

III.

REPORT OF THE COMMITTEE ON ADMINISTRATIVE ADJUDICATION IN THE EXECUTIVE BRANCH

A. BACKGROUND¹

A substantial and growing number of Coloradans depend on administrative adjudication to resolve their disputes in matters such as licensing, workers compensation, unemployment insurance, and many others. There is widespread concern, however, that administrative law judges ("ALJs"), hearing officers, and referees in Colorado State government lack impartiality. Many of those familiar with administrative hearings perceive ALJs as too subject to political pressure from special interest groups interested in the subject of their deliberations.

There is also dissatisfaction with the current structure of the administrative law system. In fact, Colorado currently has no "system" of administrative adjudication, or rational method governing the resolution of disputed claims by Colorado's various agencies. The Committee recognizes that the core of the problem lies in the absence of clear management supervision over the State's administrative law system as a whole. Furthermore, the lack of appropriate accountability in the current funding mechanism for the "Central Panel"² of the State's Division of Administrative Hearings has led to an inefficient use of State resources.

The lack of managed organization has led to a disorganized method of assigning ALJs to cases. While the Central Panel is permanently assigned to many departments and agencies, other agencies can, under their own, unpredictable criteria, assign their own ALJs to hear cases. Some agencies have their own permanently assigned ALJs, entirely apart from the Central Panel; and still other agencies assign ALJs from the Central Panel on an as-needed basis.³ Several other agencies have their own, non-lawyer staff make determinations regarding disputed matters. Clearly there is no uniform or centralized method of assigning ALJs to hear cases. The disorganized, seemingly random way in which ALJ assignments are made by the various agencies leads to confusion for parties and a perception that the hearing process is unfairly weighted in favor of the agency's own political agenda. In the end, the current system's justification seems to be purely that it is a creature of historical growth and customary practice.

Colorado's system of administrative *appellate* review is similarly chaotic. Nearly every administrative agency has its own rules for reconsideration, review, and appeal of final determinations; even a determination of "finality" varies from agency to agency. Administrative appeals follow a cobweb of tracks, some to district court, some to an intermediate administrative office for appeals, some to a commission or board, and some directly to the Colorado Court of Appeals in the Judicial Department.

An additional issue is that administrative law judges are employees of the State's classified personnel system. As members of the Civil Service, ALJs are therefore not accountable to either the Governor or his appointed leaders of the various departments of the executive branch. Nor are ALJs selected through Colorado's merit selection system for judicial officers or subject to review by the State's judicial performance commissions.⁴

Consequently, ALJs are virtually unaccountable to the citizens they are responsible for serving. While it is essential to insulate ALJs from political pressures, too much isolation has undermined public confidence in Colorado's administrative law system. It has also resulted in a lack of training and education for ALJs that may be adversely affecting their performance.

B. THE COMMITTEE'S APPROACH

The Committee has recognized two important but counterbalanced objectives in evaluating possible reforms for the effective adjudication of disputes arising in the context of administrative departments and agencies:

- (1) the independence of quasi-judicial decision-making; and
- (2) efficiency in implementing the agency's purpose.

The accountability of each individual ALJ to constituents who depend upon his or her service should be a fundamental element of any administrative law system. At the same time, departments and agencies have policy missions they are bound to implement. The parties who are affected by agency action must be able to rely upon an ALJ's objectivity, fairness, knowledge of the law, lack of bias, and independence from political influence. A proper administrative adjudication system is one in which these fundamental values are preserved and protected.

C. SUGGESTIONS FOR REFORM

1. *Reorganize the Administrative Law System into a Single Administrative Agency*

The Committee believes the need for fair administrative adjudication is so important that complete reform of the current system is required. It maintains the best way to reduce unhealthy bureaucratic and political pressure on the independence of administrative law judges is public accountability through the elected head of the executive branch of Colorado State government — the Governor. Accordingly, the fundamental recommendation of the Committee is to reorganize the State's administrative law system as a single administrative agency (called, provisionally, the "Division of Administrative Adjudication") led by a division director who is appointed by the Governor.

