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Hearing Officers in Pennsylvania: Recommendation for an Independent Central Office

Jeffrey G. Cokin*
Jonathan Mallamud**

I. INTRODUCTION

Evidentiary hearings play a central role in the administrative process. To determine how the agencies of the Commonwealth furnish officers to preside at adjudicatory hearings, the Pennsylvania Department of Justice asked the American Bar Association's Center for Administrative Justice to undertake a study of the hearings conducted by state agencies. In the final report that followed the study, it was recommended that the state establish a central office

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This article develops from participation in a study of the hearing officer procedures in Pennsylvania conducted by the Center for Administrative Justice for the Pennsylvania Department of Justice. See notes 2 & 3 infra.


2. The study was financed, in part, by a federal grant under the Intergovernmental Personnel Act of 1970, Pub. L. No. 91-648, 84 Stat. 1909 (1971) (codified in scattered sections of 5, 42 U.S.C.). One of the authors of this article, Jeffrey G. Cokin, was in charge of the project for the Department. The other author, Professor Jonathan Mallamud, served as project director. Milton M. Carrow, Esq., Director of the ABA's Center for Administrative Justice, supervised the project, which was done pursuant to an agreement between the Center and the Pennsylvania Department of Justice. The authors wish to express their thanks to Mr. Carrow, who organized the project, provided a great deal of support, and offered many substantive suggestions. Mr. Carrow convened an advisory committee for the project, and the authors wish to thank the members of that committee for their many useful comments and suggestions as well as members of the legal staff of the Pennsylvania Department of Justice who assisted in the project. The views expressed in this article are the personal views of the authors.

The Center for Administrative Justice has recently become the National Center for Administrative Justice and is now affiliated with the Consortium of Universities of the Washington Metropolitan Area.

3. The final report, "A System of Providing Hearing Officers for Adjudicatory Hearings," was written by Jonathan Mallamud and submitted under his name and Milton M. Carrow,
to provide hearing officers for those agencies that conduct hearings. If such a proposal were adopted, adjudicatory hearings held by state agencies, unless presided over by the head of the agency, would be conducted by a hearing officer who would be provided by, and accountable to, the central office rather than to the administrative agency responsible for the final determination of the dispute between it and the private party involved. Legislation to establish such a central office has been prepared by the Pennsylvania Department of Justice. In this article, we will present the factors that led to the proposal and discuss our view of the merits of a system of providing independent hearing officers through a central office.

A. Purpose of Hearings

Administrative hearings protect those affected by government action from being subjected to arbitrary or mistaken decision-making. In declaring what fundamental hearing elements state agencies must afford welfare recipients before terminating their benefits, the Supreme Court of the United States held that states must provide an effective opportunity to defend, including confrontation of adverse witnesses, presentation of evidence, and oral arguments. It is well-settled that a hearing that does not offer a party an opportunity to know and confront the adverse evidence on which the government will rely "is not the fair hearing essential to due process." And the protection against erroneous action that an evidentiary hearing makes possible serves the interests of the state as well as those of the parties. The special concern for the process by which administrative agencies develop the factual basis for their

on behalf of the American Bar Association's Center for Administrative Justice, to the Pennsylvania Department of Justice in May, 1975. The report will hereinafter be referred to as Final Report. The views in the report represent individual views and are not the result of any action taken or consideration given by the American Bar Association.

4. See ADMINISTRATIVE HEARING OFFICER ACT (Blue Draft), prepared by the Pennsylvania Department of Justice, February 1, 1977.


decisions was recently expressed by the Pennsylvania Commonwealth Court in the following terms:

We also recognize that the most critical function in the prosecution and adjudication of administrative cases is the resolution of disputed facts because the findings of fact which result from administrative proceedings are subject to only limited appellate review. The fact finding process, therefore, must be afforded the broadest dimensions of constitutional protection.8

In addition, a proper evidentiary record must be developed in order to permit a court to exercise its limited power to review the factual basis for an administrative decision.9

Administrative adjudications also involve the application of policy stated in statutes or administrative regulations, found in prior cases or created by an administrative agency in the course of an adjudication.10 The decision of cases not clearly covered by prior determinations may call for arguments based on policy grounds and any attempt to draw a sharp distinction between factual issues and policy issues for the purposes of limiting administrative hearings to questions of fact would probably prove too difficult.11 Consequently, adjudicatory hearings before administrative agencies should be viewed as opportunities for the parties to make whatever policy arguments are not foreclosed by statute or administrative ruling or regulation.12

   (a) . . . this act shall apply to the following agencies: (1) Department of Agriculture; (2) Department of State (except election cases and except proceedings involving the original settlement, resettlement, review of refund of bonus, interests or payments made into the State Treasury); (3) Insurance Department; (4) Department of Public Instruction, in so far as relates to its powers and duties in the issuance of licenses to barbers, and in so far as relates to the powers and duties of the Superintendent of Public Instruction under the "Pennsylvania Loyalty Act"; (5) Board of Property; (6)
B. Parties Entitled to Hearings

In Pennsylvania, under the Administrative Agency Law, all parties to adjudicatory proceedings have a right to a hearing. "Adjudicatory proceedings" in this context refers to agency orders or decisions "affecting personal or property rights, privileges, immunities or obligations" of a party. In addition to the rights conferred by statute, the Supreme Court of Pennsylvania has held that hearings are required "where the administrative action is adjudicatory in nature and involves substantial property rights." Beyond state law, the United States Supreme Court has required that states afford administrative hearings to persons in a variety of situations.

State Board of Education; (7) State Board of Censors; (8) State Board of Medical Education and Licensure; (9) State Board of Pharmacy; (10) State Dental Council and Examining Board; (11) State Board of Optometrical Examiners; (12) State Board of Osteopathic Examiners; (13) Osteopathic Surgeons' Examining Board; (14) State Board of Nurse Examiners; (15) State Board of Veterinary Medical Examiners; (16) State Board of Examiners of Architects; (17) State Registration Board of Professional Engineers; (18) State Real Estate Commission; (19) State Board of Examiners of Public Accountants; (20) State Board of Private Business Schools; (21) State Board of Private Academic Schools; (22) State Board of Private Correspondence Schools; (23) State Board of Private Trade Schools; (24) State Board of Cosmetology; (25) State Board of Chiropractic Examiners; (26) Pennsylvania Securities Commission; (27) State Soil Conservation Commission; (28) Water and Power Resources Board; (29) Flood Control Commission; (30) Anthracite Mine Inspectors' Examining Board; (31) Mine Inspectors' Examining Board for the Bituminous Coal Mines; (32) Pennsylvania Parkway Commission; (33) Sanitary Water Board; (34) State Board of Undertakers; (35) State Workmen's Insurance Board; (36) Industrial Board; (37) State Board of Vocational Rehabilitation; (38) State Athletic Commission; (40) Pennsylvania Aeronautics Commission; (41) State Planning Board; (42) State Civil Service Commission; (43) State Tax Equalization Board; (44) Unemployment Compensation Board of Review; (45) State Employees' Retirement Board; (46) Public School Employees' Retirement Board; (47) Department of Public Welfare; and to any other agency which has been made subject to the provisions of this act by any other act of Assembly.

Id. (footnotes omitted).
Although Goldberg v. Kelly and the cases following it rested on the due process clause of the fourteenth amendment, in California Department of Human Resources v. Java, where the Supreme Court imposed a requirement that states conduct hearings in certain unemployment compensation cases, the court did not reach the constitutional issue but decided the case based on its interpretation of the applicable statute.

There are signs that the United States Supreme Court may not continue to expand the obligation of states to conduct administrative hearings. In cases involving the denial of continued employment, the Supreme Court had held that one would be entitled to a hearing where there was a "liberty" or "property" interest involved. In Bishop v. Wood, however, the Court held that a policeman who had been permanently employed by a city government did not have a sufficient property interest in his job to entitle him to a hearing. In Board of Regents v. Roth, the Court had held that property interests were created by state law. The Court in Bishop apparently concluded that property rights created by state statute could be limited if procedural protection was not included in the statute. As Justice White stated in his dissenting opinion, "[i]n the concluding paragraph of its discussion of petitioner's property interest, the majority holds that since neither the ordinance nor state law provides for a hearing, or any kind of review of the City Manager's dismissal decision, petitioner had no enforceable property interest.
in his job." If *Bishop* represents the attitude of the present Supreme Court towards requiring agency hearings generally, then it is not likely that the Court will broaden the category of parties who are entitled to state administrative hearings. Nevertheless, as has been pointed out in this section, in addition to the already settled federal requirements, Pennsylvania state law also imposes a requirement of administrative hearings in a wide range of cases.

C. Fairness in Hearings

Where a potential adjudicator has already reached a conclusion about the proper outcome of a particular case before the hearing, that person should not participate in deciding the case. Such a proposition seems fundamental. Where an agency has already taken a position on a policy question involved in an adjudication, however, there is no bar to the agency deciding the case. When one focuses on the rule-making powers of administrative agencies and the tendency of courts and agencies to follow past decisions in which policy questions have been resolved, this second proposition also seems fundamental. The real problem in deciding the extent to which a decision-maker must be free from involvement arises in cases where the decision-maker has or seems to have an interest in the outcome.

