Part II
The Role of the Hearing Officer

A Private Practitioner's Point of View

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The position of hearing officer is like a vortex in that it draws about itself controversial aspects of administrative government. Such is inherent in the function of the position. The California Administrative Procedure Act sought to allay controversy by providing for professional competence and official impartiality in hearing officers sitting in contested licensing matters.[1] Unfortunately, because of compromises imbedded in section 11502 of the Government Code, and their consequences in internal governmental operation, the act falls short of achieving this objective.

Two principal controversies in administrative government are over construction of the statute administered by the agency and over the procedure to be followed by the agency. These might be loosely described as administrative interpretation versus judicial interpretation and administrative procedure versus judicial procedure. Administrative agencies cannot be courts; and administrators cannot be expected to behave like judges, or even juries. The hearing officer is legislated into the administrative process to help supply the amount of judicial detachment and lawyer-like competence which a majority of the legislators believed advisable in applying the Administrative Procedure Act. In intention the hearing officer is a trained and experienced lawyer.[2]

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[1] TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 19–21 (1944); National Automobile and Casualty Ins. Co. v. Downey, 98 Cal. App.2d 586, 220 P.2d 962 (1950); Hohreiter v. Garrison, 81 Cal. App.2d 384, 184 P.2d 323 (1947).

[2] Among the minimum requirements to qualify for the position of Hearing Officer, Grade I, Division of Administrative Procedure, as specified by the State Personnel Board, are the following: "Admission to practice law in California for at least five years immediately preceding application for appointment *and*

Experience, Either

1. One year of full-time experience in the conduct of judicial or quasi-judicial hearings in the capacity of presiding officer; *or*

2. Five years of full-time experience in the practice of law, which shall have included at least two years experience in the presentation of evidence and the examination of witnesses before a trial court or quasi-administrative body. *and*

Knowledge and abilities: Thorough knowledge of legal principles and their application; wide knowledge of the conduct of hearing proceedings and of the provisions of the Administrative Procedure Act;" etc.

An agency obliged to apply a statute to achieve its objectives may often take a very different approach in interpreting it than would a court which has the additional obligation of accommodating the demands of the state to the rights of the litigant.[3] Moreover, the courts have established canons to aid them in interpreting statutes which they assume legislators are aware of. Administrators, on the other hand, may find that the statutory policy, or the exigency of the matter at hand, is incompatible with legal caution. By way of harmonizing this, the courts, as ultimate interpreters of the law, declare that an administrative interpretation of the statute governing the agency has great weight as to its meaning and is to be followed unless clearly erroneous.[4] This, however, occurs after the administrative interpretation has been made. The hearing officer participates in the administrative interpretation made by decision in contested cases. Through his proposed decision, when hearing the controversy alone, or through his attendance at deliberations by the agency when it hears with him, and as advisor on matters of law, the hearing officer may bring the judicial approach to the meaning of the substantive law administered by the agency into play, or at least an appreciation of the contentions of parties to the hearing who insist upon that approach. In either type of hearing, through his exclusive control over the admission and exclusion of evidence and his position of detachment for appraising it, the hearing officer is to provide the impartiality of a fair hearing, the separation of judging from accusing.

The Administrative Procedure Act applies to hearings on curtailing, suspending or revoking licenses or permits before some fifty-five state agencies.[5] The hearing officer is to preside, unless he hears the case alone, and is to rule on the admission or exclusion of evidence, and is to advise the agency on matters of law.[6] If he hears the matter alone, he prepares a decision which the agency may adopt as its own.[7] If the agency hears the matter with him, he is to be present during the making of the decision.[8]

It might be pointed out, before going further, that because of the exclusive role in which hearing officers act under the California Administra-

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[3] See, *e.g.*, Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation*, 49 HARV. L. REV. 426 (1936).

[4] KUCHMAN, CALIFORNIA ADMINISTRATIVE LAW AND PROCEDURE 76–80 (1953).

[5] CAL. GOVT. CODE §§ 11503, 11501. The right of the licensee or permittee is usually a property right with constitutional protection. KUCHMAN, CALIFORNIA ADMINISTRATIVE LAW AND PROCEDURE 19, 105–13 (1953).