The appointment of an administrative head would provide for greater accountability to the public. It would allow any significant bureaucratic antagonisms and animosities to come to the surface and be dealt with in a public forum. A division director who is ultimately responsible to the Governor, even though reporting to the head of an existing department within the executive branch, would implement and enforce a set of standards to govern the Division of Administrative Adjudication. As a gubernatorial appointee, the division director could be held directly accountable for insuring that ALJs are effectively selected, trained and evaluated based on their demonstrated commitment to neutral, impartial, courteous and timely service to the public.

If at all possible, it is essential that the Governor directly appoint the individual who is responsible for managing all executive branch ALJs. The ideal approach, as identified by the

Committee, is for the Governor to be given the statutory power to appoint the newly created position of Director of the Division of Administrative Adjudication. Alternatively, the Colorado General Assembly could vest this appointment power in the executive director of the Colorado Department of Personnel/General Support Services (“GSS”), who would then be free to choose the new division director, who would remain outside the classified State Personnel System. A similar statutory appointment process allows the executive director of the Colorado Department of Transportation to appoint the deputy director of that department.

However, the Committee recognizes that the legal requirements of the Colorado Personnel System may complicate efforts to create a new division director position within GSS that would be directly appointed by either the Governor or the executive director of GSS and remain a non-classified position. In that event, the executive director of GSS should be statutorily designated as the appointing authority for the new division director position. This new division director position would then be selected using the competitive process mandated by the Personnel System. This reform is clearly less desirable than having either the Governor or the executive director of GSS directly appoint the position. Yet it still achieves the important goal of placing all ALJs within a single executive branch department, where they can be more carefully selected, supervised and trained. In either case, the Committee recommends placing all ALJs and other administrative decision-makers – including referees and hearing officers – within a single executive branch department, specifically GSS. At the same time, the Division of Administrative Hearings within GSS should be eliminated once the new Division of Administrative Adjudication is established.⁵

2. Reform the Funding Process

a. Transfer Budget Allocations for Adjudication Services to Division of Administrative Adjudication

Presently, each department or agency to which the Central Panel provides ALJs has an amount designated in its budget, approved separately by the General Assembly, for payment to the Central Panel for its adjudication services. Thus the Central Panel has a portion of the administrative agency's budget in its control. By contrast, agencies that utilize their own ALJs simply pay for their own hearings and retain direct financial control over their own ALJs, however they may be assigned to cases. The Committee does not believe either method achieves the goal of management accountability.

A more rational, cost-effective system would transfer each separate agency's current Central Panel budget allocation to the Division of Administrative Adjudication for management by its division director. In addition, the budget currently allocated to pay for adjudication staff that are directly employed by administrative agencies would also be reallocated to the Division of Administrative Adjudication, accompanied by a transfer of the respective hearing officers and support personnel. Likewise, supplies and locations for hearings would be reassigned from the separate agencies' budgets to that of the Division of Administrative Adjudication. This reform has the advantage of placing budget responsibility within the hands of a gubernatorially-appointed division director.

b. Allocate Some Adjudication Costs to Parties

The Committee recommends that a fee-generated supplement to the budget approved by the General Assembly be considered as a potential alternative funding mechanism. By charging parties a filing or case-processing fee, some of the costs of adjudication would be allocated to the users of that system. Certainly, the State's Judicial Department has historically assessed filing fees to parties in civil litigation. At present the costs of administrative law hearings are primarily born by the taxpayers and not by the participating parties. The imposition of a fee might focus the attention of the parties on the reality of their choice to consume public resources to resolve their dispute. Alternatively, the filing costs might be assessed only against a losing party, as in civil court.⁶

3. Assign Administrative Hearings to the Division of Administrative Adjudication

In order to achieve fundamental reform, the Committee recommends that the State's Administrative Procedure Act and other statutes relating to administrative adjudication by the various administrative agencies be amended to provide for the assignment of all quasi-judicial administrative hearings to the new Division of Administrative Adjudication. The departments and agencies themselves would not be permitted to conduct quasi-judicial administrative hearings. However, the Committee does not believe that it is politically wise or constitutionally possible to remove from the agencies the power and obligation to make ultimate findings of fact and conclusions of law and to issue final orders. Accordingly, each administrative agency would retain those functions by providing for appellate review of the decisions rendered by the administrative law judges engaged through the Division of Administrative Adjudication. Application of the law of the case would be under the ultimate administrative control of the agency, but the initial findings of fact and original application of the facts to the law would be the job of the new Division of Administrative Adjudication.