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25. 426 U.S. at 357. While *Bishop* certainly suggests reluctance on the part of the Supreme Court to extend the category of cases in which states must afford hearings under the fourteenth amendment, it is possible to read the case as resting on the ground that state law made the petitioner's job terminable at will. Moreover, one must keep in mind that *Bishop* was a 5-4 decision. Justice Stevens recently distinguished *Bishop* in *Codd v. Velger*, 97 S. Ct. 882, 890 (1977) (dissenting opinion). In suggesting that a hearing should have been afforded because a discharged state employee might have had a property interest in his job, Justice Stevens said:

> According to the state case cited by Judge Gurfein . . . the police commissioner may terminate only "unsatisfactory employees," and his determination is reviewable in the state courts on an "arbitrary and capricious" standard. . . . Unlike *Bishop*, in which a hearing would have been pointless because nothing plaintiff could prove would entitle him to keep his job, in this case the plaintiff may have had a right to continued employment if he could rebut the charges against him.

*Id.* (citations and footnotes omitted).

*Codd* does not represent any disposition on the part of the Court to expand the category of cases in which hearings are required. There, in an unsigned opinion, the Court held that even if the discharged employee might have a right to a hearing because the stigmatization involved in the discharge impaired a protected liberty interest, the claim to a hearing had to fail because there was no allegation that the allegedly stigmatizing report was false.


While, clearly, a decision-maker with a pecuniary interest in the outcome of a case must be disqualified on due process grounds,\textsuperscript{28} interests arising from one's official position in the governmental structure may also require disqualification.\textsuperscript{29} Thus, it is not consistent with due process for a mayor of a village to act as judge in cases in which the fines imposed in those cases formed a substantial part of the village revenues.\textsuperscript{30} Similarly, the Pennsylvania Supreme Court has ruled that even though one may be acting in an official capacity, one cannot be a member of the agency bringing a complaint against a person and also sit as a member of the agency deciding the case.\textsuperscript{31}

Other problems arise from administrative agencies' combination of investigatory, prosecutorial, and judicial functions. Although such a combination of functions does not inherently violate due process,\textsuperscript{32} care must be taken that the prosecutorial and judicial functions are kept sufficiently separate to ensure that hearings remain impartial and fair. Thus, the Federal Administrative Procedure Act\textsuperscript{33} provides that hearing officers presiding at adjudicatory hearings may not be subject to the supervision of anyone engaged in investigative or prosecutorial functions and that those who participated in the investigatory or prosecutorial aspects of a case may not participate or render advice in the decision of that case. In Pennsylvania, a series of decisions has held that the person who presents the case for the state, or who is involved in the prosecution, may not advise or assist in the decision of the case.\textsuperscript{34} But where the functions are kept separate—even though both the prosecutor and the person who advises the decision-maker work for the same

\textsuperscript{28} See Tumey v. Ohio, 273 U.S. 510 (1927).
\textsuperscript{30} Id.
\textsuperscript{33} Administrative Procedure Act, § 5(c), 5 U.S.C. § 554(d) (1970).
agency—the hearings will probably not be considered to lack fundamental fairness merely because of the common employer. In keeping with the idea that the common employer does not necessarily give rise to a sufficient appearance of unfairness to vitiate due process, the commonwealth court in City of Philadelphia v. Hays upheld the denial of disability benefits to a former city employee even though the city solicitor appointed both the attorney for the city and the attorney for the civil service commission that heard the case.

Despite Hays, Pennsylvania may be moving toward a stricter rule with regard to what constitutes insufficient separation of functions. In Commonwealth Department of Insurance v. American Bankers Insurance Co., the commonwealth court reversed a determination of the Insurance Commissioner because the hearing officer who heard the case for the Commissioner was the direct supervisor of the associate general counsel who presented the Department's case. Shortly before the decision in American Bankers, the commonwealth court, in Commonwealth Human Relations Commission v. Thorp, Reed & Armstrong had upheld a decision in which the general counsel to the Human Relations Commission sat as adviser.

35. Commonwealth Human Relations Comm'n v. Thorp, Reed & Armstrong, 25 Pa. Commw. Ct. 295, 361 A.2d 497 (1976). In Commonwealth Human Relations Comm'n v. Feeser, 20 Pa. Commw. Ct. 406, 341 A.2d 584 (1975), the commonwealth court set aside a decision of the Pennsylvania Human Relations Commission on the grounds that the Commission's general counsel, who presented the case on behalf of the Commission before it, had given legal advice to the Commission during the hearing. The Supreme Court of Pennsylvania reversed, 364 A.2d 1324 (Pa. 1976), on the grounds that the Commission's counsel had merely made adversary arguments on the record before the Commission. The supreme court stated: "We find no evidence in the record to support the contention that PHRC's general counsel advised the hearing panel at the hearing or in the decisional process." Id. at 1327.


38. In remanding for a hearing "in which the separation of prosecutorial and judicial functions will be strictly observed," the court described the objectionable procedure as follows:

American's objection is based on the fact that the Associate Chief Counsel of the Department was appointed a Deputy Insurance Commissioner for the purpose of acting as the hearing examiner at American's hearing before the Department. As a result of this appointment, the associate counsel who prosecuted the Department's case was the direct subordinate of the hearing examiner who must act in an impartial judicial capacity.

Id. at 190-91, 363 A.2d at 876.

to the Commission at a hearing while an assistant attorney general attached to the legal branch of the Commission presented the charges. A possible distinction was that in this case the general counsel had acted as adviser, not as a superior who sat as the hearing officer for the Commissioner. Together, the cases demonstrate that the commonwealth court will closely scrutinize the relationship of the hearing examiner and those presenting an agency’s case.

Another area in which the commingling of functions must be examined is where an agency first investigates and decides whether to prosecute and then, after prosecution, makes the final determination of whether the charges have been proved. The general rule has been that due process is not violated in such circumstances. In *Dussia v. Barger*, the Supreme Court of Pennsylvania was faced with determining the constitutionality of the commingling in one person of the power to decide whether charges should be brought in the first place and the authority to make the ultimate determination in the case. The United States Supreme Court in *Withrow v. Larkin* had specifically upheld such a commingling of functions in a collegial body. *Withrow*, of course, does not foreclose a finding that the commingling of preliminary prosecutorial functions with

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40. *Id.*
41. In *Thorp, Reed & Armstrong*, the court stated:

[W]e have two individuals who are both within the same branch of an administrative entity, one handling a prosecutorial function and the other separately handling an adjudicatory function. These circumstances place us at the interface between a constitutionally permissible and a constitutionally impermissible commingling of prosecutorial and adjudicatory functions.

*Id.* at 302, 361 A.2d at 501.


44. 421 U.S. 35 (1975).
45. The Supreme Court concluded:

No specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Without a showing to the contrary, state administrators “are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”

*Id.* at 55 (citation omitted).
the making of a final decision does not provide due process.\textsuperscript{46} Accordingly, the Pennsylvania Supreme Court appeared to take a very different view than that taken by the United States Supreme Court. In \textit{Dussia}, the court announced:

The decision to institute a prosecution is such a fundamental prosecutorial function that it alone justifies concluding a dual capacity where the individual also is charged with the responsibility of making the ultimate determination of guilt or innocence. Moreover, it is a decision which requires a judgment as to the weight of the evidence against the accused, a judgment which is incompatible with the judicial function of providing an impartial forum for resolution of the issues presented.\textsuperscript{47}

It would appear that the Supreme Court of Pennsylvania “is applying a more stringent standard to prevent a commingling of the judicial and the prosecutorial functions” than the “United States Supreme Court is presently applying.”\textsuperscript{48} Therefore, one must question whether, as a matter of state law, the combination of the function to make a preliminary determination with the function of reaching a final decision after an adversary hearing is still permissible in Pennsylvania.\textsuperscript{49}

It should be emphasized that the requirement of fairness in hearings goes beyond simply requiring that there be no actual prejudice. The Pennsylvania Supreme Court tends to talk in terms of avoidance of “the appearance of possible prejudice” and the prohibition of procedures that are “susceptible to prejudice.”\textsuperscript{50} Although an essential function of evidentiary hearings is to ensure a high degree of accuracy in decision-making, the \textit{appearance} of fairness also serves an important governmental function. Since law enforcement ultimately depends on the people’s acceptance of the law, it is important that those affected by agency action feel that the agency acted fairly. Thus, apart from any legal requirements, fair adjudicatory procedures should be a goal of sound policy.

\begin{footnotes}
\item[47] 466 Pa. 152, 165, 351 A.2d 667, 674 (1975) (footnote omitted).
\item[50] See, \textit{e.g.}, Horn v. Township of Hilltown, 461 Pa. 745, 748, 337 A.2d 858, 860 (1975).
\end{footnotes}
II. PRESENT PRACTICE

At present, Pennsylvania does not have a uniform system for making examiners available. Agency provisions for such decision-makers range from situations where the administrative head conducts the hearing and renders a decision, to the use of part-time hearing officers either hired from outside the government on a contract basis or drawn from the existing legal staff of the agency. Moreover, great variations exist in the qualifications of the officers.