[6] CAL. GOVT. CODE § 11512.

[7] CAL. GOVT. CODE § 11517(b).

[8] CAL. GOVT. CODE § 11517(a). This imposes a mandatory requirement, not only because of the use of the word "shall," a mandatory word (CAL. GOVT. CODE § 14), but also because the statutory provision would serve no purpose unless it contained a procedural requirement, since the agency can always direct its subordinate. See Schwartz, *Institutional Administrative Decisions and the Morgan Cases: A Re-examination*, 4 J. PUB. L. 49, 83 (1955).

tive Procedure Act, there is no parallel with the position of hearing officer in the federal government. The former do not participate in hearings or decisions on matters of taxation, rate making, public utility valuation, agricultural marketing orders, workmen's compensation, industrial safety orders, minimum wages, rule making, unemployment insurance, milk pricing or any affairs in which "expertizing" or the "institutional decision" may have value. There is no advantage to competent administration in having the abode of decision within the agency, with its experts and intensive experience in the field of regulation, that can be urged against independence of the hearing officer under the Administrative Procedure Act.[9] Neither do any of the agencies subject to the act have long established procedures congenial to both the agency and a specialized bar of practitioners which would be upset by using independent hearing officers.[10]

Hearing officers are employees of the Division of Administrative Procedure in the Department of Professional and Vocational Standards.[11] In addition to this division, the Department comprises twenty-five licensing boards or commissions,[12] all under control of a director.[13] Hearing officers from the Division serve at approximately two-thirds of the hearings before these boards and commissions, which is about half of the hearing work of the Division. The other half of its hearing work is done with a dozen agencies, such as the Department of Insurance, Division of Real Estate in the Department of Investment, and the Department of Social Welfare, sharing the contested case loads there with hearing personnel employed within those agencies.[14]

As the foregoing suggests, hearing officers in the Division of Administrative Procedure are not the only personnel who conduct hearings under the Administrative Procedure Act. Indeed, liquor license hearings, of which there were 2,070 in the year 1954, and 1,340 in the first three-quarters of 1955, are conducted entirely by agency-employed personnel. Section 11502(a) of the Government Code provides in part as follows:

> Any agency requiring full-time hearing officers for the purposes of this act has power to appoint them for the particular agency. Each hearing officer shall have been admitted to practice law in this State for at least five years

[9] See Fuchs, *The Hearing Officer Problem—Symptom and Symbol,* 40 CORNELL L.Q. 281 (1955). Compare Rutledge, *Administrative Trial Examiners: The Anonymous "Masters",* 30 WASH. L. REV. 26 (1955).

[10] *E.g., Impact of Proposed Administrative Code Upon Interstate Commerce Commission, Its Practice and Practitioners,* 28 ICC PRAC. J. No. 2, sec. II (November 1955).

[11] CAL. BUS. & PROF. CODE § 110.5. As proposed to the Legislature, the Administrative Procedure Act called for establishment of a separate Department of Administrative Procedure. See TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 36 (1944).

[12] CAL. BUS. & PROF. CODE § 101.

[13] CAL. BUS. & PROF. CODE § 150.

[14] FIFTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE (Jan. 1, 1955).

> immediately preceding his appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

And Section 11502(b) states:

> All persons now employed or on reemployment lists or in the military service who, pursuant to and in accordance with the terms and provisions of their civil service classifications and prior to the effective date of this act, shall have performed functions similar to those of a hearing officer in an agency may act as hearing officers in the same agency and shall not be subject to the qualifications provisions of subdivision (a).

Not only, therefore, is a large volume of contested matter subject to the Administrative Procedure Act heard by personnel employed by the agency concerned, but the condition is one that is disadvantageous to the employment of hearing officers from the Division of Administrative Procedure.

Under the statutes just quoted, agencies are free to consider whether or not hearing officers on their own staffs offer economy and expedition in the discharge of hearing work, compared to utilizing hearing officers in the Division. The act's objectives of fairness and impartiality are less palpable counter considerations. An agency that, perhaps for budgetary reasons, prepares cases against only the most derelict of its licensees, and then only after past warnings to them have been unavailing, wants a result rather than procedural safeguards. The same is true of an agency engaged in "cleaning up a mess," whether for political or other reasons. Economy in the hearing process is a forceful consideration in any event.