4. Develop and Maintain Expertise in Administrative Law Judges

In many specialized administrative law areas — for instance, workers' compensation, public utilities, State personnel, and professional licensing — the ALJs hearing such cases should demonstrate special expertise and knowledge in relation to their subject matter. Therefore, the Committee recommends that assignments of administrative law judges and hearing officers be standardized so that particular ALJs routinely hear matters arising from particular agencies or in particular fields. This will help develop and maintain expertise in ALJs, a condition that approximates the present practice of agencies that retain their own panels of ALJs and will lead to a more efficient and effective adjudication process.⁷ The director of the Division of Administrative Adjudication, as a Governor's appointee, would be in the best position to develop maximum efficiency from the staff of ALJs and hearing officers assigned to that Division. No one in government is currently performing this function now across agency boundaries.

D. CONCLUSION

The Committee believes that the consolidation of administrative law judges to a new Division of Administrative Adjudication, with management control by a Governor's appointee, is the best method to improve both the quality and efficiency of Colorado's administrative law system. This reform would enhance ALJs' accountability to the public while permitting ALJs to get the supervision and training they need to perform the vital responsibilities with which they have been entrusted.

¹The Committee wishes to acknowledge the invaluable research and documentation provided by the Colorado Division of Administrative Hearings. Executive Director Dolores Atencio and Chief Administrative Law Judge Marshall Snider performed beyond the call of duty in focusing the Committee's exploration of ideas and developing arguments and in helping the Committee understand the complexity of the current Colorado administrative law system.

²The term for the collection of administrative law judges within the Department of Personnel, organized under General Support Services. As of the 99-00 Fiscal Year, the Central Panel has 16 ALJs who conduct hearings statewide. The primary types of cases heard by Central Panel ALJs are worker's compensation, public entitlement, professional licensing, and statutory cases; *e.g.* complaints filed under the Fair Campaign Practices Act. ALJs are assigned to the various Departments under which the dispute arose and their services are billed on an hourly rate. This funding system is commonly known as the "Oregon Plan."

³ For example, the Department of Labor and Employment employs about twenty-seven ALJs and hearing officers. The State Division of Worker's Compensation has its own force of pre-hearing administrative law judges to address procedural issues and settlement of claims, while the Division of Administrative Hearings assigns its own ALJs from the Central Panel to hear disputes about benefits from the same worker's compensation claims.

⁴Colorado Constitution, Art. VI, §24. Both state and district judicial performance commissions were created by Section 13-5.5-101 *et seq.*, Colorado Revised Statutes.

⁵The new Division of Administrative Adjudication would allow the variety of decision-makers — referees, hearing officers, and ALJs — to be managed consistently in a professional environment. The Committee does *not* recommend an "elevation" of all such staff to a higher, administrative law judge status, with the attendant increased complexity and technical rules of procedure. The goal, instead, would be to simplify and clarify the hearing process. The Committee believes this standardization and centralization of the State's administrative law system will increase its efficiency and effectiveness and improve its quality and impartiality.

⁶ For parties unable to pay, a method for waiving fees (*i.e.*, permitting *in forma pauperis* proceedings) could be used as it is by the Judicial Department. Although the Committee does not take a position on whether fees should be charged or on what the appropriate amount of such a fee would be, the Committee believes it would be unrealistic to expect fees for services to cover the entire budget for the Division of Administrative Adjudication.

⁷This recommendation is similar to that made by the Business Courts Committee of this Task Force, that business courts be established to specialize in commercial cases to secure the benefits of judicial expertise in business matters. See Part I of this Report.