Both the Pennsylvania Human Relations Act\(^{51}\) and the Pennsylvania Securities Act of 1972\(^{52}\) forbid the delegation of the hearing function; hearings in those agencies are conducted by the agency head or panels of members of the agency. Similarly, hearings concerning the fixing of milk prices must be heard before one or more members of the Milk Marketing Board.\(^{53}\) Initial hearings are also held before members of such boards and commissions as the Commission on Charitable Organizations,\(^{54}\) the Industrial Board,\(^{55}\) and several of the licensing boards within the Bureau of Professional and Occupational Affairs.\(^{56}\) Several of the professional and occupational licensing boards, however, now utilize hearing officers.\(^{57}\)

Since parties in administrative adjudications are entitled to receive a hearing before an impartial tribunal,\(^{58}\) it is important to ensure that hearing officers are in a position to provide such a hearing. Presently, where agency heads delegate the hearing function, hearings are conducted by full or part-time hearing officers hired pursuant to service purchase contracts, by full-time agency employees whose sole function is to hear cases, by full-time employees who conduct hearings as only one of their duties, or by an agency lawyer who conducts hearings as part of his agency duties. For example, in


\(^{52}\) PA. STAT. ANN. tit. 70, § 1-606(d) (Purdon Supp. 1977-1978).


\(^{56}\) The State Dental Council Examining Board, for example, must sit either en banc or in a panel whenever a hearing is conducted. PA. STAT. ANN. tit. 63, § 122(h) (Purdon 1968). See generally PA. STAT. ANN. tit. 63 (Purdon 1968 & Supp. 1977-1978).

\(^{57}\) Even though the State Real Estate Commission remains the decision-maker, it may delegate the hearing function to a hearing officer. PA. STAT. ANN. tit. 63, § 440(b) (Purdon 1968). For other examples of licensing boards that may delegate the hearing function, see generally PA. STAT. ANN. tit. 63 (Purdon 1968 & Supp. 1977-1978).

\(^{58}\) See text accompanying notes 26-50 supra.
workmen's compensation\(^59\) and unemployment compensation cases,\(^60\) hearings are conducted by full-time employees who are subject to the state's civil service law. The Liquor Control Board employs, on an annual salary basis, part-time hearing officers who are permitted to maintain their own law practices.\(^61\) In the Department of Agriculture, hearing officers are hired pursuant to a service contract and are paid on a per diem basis.\(^62\) Many other agencies, including the Department of Education\(^63\) and the Department of Labor and Industry\(^64\) use an assistant attorney general or the agency's chief counsel to conduct hearings. Usually, the hearing function is only one of a wide variety of duties these individuals perform.\(^65\) In the Department of Health, hearing officers are hired on an ad hoc basis in cases regarding new health care facilities.\(^66\)

The hearing officer arrangement has recently been changed in at least two agencies. In the Department of Public Welfare, a new "Hearing and Appeals Unit" was created in response to a consent decree issued by a federal district court.\(^67\) And, since many aspects

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61. As a general rule, each of the Liquor Control Board's eleven examiners work from one to two days per week and are paid from $13,281 to $16,832 per year. Final Report, supra note 3, at 39-41.
62. The Department of Agriculture does not hold many hearings; it only requires one part-time hearing officer. Id. at 6-8.
63. Id. at 23-32.
64. Id. at 44.
65. See id. at 25.
66. 42 U.S.C.A. § 1320a-1(b)(3) (West 1974) and the regulations promulgated thereunder and codified at 42 C.F.R. § 100.106(c)(2) (1976) require that hearing officers must be appointed by the governor or his designee but must not be employees of the Health Department. The Department of Justice has been designated by the governor to provide hearing officers in these situations, and it has compiled a list of individuals who are qualified to conduct this type of hearing. A problem is that hearing officers may be subject to local pressures to decide a case in favor of the institution.
67. In the past, the Department of Public Welfare employed hearing officers on an annual salary, but permitted them to maintain an outside private practice. As a result of the consent decree entered in Marsden v. Beal, No. 75-714 (E.D. Pa. 1975) (unpublished opinion), the Department of Public Welfare must afford a hearing as well as a decision by a hearing examiner which must be reviewed within ten days by the secretary or his designee in all cases involving termination of any benefits administered by the Department. In order to implement the consent decree, the Secretary of Public Welfare created a Hearing and Appeals Unit which supplies the hearing officers for all departmental hearings. The Unit's executive director has been designated by the secretary as the final decision-maker of the Department. The unit is moving toward creating a cadre of hearing officers (both lawyers and nonlawyers) who will devote full time to their duties.
of the hearing system previously used by the Public Utility Commission did not meet the due process requirements of the United States and Pennsylvania Constitutions, legislation has been passed to improve the PUC's hearing system; administrative law judges now hear cases and write recommended decisions.

The qualifications of hearing officers vary widely, depending upon the agency involved. Although most agencies require their hearing officers to be lawyers, some do not. For example, many referees in unemployment compensation cases are nonlawyers, although the referees who are not lawyers usually have had long experience within the Bureau of Employment Security. Pennsylvania's Labor Relations Board also utilizes some nonlawyers as hearing officers, but these nonlawyers usually have had extensive experience with the National Labor Relations Board. Most hearings within the Department of Education are conducted by lawyers, but those cases concerning the placement of retarded children in special education classes are heard by nonlawyers because of a frequent inability to locate lawyers who have extensive knowledge and credentials in the area of special education. The Board of Probation and Parole and the Bureau of Traffic Safety of the Department of Transportation also utilize nonlawyers to conduct hearings. The recent trend, as illustrated by amendments to the Public Utility Law requiring administrative law judges to be lawyers for a mini-

69. Act No. 216, § 7, 1976 Pa. Laws 1075 (codified at Pa. Stat. Ann. tit. 66, § 457.2 (Purdon Supp. 1977-1978)). This Act establishes a system of administrative law judges for the Public Utility Commission, provides for a code of ethics, and sets the minimum qualifications for such judges. When the Commissioners do not preside over a hearing themselves, the presiding officer must initially decide the case unless the Commission, by general rule or on an ad hoc basis, requires the entire record to be certified to it for a decision. The Act also provides that the recommended decision of the administrative law judge, which must include findings, conclusions, and the reasons therefor, shall be part of the record.
70. The Pennsylvania Superior Court had held that a Public Utility Commission examiner was not authorized to file a report or make recommendations. He was only permitted such duties as administering oaths, examining witnesses, and receiving evidence. J. Benkart & Sons v. Pennsylvania Pub. Utils. Comm'n, 137 Pa. Super. Ct. 5, 11, 7 A.2d 584, 587 (1939) (Keller, P.J., concurring).
71. Final Report, supra note 3, at 49.
72. Id. at 89.
73. Id. at 30.
74. Id. at 58, 89.
75. Id. at 74.
minimum of three years,\textsuperscript{76} is for attorneys to conduct hearings.

Hearing officers’ powers also vary from agency to agency. Until recently, hearing officers with the Public Utility Commission could not even make recommendations; they merely presided over the hearings and ruled on the admissibility of evidence.\textsuperscript{77} At the other end of the spectrum, hearing officers in workmen’s compensation\textsuperscript{78} and unemployment compensation\textsuperscript{79} cases render decisions that are final unless appealed.

Where the hearing officer has no formal decision-making authority, the parties may not even be aware that the officer has made a recommendation. The state Labor Relations Board seems to have recognized the difficulty that the inability to utilize hearing officers’ recommendations presents to the parties. After reviewing recommendations of its hearing officers, the Board implements a procedure in which it issues \textit{nisi} decisions and then permits the parties to request oral argument before the Board after reviewing those decisions. If no argument is requested, the \textit{nisi} decisions become final.\textsuperscript{80}

\textbf{III. PROBLEMS OF PRESENT PRACTICES}

In recent years, the United States Supreme Court has significantly broadened the contexts in which parties are entitled to administrative hearings\textsuperscript{81} and the importance of fair hearings in the

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  \item \textsuperscript{76} PA. STAT. ANN. tit. 66, § 457.2(c)(2) (Purdon Supp. 1977-1978).
  \item \textsuperscript{77} See note 70 and accompanying text supra.
  \item \textsuperscript{78} Decisions of workmen’s compensation referees are final unless an appeal is taken within 20 days from the receipt of notice of the decision. PA. STAT. ANN. tit. 77, § 853 (Purdon 1952 & Supp. 1977-1978) (occupational injury); id. § 1523 (occupational disease). On appeal, the Board may hear more evidence, PA. STAT. ANN. tit. 77, §§ 854, 1525 (Purdon 1952 & Supp. 1977-1978), but § 854, governing occupational injury and disease cases, prevents the Board from disregarding findings of fact by the referees if they are supported by “competent” evidence. In line with that provision, it has been established that, without taking new evidence, the Workmen’s Compensation Appeal Board may not depart from the findings of fact made by the referees. See Kimbob Corp. v. Workmen’s Comp. Appeal Bd., 12 Pa. Commw. Ct. 92, 315 A.2d 304 (1974); Universal Cyclops Steel Corp. v. Krawczynski, 9 Pa. Commw. Ct. 176, 305 A.2d 757 (1973); Final Report, supra note 3, at 53.
  \item \textsuperscript{79} Unemployment compensation referees’ decisions are final and binding unless appealed to the Unemployment Compensation Board of Review. However, rule 200 of the Rules of Procedure of the Unemployment Compensation Board of Review provides that the Board may on its own motion review a case that a referee has decided. 34 Pa. Code § 101.101. See PA. STAT. ANN. tit. 43, § 824 (Purdon Supp. 1977-1978). This power is infrequently exercised. Final Report, supra note 3, at 49.
  \item \textsuperscript{80} Final Report, supra note 3, at 43.
  \item \textsuperscript{81} See, e.g., Goss v. Lopez, 419 U.S. 565 (1975); Morrissey v. Brewer, 408 U.S. 471 (1972);
administrative process has been recognized by the Pennsylvania Supreme Court. Since adjudicatory hearings play an increasingly important role in the administrative process and the administrative bureaucracy continues to play a constantly expanding role in society, the problems of the present system must be recognized and rectified.

