management: Cases heard in this area include oil pollution control, illegal discharge or handling of controlled hazardous substances, and permit activities relating to industrial discharges, groundwater discharges, sludge handling, and landfill activities.

Water Management: The OAH handles cases pertaining to municipal and private (including industrial) wastewater discharge permitting and enforcement. The OAH holds permit hearings on behalf of local health departments for on-site sewage disposal and private well construction. These permits are required for the installation of private residential waste disposal systems and construction of wells, and can be a prerequisite for obtaining local building permits.

The OAH hears contested cases involving the issuance of permits for a wide variety of activities including the mining of coal and nonfuel minerals, waterway and dam construction, the appropriation and use of surface and ground water, and the dredging and filling of wetlands. Permittees in such cases may be individual landowners or large developers, municipalities, or other state agencies. The OAH also hears enforcement cases involving these activities.

Sediment & Stormwater Management: These cases involve the violation of laws and regulations covering sediment and stormwater controls.

Air Management: MDE's Air Management Administration enforces regulations to control emissions from srationary and mobile sources. The OAH adjudicates contested cases where stack or other emissions have violated laws and regulations governing air quality, or where a proposed permit limiting emissions is in dispute. OAH also hears alleged violations of the Maryland Radiation Act and the lead abatement law.

Insert K

THE OFFICE OF
ADMINISTRATIVE HEARINGS

Inmate Grievance Office

Inmates confined to a Maryland correctional facility may initiate legal action against the Division of Correction. Examples of cases heard by OAH include:

Property Grievances: An inmate may initiate an action alleging that correctional personnel negligently destroyed or improperly confiscated his personal property. The Grievant may seek the return of the property, or monetary compensation.

Disciplinary Actions: Inmates who violate institutional rules and regulations are subject to disciplinary action, which might include loss of privileges or loss of "good time" credits. Inmates may appeal those convictions to OAH.

Other: Inmates may initiate actions alleging a physical injury received while in custody, a violation of constitutional rights, improper calculation of sentence, or violation of applicable laws or regulations by correctional officials. These hearings may involve complex legal issues involving numerous State and federal appellate court decisions.

Insert L

THE OFFICE OF
ADMINISTRATIVE HEARINGS

Department of Education and
Maryland Insurance Administration

Department of Education

State Board of Education: These cases involve student expulsions, teacher dismissals, school boundary disputes, student transfer requests, and collective bargaining disputes.

Superintendent of Schools: These cases involve appeals from revocation or suspension of teaching credentials for such things as fraudulent credentials or child abuse.

Special Education: These cases involve disputes concerning the identification, evaluation and educational placement of students with disabilities. OAH also offers mediation of these cases.

Division of Rehabilitation Services: OAH conducts hearings on the appeals of the initial determinations made by the Division of Rehabilitation Services and, when requested, provides mediation services for the Division.

Maryland Insurance Administration

The OAH conducts hearings involving the proposed cancellation and non-renewal of automobile liability and homeowners' insurance policies. The OAH also hears cases involving disciplinary action taken by the Maryland Insurance Administration against licensed insurance companies or agents.

Insert M

THE OFFICE OF
ADMINISTRATIVE HEARINGS

Miscellaneous Agencies

Office of the Attorney General: The OAH conducts hearings on behalf of the Consumer Protection Division in cases concerning problems with health clubs and spas, and automobile repair facilities. The OAH issues proposed decisions in these cases; final decisions are made by the Director of the Consumer Protection Division. The OAH also hears cases for the Securities Division involving alleged violations of the Maryland Securities Act.

Department of Budget & Management: The OAH conducts hearings on the interception of tax refunds as recoupment of debts owed to certain state agencies. These cases may include unemployment benefit overpayments, Food Stamp fund recoveries, and debts owed to the Higher Education Loan Corporation.

Board of Public Works: The OAH conducts hearings in cases involving the suspension or debarment of a contractor from participating in state contracts. The OAH issues proposed decisions in these cases.

Maryland State Retirement & Pension Systems: The OAH hears cases, and issues proposed decisions, involving the appeal of a denial of ordinary or accidental pension benefits in both disability and nondisability related retirement cases.

Office of the Secretary of State: The OAH may hear cases involving charitable organizations that fail to register as a fundraising charity, have a false registration, or are denied an application for registration. The OAH also hears cases on behalf of theSecretary of State involving condominium and timeshare registration.

Public Information Act

Applicable to nearly every State agency, these cases involve the denial of access to public records and/or corrections of records. There is joint jurisdiction with the Circuit Court.