One aspect of the present system that needs improving is the general supervision of hearing officers. Although there are some exceptions, hearing officers generally are supervised, if at all, by individuals who are involved in the substantive decision-making process of the agency. For example, at the Labor Relations Board and the Liquor Control Board, the executive director or general counsel supervises the hearing officers. Such a situation creates a possibility that an officer's decision may be influenced by a desire to please his superior. Even though most hearing officers may make their decisions on the basis of the facts before them, it would be better to isolate the decision-making process from the substantive work of the agency. It is not necessarily an evil that substantive agency employees are involved in the supervision of hearing officers, but the appearance of fairness would be increased without such a relationship.

When an agency has too few hearings to justify the hiring of several full-time hearing officers, the hiring of a person to supervise the hearing officers seems unnecessary and wasteful. As a result, hearing officers who render decisions for such agencies are supervised, if at all, by people who have other substantive duties. This problem, which is inescapable under the present system of hearing officers in Pennsylvania, may result in the utilization of hearing officers who are not particularly competent since no one is given the direct responsibility of evaluating the officers' work. When a hearing officer performs poorly, such performance stands out and the services of that hearing officer probably will be terminated. However, if the hearing officer performs marginally, the agency may use the

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83. Both the Workmen's Compensation Board and Unemployment Compensation Board employ individuals whose primary function is the supervision of the referees. See Final Report, supra note 3, at 93.

84. Id.
same officer again without questioning his or her capability. Even if an agency were to make an effort to supervise part-time hearing officers, it is doubtful that the skills and talents of people holding hearings part-time can be polished as well as those who are full-time career adjudicators.

A hearing officer should not have a bias toward the agency. When a particular policy has not been enunciated or when a policy is not clear, the parties to a proceeding should have the benefit of a decision by a hearing officer based upon a fair and unbiased appraisal of arguments that have been made. All open questions should not automatically be decided in the favor of the agency. A hearing officer's recommendation, too, must be viewed from the perspective of fairness. Recommended decisions, when adopted by agencies, will be seen to have great weight; where the parties did not get to argue before the agency head, their presentation to the hearing officer may be the parties' only input in the decisional process.

It is questionable whether impartiality prevails when agencies use their own personnel to conduct hearings. In the Department of Labor and Industry, hearings in prevailing wage cases are prosecuted by staff attorneys who act as hearing officers in similar cases. The Insurance Department has its staff attorneys prosecute the same kinds of cases as those in which the attorneys act as hearing officers. Even though these assistant attorneys general attempt to refrain from discussing the different cases with each other, human nature being what it is, there is certainly no guarantee that they are successful. As a result, a prosecutor can indirectly exert undue influence when his or her colleague is the hearing officer. Other examples of such commingling practices abound. The executive director and

85. Not only must a decision be fair in fact, but the appearance of fairness may be crucial. See Gardner v. Repasky, 434 Pa. 126, 129-30, 252 A.2d 704, 706 (1969).

86. In Pennsylvania, such a commingling of functions by the agencies would often appear to amount to a denial of due process. See cases cited in note 34 supra and text accompanying notes 34-41 supra. In a closely related circumstance, a recent decision of the Insurance Commissioner was reversed because the associate chief counsel who conducted the hearing was the direct supervisor of the associate counsel who prosecuted the case for the Department. Commonwealth Dep't of Ins. v. American Bankers Ins. Co., 26 Pa. Commw. Ct. 189, 363 A.2d 874 (1976) (petition for allowance of appeal to Pennsylvania Supreme Court granted January 31, 1977).


general counsel of the State Harness Racing Commission both conduct hearings and occasionally make recommendations to the Commission. In the Department of Banking, a departmental staff member acts as a hearing officer whenever one is required. In the Department of Education, teacher tenure cases are prosecuted and heard by the Department’s relatively small staff of assistant attorneys general; these same attorneys have the responsibility of advising local school boards concerning the rights of tenured teachers and the procedures for their dismissal. Although the attorneys undoubtedly attempt to avoid conflict in particular cases, the mixing of functions in these agencies may violate due process; at best, it seems unwise. In view of the recent judicial decisions in Pennsylvania involving contacts and relationships between those presenting the state’s case and the decision-makers, it would seem appropriate to take steps to separate hearing officers from other agency staff members.

Some agencies use non-Commonwealth employees as hearing officers. Usually these persons are attorneys with their own private practices. A basic problem of hiring hearing officers on an ad hoc basis, however, is that they may be hired with a particular outcome in mind. Moreover, such hearing officers, in order to increase their chance of being hired for similar cases in the future, may tend to rule in favor of the agency. Obviously, these practices can create an appearance of unfairness which would violate the principles enunciated in Gardner v. Repasky. In order to obviate this problem, some agencies, such as the Department of Health, have had hearing officers appointed by an outside authority. The Department of Education, in school busing and state aid cases, requests the assistance of the Department of Justice in the appointment of hearing officers. Although this method is a great deal better than having the agency appoint hearing officers itself, there may still be a problem of lack

89. Final Report, supra note 3, at 22.
90. Id. at 9.
91. Id. at 25.
92. Id. at 23-32.
95. See note 66 supra.
of independence since the Justice Department attorneys who make the appointments are also responsible for giving legal advice to the agency and, in addition, are often required to approve the adjudications of the agency.

IV. ALTERNATIVE SYSTEMS

Although we think that the present system of providing hearing officers can best be improved by the establishment of a central office for hearing officers, it is necessary to discuss the various alternative systems that have been considered and rejected. These alternatives range from a variety of partial central office systems to a general statutory scheme setting forth broad guidelines for the utilization, powers, and qualifications of hearing officers.

The current system could no doubt be improved by the enactment of a statute that would set forth minimum standards for all hearing officers. The separation of functions within each agency—preventing hearing officers from prosecuting and hearing similar kinds of cases within the same agency—could be mandated. To satisfy due process, the statute could contain a prohibition concerning the commingling of the investigatory, prosecutorial, and hearing functions. The same individual could be prohibited from prosecuting a case and giving legal advice to the decision-maker. The statute could contain the minimum qualifications of all persons who are authorized to conduct hearings in Pennsylvania. A basic requirement might be that all hearing officers must be lawyers except in situations where a person with special skills not readily found in a lawyer could conduct a particular class of hearings. Or, the statute could require that before a person is employed as a hearing officer he must pass a test prepared by the state Civil Service Commission to ensure that the applicant would have the basic skills necessary for conducting a hearing.

A statute requiring applicants to qualify by means of a competitive examination would make available a pool of individuals from which an agency could choose; it would also leave a great deal of discretion in the agencies to choose who they wanted. As we see it, there is a need for discretion in the selection and assignment of hearing officers, but, because of the need for fairness in an adjudicatory process in which the government agency plays an adversary as well as a decisional role, that discretion should not remain in the agency.
Another statutory requirement might be a limitation upon the number of part-time hearing officers a particular agency could employ, coupled with the requirement that all part-time hearing officers meet the same qualifications as full-time hearing officers. In order to encourage compliance, the statute might contain a provision that would render void any adjudication not heard by a qualified hearing officer. The statute could also require periodic reports by each agency and by each hearing officer, conveying such information as the number of cases heard, time of disposition, appeals taken, and other relevant matters.

The basic problem with a general statutory scheme controlling the use, powers, and qualifications of hearing examiners is that different agencies have different needs. It would seem inappropriate to require an individual who hears relatively simple automobile driver license revocation hearings to have the same qualifications as an individual who hears complicated Public Utilities Commission rate cases. Thus, we conclude that because of the wide variety of hearings conducted in Pennsylvania, a general statute would be a great improvement upon the present system, but would not render certain a fundamentally fair hearing with the appearance of impartiality while maintaining the necessary administrative efficiency.

A partial central office system to provide hearing officers to some—but not all—agencies could also be established. Varieties of such a system range from the kind where a central office provides all hearing officers whenever they are needed to one where the central office has a few hearing officers that are provided to agencies that require hearing officers only on rare occasions. Illustrative of the latter kind of partial central office system is the Missouri alternative which requires that occupational licensing hearings are to be held by an Administrative Hearing Commission.\(^7\) Even though licensing boards maintain the final decision-making responsibility, all hearings involving occupational licenses are heard by one hearing commissioner.

Another possibility is to establish a central office that would provide hearing officers only to those agencies that do not have a sufficient number of hearings to warrant employing their own. Such a

system would solve the basic problem of availability of hearing examiners and eliminate the need to use part-time officers. Agencies could elect to use hearing officers supplied by the central office, or, if they were so inclined, they could employ their own. California once utilized a variation of such a system. It was not very successful; a by-product of the arrangement was competition between central office hearing officers and agency hearing officers. Thus, in 1961, California began to require that all hearings under its Administrative Procedure Act be conducted by hearing officers supplied by the central office. Although the new California system appears to be broad in coverage, it is in reality a partial system. Florida has also adopted a partial, central office system. And, legislation re-

98. See N. ABRAMS, DESIGNING A STATE HEARING OFFICER SYSTEM: ISSUES SUGGESTED BY THE CALIFORNIA EXPERIENCE 3-4, 14 (1974) (study prepared for the Center for Administrative Justice, American Bar Association) [hereinafter cited as ABRAMS].

99. One author who studied the arrangement concluded:

'The experience in California suggests that as a long-term system it had serious weaknesses. As previously described, central panel hearing officers under the hybrid system in California were at an automatic disadvantage in the competitive situation into which they were thrust, and this disadvantage undoubtedly affected morale and may have subtly influenced decisions.

Id. at 35.

100. Id. at 5; see generally Clarkson, The History of the California Administrative Procedure Act, 15 HASTINGS L.J. 237 (1964) [hereinafter cited as Clarkson].

101. Abrams describes its coverage as follows:

At present there are about 20 hearing officers handling all APA hearings in the State, covering the adjudicative activities of approximately 56 agencies. Most such agencies primarily perform licensing functions but others . . . are also included within APA coverage. There are a total of approximately 350 hearing officers or the equivalent working in the State. Most are referees who conduct hearings for the Industrial Accident Commission in workmen's compensation matters; about 20 are attached to the Public Utilities Commission. The existing central panel system in California thus does not include within its coverage the great majority of hearing officers.

ABRAMS, supra note 98, at 5-6 (emphasis supplied).

102. Florida's "central office" system excludes from its coverage the following:

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

2. Hearings before the Industrial Relations Commission, judges of industrial claims, unemployment compensation appeals referees, and the Public Service Commission or its examiners;

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

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

5. Hearings in which the division is a party, in which case, an attorney assigned by the Administration Commission shall be the hearing officer;
cently introduced in New Jersey would establish a central office for hearing officers but would exclude from its coverage rate-making proceedings and proceedings before the state’s Board of Parole, the Public Employment Relations Commission, the Board of Education, the Board of Higher Education, and retirement systems in the Division of Pensions.103

6. Hearings which involve student disciplinary suspensions or expulsions and which are conducted by educational units; and
7. Hearings of the Public Employees Relations Commission in which a determination is made of the appropriateness of the bargaining unit, as provided in § 447.307.

FLA. STAT. ANN. § 120.57(1)(a) (West Supp. 1977).

103. N.J. Senate Bill 1811, 197th Legis., 1st Sess. (1976) (introduced by Senator Garra-mone). The full list of agency exclusions is set forth in § 9 of the bill as follows:

9. (New section) Unless a specific request is made by the agency, no hearing officer shall be assigned by the director to hear contested cases with respect to:
   a. The State Board of Parole, the Public Employment Relations Commission, the Division of Workers' Compensation, the Division of Tax Appeals, or to any agency not within section 2(a) of P.L. 1968, c. 410 (C. 52:14B-2(a));
   b. Any matter which requires an en banc administrative adjudication but which is permitted to be and is to be conducted by one or several of multiple members of the agency, including but not limited to the Civil Service Commission, the Public Utilities Commission, the Board of Education, the Board of Higher Education, or any retirement system in the Division of Pensions in the Department of the Treasury;
   c. Any matter where the head of the agency determines to conduct the hearing directly and individually; or
   d. Any agency for the adoption, amendment or repeal of any administrative rule, including the adoption, amendment or repeal of any rate, toll, fare or charge for a product or service provided by any business, industry or utility regulated or controlled by the agency.

Appended to the bill is a statement, part of which offers the reasons for the creation of a central office:

Presently, the Administrative Procedure Act requires that all contested cases involving State agencies be heard by a hearing officer. The existing system of part-time hearing officers has caused delay in the disposition of cases, and unnecessary expense to the State. In many instances, the Attorney General experiences difficulty defending in court the hearing officer reports, as adopted by the agency head, because they are not expertly prepared. Further, hearing officers employed by the various agencies involved in the decisions being rendered are often not impartial, an ill created in part by the fact that the agency head selected them in the first place. The concept of due process of law is also undermined by the combination of investigative, prosecutorial and hearing functions, all being administered by the same agency and sometimes by the same individual. Finally, the employment by the State of part-time hearing officers who are attorneys representing clients before other State agencies raises serious issues under the conflicts of interest law, because paid hearing officers, even those serving part-time, are State officers or employees subject to the most stringent conflicts law requirements.

The statement also says that the bill incorporates concepts first used by Justice Nathan L. Jacobs in his dissenting opinion in Mazza v. Cavicchia, 15 N.J. 498, 536, 105 A.2d 545, 566-67 (1954). There, Justice Jacobs referred, *inter alia*, to a legislative proposal that would have
There are several advantages to a partial central office. If, for example, some agencies use central office hearing officers and others use their own hearing officers, competition may result in superior decisions. Also, agencies which do not need full-time hearing officers will have a readily available pool to serve their needs. A partial central office is based on the same concept as a central office, and to the extent that states have adopted a partial central office they can be seen as moving toward the development of an independent central system. Yet, a totally centralized system seems far more advantageous for providing fundamentally fair hearings.

V. CENTRAL OFFICE FOR HEARING OFFICERS

A. Reasons for a Central Office

In addition to providing highly skilled, independent hearing officers to conduct adjudicatory hearings, other improvements would result from a central hearing officer system. By treating the hearing function as a separate and important function of the government, and by creating a career service and established corps devoted to conducting administrative hearings, the establishment of a central office would increase the quality of hearings and recommended decisions. Thus, we feel that Pennsylvania should adopt a system in which hearing officers employed by, and responsible to, a central office would conduct the adjudicatory proceedings held by the state agencies.

The most apparent benefit of such an office would be that it could supply trained hearing officers to agencies whose caseloads do not require the services of full-time hearing examiners. This would avoid the use of agency legal staffs and their appearance of partiality, and employment of part-time hearing officers and outside lawyers who may be inexperienced. Instead, agencies would receive trained hearing officers who could be expected to conduct fair hearings and to write good initial decisions. For agencies that now employ their own full-time hearing officers, other gains would result from the establishment of a career service. The agencies would be provided for "an independent corps of hearers who would not be subordinate to the heads of administrative agencies . . . ." He then said, "there are those who believe that without a corps of independent hearers, or a comparable substantive device, the basic problem will not be met despite such procedural gloss as may be imposed from time to time."
freed of the need to handle personnel matters pertaining to the hearing officers, and hopefully, there would be an overall improvement in the adjudicatory process.

By placing all hearing officers in a single administrative unit, it would be possible to create an environment in which hearing officers could gradually acquire a high degree of skill in conducting administrative hearings. Within state government, the different kinds of hearings required vary in complexity; through efficient handling of assignments by the central office, hearing officers could be assigned to conduct hearings so that the more difficult cases would go to the more experienced officers, while beginning officers are allowed to become acquainted with procedures. Furthermore, the prospect of going beyond a single area, and developing an ability to handle a variety of hearings might well create a more appealing career opportunity. Although for reasons discussed below it may be desirable to have hearing officers assigned to a particular agency for extended periods of time, the advantage of having such special expertise develop in some areas may be outweighed by the inertia that may result from years of conducting a single kind of hearing and the accompanying perception that the hearings have become repetitive routine. Where such staleness sets in, the quality of work may diminish even if the actual output continues at a satisfactory level.

A government-wide career service for hearing officers might be attractive to some attorneys who might not otherwise consider such a career since a central office could initiate more extensive recruiting procedures than any one agency. Moreover, a central office responsible for a large number of hearing officers would also be able to conduct more sophisticated training programs than could a single agency. With regard to taking advantage of training programs given by other institutions, a central office, with control over a substantial number of hearing officers, would have more flexibility in rotating assignments and thus may be able to facilitate leaves for advanced study and other developmental exercises.

It would be expected that a central office would make possible continuing review of the work of its hearing officers. Not only could the office monitor output, but it could exercise a fair degree of criticism of the conduct of hearings and of the quality of officers' decisions. In performing this function, a central office would not be in the institutional position of desiring a particular result and, even more importantly, would not be seen by the public to be influencing outcomes in the way that such supervision by the substantive
agency might appear to do. The central office would have only an institutional interest in the improvement of adjudicatory hearings. It could study the operation of administrative process and make recommendations for its improvement.

B. Problems with Independent Hearing Officers

Although the independence of hearing officers is one of the main advantages of a central office system, such independence can also be seen as a disadvantage. After examining a federal program that temporarily transferred hearing officers from one agency to another, one commentator stated that "[t]he borrowed examiner has no special commitment to the successful achievement of the goals of that agency to which he is temporarily assigned."  

Perhaps a system in which an officer is borrowed from one substantive agency by another does not serve as a good example for identifying the possible attitudes of central office hearing examiners. Nevertheless, the experience may give some idea of the nature of the problems that result from a hearing officer occupying a position independent from the agency for whom he or she conducts hearings. It has been also noted:

The borrowed examiner approaches his case with an attitude significantly different from that of an examiner sitting within his own agency—an attitude closer to that of an appellate court than of one who is "acting for the head of the agency." For better or worse, his decision is somewhat less of an "agency decision," with the cohesiveness of purpose which that phrase implies; and somewhat more of an objective judicial determination, giving the agency the benefit of no legal doubts, inserted at the very outset of the administrative process. 

In California, where a central office system to conduct hearings for its licensing agencies and its Department of Social Welfare and the Commissioner of Corporations is used, a hearing officer in the central office described those hearing officers as "fiercely independent," and pointed out that there was a tendency for an atmos-

105. Id. at 355.
106. ABRAMS, supra note 98, at 5-6. See generally Clarkson, supra note 100.
sheer of antagonism to develop on the part of the agencies, especially where the agencies are licensing bodies controlled by the businesses or professions being regulated. 108

When examined in the context of the function of the hearing officers, however, conflict between the independent hearing officer and the agency should not appear to be acute. The function of the hearing officer is to determine facts, to apply the law to those facts, and, where necessary to a decision, to make policy determinations that are in keeping with the overall policy set by the agency. For the most part, agencies will have the final authority to reverse the hearing officers in any individual case. Hearing officers sit to apply the policy formulated by an agency. They do not make policy, except insofar as policy judgments necessary to decide a particular case have not already been made by the agency. Professor Norman Abrams acknowledged:

The agency may be concerned lest the hearing officer be so independent that his decisions are inconsistent with agency policy. That concern suggests a basic tension in the administrative process—between the notion that in deciding cases hearing officers should be independent of the agency and at the same time should, in some sense, be an arm of the agency and reflect its policy. We usually resolve that tension by distinguishing between agency influence upon the hearing officer in the individual case, deemed impermissible, and hearing officer adherence to general policies of the agency which is deemed not only acceptable but desirable. 109

The problem really is not one of containing the officious intermeddler, but rather one of communication between the agency and the hearing officers. The problem is somewhat complicated by the fact that outside parties are involved and that policy articulated by an administrative agency amounts to law.

Abrams did find that “hearing officers under a central panel system may find it more difficult to keep abreast of agency policies.” 110

In an attempt to deal with this problem in California, licensing agencies have furnished the central office with memoranda stating

108. Id. at 89.
109. ABRAMS, supra note 98, at 8.
110. Id. at 7.
their policies, and these memoranda are made available to the hearing officers. The memoranda "are only guidelines to the thinking of the agency and in no way [are] binding upon the hearing officers," but at least one hearing officer in California has recognized that since these policy statements appear to be rules of general application, perhaps they should be adopted as regulations. The point is that agencies should be encouraged to articulate their policies. To the extent that agencies expect hearing officers to conform their decisions to agency policy, agencies should embody that policy in regulations.

In addition, hearing officers must presumably follow prior decisions of the agency. Since it makes very little sense to have decisions that are so independent of agency policy that they require reversal by the agency, hearing officers, as far as possible, should apply the policy that the agency establishes. Expertise and experience is required to understand and apply the policy, so familiarity with agency goals, especially where agency regulations may be somewhat complex, is a definite virtue. Latitude given to hearing officers is substantial only in those areas where the agency has not formulated its policy in regulations or decisions. But it is in precisely these areas that parties expect the examiners to hear and seriously consider their arguments and the parties should be afforded an opportunity to make whatever record might be necessary to support those arguments.

We suggest that one way to combine independence with the necessary understanding of agency policy is to place the hearing officers in a central office, but assign the officers to cases of single agencies for extended periods of time. In this manner they can acquire the expertise necessary for the efficient handling of cases, and at the same time can maintain the requisite distance from the agency. Supervision would still come from an outside agency. The director of the central office would remain responsible for the career advancement of the hearing officer and he could handle situations, were they to arise, in which an officer became so attached to an agency that he was no longer able to make independent determinations of factual and other open issues. Even where an agency had

111. Coan, supra note 107, at 89.
112. Id.
113. Id.
an insufficient volume of cases to justify employment of a full-time hearing officer, if the same person were assigned to that agency to conduct hearings, there would be a development of expertise.

Another possible difficulty arising from having hearing officers located in a central office is that since they would be less known to the agencies, the agencies might be less willing to adopt their decisions. To the extent that hearing officers heard cases for the same agency for an extended period of time, this, too, would be remedied.

In order to assure the integrity of the decisional process, and to avoid any appearance that scheduling is done by agencies to achieve particular substantive results through the selection of hearing officers, scheduling authority must lie with the central office. The insertion of an outside agency's scheduling machinery into the agency decision-making process could result in scheduling that is slower and not as responsive to an agency's needs than if the agency itself had full control over scheduling. The "question to be faced is whether the loss in control over scheduling and resulting delays are worth the gain of insuring the independence of the hearing officer." Although there may be increased delays, we feel that they are worth the advantage of independence. We, of course, anticipate that, along with the impartiality resulting from the central office system, will come improved decision-making by hearing officers generally.

C. Description of the Central Office

A central office, perhaps called the Office of Administrative Hearings, should be under the supervision and control of a single person, the Director of Administrative Hearings, and should be an independent agency. The director should be appointed by the governor for a term of six years and should be removable for cause. If the agency is to be effective, a strong administrator must be in charge. He should be in a position to resist agency pressures that might compromise, or appear to compromise, the neutrality of the hearing officers. To support the director's independence, the statute creating the office should contain restrictions on the director's participation in outside activities, including the usual restriction on political ac-

114. Id.
115. See Abrams, supra note 98, at 29.
116. Id. at 30.
tivities applicable to all civil service employees.\textsuperscript{117}

The director should have full power over personnel matters. Thus, he or she should have the authority to employ, supervise, promote, suspend, demote, and remove hearing officers and other employees in accordance with generally applicable civil service provisions. In cooperation with the Civil Service Commission and the Executive Board,\textsuperscript{118} the director should set appropriate classifications and employment requirements for the hearing officers.

To assist the hearing officers, the central office should hire supporting personnel, including official reporters and secretaries. Such personnel should be employed by the central office so that the hearing officers will not be dependent on the agencies for these necessary services. Similarly, the central office should include office space for the hearing officers. Were hearing officers assigned to occupy offices within the agencies themselves, there might be an undue appearance of impermissible contact.

The central office would assign hearing officers to hear cases and would supervise the scheduling of hearings. An equally important function of the central office would be the supervision and career development of the officers. Many of the advantages that are possible under a central office system will depend on the importance which the office attributes to training and development of the officers.

A central office might work with individual hearing officers and conduct group courses with a view toward improving skills in presiding at hearings and writing decisions. The office could also plan programs to address problems that might prevent hearing officers from performing well. It might concern itself with the reporting of new agency decisions, or with other means of informing the hearing officers of the policy positions taken by the agencies. Because we feel that the office, if it were functioning as we envisage, would necessarily become aware of defects in the process of administrative adjudication, we think that the central office should have the authority and financial ability to undertake studies of administrative law and procedure.


\textsuperscript{118} The Executive Board, which consists of the governor and six administrative department heads designated by him or her, PA. STAT. ANN. tit. 71, § 64 (Purdon 1962), has certain powers over the salaries and classifications of Commonwealth employees. See PA. STAT. ANN. tit. 71, § 741.707 (Purdon Supp. 1977-1978).
We hesitate to suggest any rigid qualifications for hearing officers in the belief that these should be worked out by the director of the central office in consultation with the various agencies who will utilize the officers. Some general comments may be made, however, about the nature of the position and some of the issues that might arise with regard to qualifications.

Since a good adjudicator can minimize conflicts between parties, the officer should have a well-developed sense of how to deal with people and should be sensitive to the positions of individuals in an administrative dispute. While some hearings involve matters that justify sophisticated representation, many administrative hearings involve controversies that are small in dollar amount and concern people who are not knowledgeable about administrative procedures and practices. An adjudicator who intelligently handles the problems that parties face in the administrative process stands to increase respect for government and at the same time facilitate the handling of cases. Thus, prime qualifications for such officers include sensitivity, patience, and intelligence. These attributes may develop from experience in dealing with people from a variety of backgrounds.

It may prove necessary to hire people with substantial experience in particular substantive areas related to certain types of hearings. Without a doubt, a solid background in the substantive area which is the focus of a hearing goes a long way toward permitting someone to become a good adjudicator, especially where the hearings require expertise in specialized material. Nevertheless, even in many complicated areas, a good adjudicator, even though unfamiliar with the area, may be able to grasp the material with sufficient understanding to make a good decision. Given our recommendation that hearing officers be assigned to particular agencies for substantial periods of time, it might be possible to make good use of generalists who subsequently develop specialized knowledge. The controversy over whether to use generalists who develop the expertise in the course of conducting hearings or experts in particular substantive areas, however, appears to be a continuing one in the discussion of necessary qualifications for hearing officers. Of course, in any hearing

officer system, demands for hearing officers must be met with the available personnel. While we feel that the best approach would be to develop a pool of hearing officers who, by careful assignment, would gain expertise in the areas in which hearings had to be held, we think that flexibility is important and that there may be a need to recruit specialists in certain areas. This need to use specialists may be more acute in the early stages of the operation of the central office. Actions taken in the transition period must not, however, impede the long-range development of a central office where hearing officers sharpen their skills as adjudicators beyond any special expertise necessary in particular areas.

In addition to hiring people who have had substantial experience, the office should also hire recent law school graduates who could become initiated through the simpler types of hearings and gradually develop adjudicative skills. In this context, we might suggest that long experience as an effective legal practitioner, may, but does not necessarily, make one qualified to perform well as an adjudicator.120

Closely related to the issue of specialization is the question of whether all hearing officers should be lawyers. California requires that hearing officers must have practiced law in California for at least five years.121 Florida requires that, prior to employment, a hearing officer must have been a member of the Florida Bar for three years.122 Although the Florida statute does permit the director of the central office to appoint nonlawyers to conduct hearings, he

-discussed this point in the course of dealing with California's requirement that hearing officers be admitted to practice law in the state. He said:

On the other hand, it was argued that the technical nature of much of the Commission's work justifies the employment of engineers, rate experts and accountants as examiners, presumably upon the theory that attorneys might find undue difficulty in technical fields. While every lawyer would no doubt rise to champion the ability of the legal profession to master the most esoteric subject of human knowledge sufficiently to perform the hearing and judging function, and would point to the long tradition of the judiciary in that respect, practical considerations of incumbency and historical precedent proved the deciding factor. Several non-lawyers who are technically trained men with previous experience in examining were blanketed into the office of chief examiner.

Id. (footnote omitted).

120. It is relevant to note here that in some legal systems judges are recruited directly out of law school rather than from the practicing bar. See, e.g., R. DAVID & H.P. deVRIES, THE FRENCH LEGAL SYSTEM 18 (1958).


122. FLA. STAT. ANN. § 120.65(2) (West Supp. 1977).
may only do so if he also appoints a lawyer "to assist in the conduct of the hearing and to rule upon proffers of proof, questions of evidence, disposition of procedural requests, and similar matters."\textsuperscript{123}

Certainly, instances can be cited in which nonlawyers conducted hearings well. One scholar, after studying similar types of hearings conducted by lawyers and social workers, concluded that social workers were more desirable adjudicators,\textsuperscript{124} but the conclusions drawn from the data in that study have been criticized.\textsuperscript{125} At any rate, the study dealt with hearings in which the individual parties were not ordinarily represented by counsel.\textsuperscript{126} Where parties are represented by attorneys, it is not impossible for nonlawyers to do a good job as hearing officers; lawyers, however, may more readily understand some of the tactics used by other lawyers. Counsel's methods may appear impolite or needlessly dilatory to nonlawyers even though they may be necessary to protect a client's rights; on the other hand, unnecessary delays or subterfuges also may be more readily identifiable by another attorney.

Where there is no representation of the parties, the hearing officer may have "to aid the claimant in presenting his evidence and testimony and in ferreting out and formulating the issues."\textsuperscript{127} Although a nonlawyer well-versed in the applicable rules and regulations might be able to do this, it may be more easily handled by a lawyer presiding. A way to minimize disparities would be to have nonlawyers "undergo a short-term paraprofessional training program to familiarize them with the different aspects of the hearing officer's job."\textsuperscript{128} As with the area specialization problem, the issue is hard to resolve definitively. We suspect that the focus should be on the qualifications of the particular individual conducting the hearings—how well he has come to know the material involved, and has developed adjudicatory skills. As mentioned earlier, the practice of law itself does not assure possession of adjudicatory skills. Never-

\textsuperscript{123} Id. § 120.65(4).
\textsuperscript{125} Abrams, supra note 98, at 58-60.
\textsuperscript{126} tenBroek, supra note 124, at 244.
\textsuperscript{127} Id. at 248.
\textsuperscript{128} Abrams, supra note 98, at 60. Abrams concluded: "In the final analysis, the choice between requiring legal training for general panel hearing officers or introducing a type of paraprofessional depends on how judicial one views the hearing officer's function to be, and how large is the available pool of potential lawyer hearing officers." Id.
theless, it is probably true that in formulating a general rule designed to identify those most likely to develop such skills, the requirement of formal legal training makes a lot of sense. We think, therefore, that, generally, hearing officers should be lawyers, but that the director should have the power to make exceptions where it would be desirable to utilize people without law degrees and with particular expertise.

We also think that it is important that hearing officers be full-time employees of the state and that they be free from conflicts of interest. The major innovation of a central office would be to cultivate a corps of trained, experienced adjudicators. Such a development would be almost impossible through the use of part-time employees. What is needed is a group of people who are committed to increasing their skills and who would strive to achieve a high degree of expertise in the various areas to which they were assigned to hold hearings. Finally, we think that hearing officers should be subject to a code of ethics designed to ensure the appearance and reality of impartiality, with restrictions on political activities applicable to all civil service employees.129

H. Powers of Hearing Officers

1. Generally

Hearing officers need the power necessary to preside effectively at administrative hearings. Thus, in general, hearing officers should possess whatever authority the head of the agency would have were he presiding—the power to hold necessary conferences, rule on the evidence, govern the course of proof, and issue subpoenas. Once a case is assigned to a hearing officer, he should have the power to schedule the hearing subject to the supervision of the director of the central office. These suggestions are based on the proposition that hearings will proceed smoothly and efficiently where the presiding officer has authority to regulate their course.

Naturally, the presentation of the case will rest with the parties. But where one of the parties is not represented by counsel, the obligation of the hearing officer to make a full record for the agency may require that the hearing officer elicit evidence. When a hearing officer does this for a private party, there is probably little harm.

done to the administrative hearing process aside from some possible annoyance on the part of the administrators. We do not mean to suggest that it is not important to make government employees feel that the hearings are fair. That is important, and certainly effective administration may be impeded if these employees feel that their best efforts are being frustrated by hearing officers who do not give them a fair opportunity to present their cases. Nevertheless, that problem is less significant than the problem that arises when the state is unrepresented and the hearing officer elicits evidence to aid the state's case. In that situation, the appearance of fairness is overshadowed by the suggestion that the hearing officer is operating on behalf of the state. Thus, the cause of fair hearings is probably best served when the state is represented by legal counsel or by administrators.

2. Recommended Decisions

One extremely important function of hearing officers is to prepare recommended decisions. Without that power, a hearing officer becomes a listener without focus, who cannot be expected to guide the proceedings in a way that will narrow the issues. Where the hearing officer must function as a decision-maker, he can be expected to assume a sharp sense of what evidence is relevant, to analyze the case, to narrow the issues in terms of the questions that arise with reference to applicable agency policy, and to guide the parties with regard to the impact of agency policy on their case. In sum, the requirement that a hearing officer make an initial decision forces him to come to grips with the case. Moreover, the officer's decision will serve as material for the director to use in training other hearing officers.

The requirement that hearing officers make initial or recommended decisions also facilitates the work of the agency. The agency head, instead of being confronted by a raw record, may read a reasoned application by the hearing officer of the agency's administrative law and policy to the facts and decide whether the analysis is correct. Recommended decisions also help the private parties. Where there is no recommended decision, the agency head is likely to be given a staff recommendation based on the record. While such staff recommendations may be given even where there is an initial decision, a benefit of the initial decision is that, generally, the parties are privy to such a report. Thus, the initial decision may help the parties prepare their arguments and clarify their positions for
the agency head as well as provide direction to the agency from a neutral officer familiar with the record.

The right to be able to present a reasoned argument to the agency head is extremely important. As the United States Supreme Court once said:

The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.\(^\text{130}\)

When the case is not initially heard by the agency head, it is therefore important that there be available an initial decision to provide the necessary focus for intelligent arguments to be presented to the agency head.

While it might be possible to have recommended decisions made, but not given to the parties, that seems extremely unfair. In an opinion on behalf of the New Jersey Supreme Court in support of the holding that parties to administrative adjudication were entitled to see the hearing officer’s report, Chief Justice Arthur T. Vanderbilt said:

Where, as here, the final decision is rendered by one who did not hear the evidence but relies, in part at least, upon the findings and report of the hearing officer, there is an obvious danger that the decision may be based on findings set forth in the hearer’s report that are not supported by the evidence. To guard against this danger and to accord the appellant the fair play to which he is entitled it is essential that prior to its submission to the deciding officer the hearer’s report be made available to the parties and that they then be given an opportunity to correct any mistakes that may appear in the report. This simple requirement, while imposing no hardship on the

\(^{130}\) Morgan v. United States, 304 U.S. 1, 18-19 (1938).
agency, does protect the individual against the strong possibility of a miscarriage of justice or the suspicion thereof.\footnote{131}

The Federal Administrative Procedure Act requires that a recommended decision be made when the agency did not hear the case,\footnote{132} and that it be part of the record.\footnote{133} Similarly, the Model State Administrative Procedure Act,\footnote{134} the Florida Administrative Procedure Act,\footnote{135} and the New Jersey Administrative Procedure Act\footnote{136} provide that recommended decisions must be served on the parties.

\footnote{131}{Mazza v. Cavicchia, 15 N.J. 498, 523-24, 105 A.2d 545, 559 (1954).}
\footnote{132}{Administrative Procedure Act, § 8(a), 5 U.S.C. § 557(b) (1970). An exception is made for rule-making and for the determination of initial license applications but the exception applies only where the agency makes a tentative decision first, where a recommended decision is made by an agency employee, or where agency business "imperatively and unavoidably" requires.}
\footnote{133}{Administrative Procedure Act, § 8(b), id. § 557(c) (1970).}
\footnote{134}{Section 11 of the Model State Administrative Procedure Act provides: When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section. Uniform Law Commissioners' Revised Model State Administrative Procedure Act, 1970 version, reprinted in K.C. Davis, Administrative Law Text 579 app. (3d ed. 1972). One problem with the Model Act is that it does not require that there be a recommended decision if the agency head has read the record. We think that this is a mistake because it deprives a party of the benefits of having a recommended decision.}
\footnote{135}{FLA. STAT. ANN. § 120.58(1)(e) (West Supp. 1977). The text of the Florida provision does not differ in any substantial and material way from the text of the Model Act provision. See note 134 supra.}
\footnote{136}{According to the New Jersey statute: When a person not empowered to render an administrative adjudication is designated by the head of the agency as the presiding officer, his recommended report and decision containing recommended findings of fact and conclusions of law shall be filed with the agency and delivered or mailed to the parties of record; and an opportunity shall be afforded each party of record to file exceptions, objections, and replies thereto, and to present argument to the head of the agency or a majority thereof, either orally or in writing, as the agency may order. The head of the agency shall adopt, reject or modify the recommended report and decision. The recommended report and decision shall be a part of the record in the case. N.J. STAT. ANN. § 52:14B-10(c) (West Supp. 1977-1978).}
3. Effect of Recommended Decisions

Where recommended decisions represent the fair application of administrative law and agency policy to the facts, a good chance exists that agencies will adopt the decisions of the hearing officers. In the last analysis, policy remains the prerogative of the agency head, and the effect of recommended decisions should be left to the discretion of each agency. Thus, an agency should have the power to determine what force and effect the recommended decisions should have. There are several possibilities. An agency could provide that it will review all recommended decisions automatically—in effect saying that a recommended decision remains merely a recommendation until approved. At the other extreme, an agency could provide that decisions of the hearing officers are final decisions of the agency. A more likely possibility is that an agency would provide that a recommended decision becomes final after a certain period if not appealed by a party (including the state) or certified for review by the agency head. These alternatives are not the only possibilities; agencies should be able to adopt rules that give the recommended decisions an effect that is consistent with the needs of each agency.

F. Funding the Central Office

There are at least three mechanisms for financing a central office of hearing officers. The central office could have its own budget financed by an appropriation from the general state fund; the expenses of the central office could be borne entirely by the agencies using its services; agencies could reimburse the central office for the hearing officers they use while the general overhead\(^{137}\) of the office is funded by a legislative appropriation. Unfortunately, there is a dearth of information available evaluating the benefits of these funding alternatives. In addition, there is insufficient information to assess whether a central office would be more costly than the present system.

Certainly, a great deal of money is currently being expended for hearings in Pennsylvania.\(^{138}\) Since a central office system would not

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137. For the purposes of this article, overhead is considered to be all costs of the operation of the central office, excluding the salary and fringe benefits of hearing officers.

138. The Pennsylvania Department of Justice, based on an informal study conducted by one of the authors, has estimated that approximately $10 million is expended annually for
significantly expand the number of hearings, there need not be a great increase in costs. If the central office is to be funded by an appropriation out of the general fund, then all appropriations to the various agencies for hearing officers can be eliminated. Expenses for all equipment, files, records, and other similar supplies which are currently used by the agencies for the hearing function could simply be transferred to the central office budget. In fact, it could be argued that a central office would actually cost the Commonwealth less than the present system due to the streamlining efficiency that would be inherent in the centralized system. Since many of the costs incurred by an agency using its own hearing officers are hidden in the performance of other functions, it would be very difficult to separate and identify the cost of hearings.\textsuperscript{139} By eliminating the identifiable costs of the hearing function in each agency, however, the savings should nearly equal the total cost of the central office; the only significant new costs would be for maintaining the staff necessary to operate the central office.

Of course, there will be a variety of cost changes in a central office system that are hard to predict and more difficult to quantify. For example, the time spent by agency personnel supervising hearing officers and finding and hiring new hearing officers will be saved under a central office system. At the same time, in agencies in which the decisional process has heretofore been relatively informal, there will now be added costs of such procedures as having to take exceptions to the recommended decision and to file briefs in support of the position that the staff would like the agency to take. This additional expense is not confined solely to a central office system but would apply to any system that involves the use of recommended decisions.

Although it is impossible to predict with any certainty that a central office will result in greater or lesser costs to the government,
even if the central office were to result in increased costs, we feel that the inevitable increases in the quality and fairness of the hearings held will justify costs.

There are several benefits from having the agencies pay for the entire cost of the operation of the central office. Yet a glaring negative feature prevents us from endorsing it. If agencies bear the cost of the hearings, an agency may be charged for the amount of time it uses a hearing officer provided by the central office. The agency may also pay its pro-rata share of the overhead of the central office. This system of financing the central office would obviate the necessity of determining the amount of funding necessary for a general appropriation since the central office could bill the agencies and thereby receive funds from their appropriations. The major drawback, however, is that an agency, in an effort to save money, may forego a hearing entirely to avoid utilizing a hearing officer provided by the central office, particularly when an agency doubts that a hearing is necessary. As a result, there may be a failure to grant hearings when they would be desirable. This would be unacceptable. If agencies were required to reimburse the office only for the hearing officers it uses while the overhead of the office is funded by a general appropriation, the incentive of agencies to forego the hearing process altogether would be lessened, but perhaps not eliminated. A means of entirely eliminating this undesirable situation is to grant a general appropriation to the central office out of which it must perform all its functions.

Although the selection of the funding mechanism for the central office is important, it is not essential that the “right” choice be made initially. In fact, the central office, once established, may be best equipped to study the funding problem and make recommendations to the General Assembly. A general appropriation is easy to administer and the most common means of funding a new office. Therefore, an appropriation—rather than a complicated billing structure—should be the initial source of funds. Another factor sup-

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140. If, for example, an agency utilizes five percent of the total number of hearing officers employed by the central office, in addition to paying the central office for the use of the hearing officers’ time, the agency must pay five percent of the overhead of the central office.

141. In his assessment of the California experience and its central pool of hearing officers, Coan agrees. He stated: “there is no question in my mind that an independent Office of Administrative Hearing should be budgeted from the general fund, just as our courts are budgeted.” Coan, supra note 107, at 91.
porting this view is that passage of proposed legislation would be rendered more difficult if an unusual means of funding were proposed.

VI. Conclusion

Pennsylvania presently lacks any system for the provision of hearing officers to state agencies that require them. Each agency now uses its own devices to attract suitable personnel to conduct hearings. A central office with the function of supplying hearing officers would free the agencies from the task of recruiting and supervising hearing officers, and at the same time would cultivate an impartial hearing process. This independence would aid in ensuring both the appearance and actuality of fairness in administrative hearings. Furthermore, the existence of an office with the primary function of improving the performance of hearing officers will tend to improve the quality of hearings and decisions rendered. A central office system would create the opportunity for people to become career adjudicators who can utilize their talents, polish their skills, and become highly qualified in conducting administrative hearings.

We should emphasize that a central office will depend upon the people who operate it. The capabilities of the first director will be a crucial factor in its success. Therefore, in addition to recommending the establishment of a central office, we suggest that its first director be a person of unblemished integrity with a sophisticated understanding of the administrative process and the ability to be steadfast in his or her devotion to the goals of the office.

Although there are other methods by which the present hearing procedures might be improved, it is our opinion that the establishment of a central office for the provision of hearing officers will substantially improve the administrative process.