Nearly all boards and commissions in the Department of Professional and Vocational Standards are self-supporting from licensing fees. Some have huge surplus funds.[15] On the other hand, the Division of Administrative Procedure has to be supported out of appropriations from the general fund.[16] This means that the Director of the Department of Professional and Vocational Standards, in preparing a budgetary request for the Division, must ask for general funds to support an agency rendering services to self-supporting agencies; whereas, if these agencies had their own hearing personnel, as some do, no such call would be made upon the state's general funds. This situation is aggravated when the Division furnishes hearing officers to agencies outside the Department; for to support that service the

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[15] According to STATE OF CALIFORNIA BUDGET FOR THE FISCAL YEAR JULY 1, 1955 TO JUNE 30, 1956, schedule 5, the accumulated balances of surplus in the Contractor's License Fund is $255,936.00; Real Estate Fund, $945,194.00; Nurse Examiners' Fund, $322,642.00; Accounting Fund, $398,034.00; Furniture and Bedding Inspection Fund, $238,447.00; Insurance Fund, $2,000,000.00; Medical Examiners Fund, $605,852.00; Professional Engineers Fund, $411,147.00.

[16] STATE OF CALIFORNIA BUDGET FOR THE FISCAL YEAR JULY 1, 1955 TO JUNE 30, 1956 at 848, shows expenditures from the general fund for the Division of Administrative Procedure: 1953–54 actual, $90,433.00; 1954–55 estimated, $94,265.00; 1955–56 proposed, $94,721.00.

Director requests general funds for his Department which are used for the benefit of agencies outside it and which are likely as not to be self-supporting from license fees too. The Department of Finance, having general supervision over the Department's budget,[17] finds this situation intolerable. It has insisted that the Division charge for conducting hearings, and even for scheduling hearings never conducted, on a basis which would make the Division nearly self-supporting. Of course, the higher the Division's charges the more disposed an agency is to use its own personnel for hearings. Examples of the extremes to which such insistence has gone are set out in Opinion of the Attorney General for the Director of Finance on December 14, 1954,[18] where the following charges proposed for the Division were ruled improper:

1. Charges may not be made by the Division of Administrative Procedure for time reserved for hearings and not used;
2. Charges may not be made by the Division of Administrative Procedure for overhead or administrative costs;
3. Charges may not be made by the Division of Administrative Procedure on a "stand-by" basis without regard to actual use of the division's services;
4. Charges may not be based upon cost of travel unless actually incurred.

The opinion summarized the purpose of the hearing officer requirement of the Administrative Procedure Act in this way:[19]

> Giving due consideration to this legislative background, to the purposes and intent of the legislation as proposed in the Tenth Biennial Report of the Judicial Council, and to the statutory construction placed on said enactments by our appellate courts, it is crystal clear that one of the prime objectives to be achieved is to promote the public benefit and to guarantee fairness in the administration of public business. Further, that appropriations from the general fund to provide for independent hearing officers are well justified and will aid in achieving the desired objectives.

Communication with budget analysts is limited to quantitative expressions. They can evaluate such data as total number of cases scheduled for hearings, average elapsed time between scheduling and commencement of the hearing, etc. But independent judgment on the evidence is not reducible to data which can win the approval of fiscal officers in the Department of Finance for items in the budget of the Division.

The existing situation is uncomfortable to the official integrity of hearing officers in the Division and stultifying of the statutory objectives. To get conduct of an agency's hearings the Division must convince the partic-

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17 CAL. GOVT. CODE § 13070.

18 24 OPS. CAL. ATT'Y GEN. 232, 233 (1954).

19 *Id.* at 235.

ular agency that the Division's hearing officers can do more satisfactory work than agency personnel and do it cheaper. This standard for satisfaction is not the concept behind the Administrative Procedure Act. The cost for the service furnished is beyond the Division's control. There is no resolution of this impass except to preclude agency personnel from conducting hearings under the Act, and to establish the Division as an independent department of state government.

The controversies which the hearing officer requirements of the Administrative Procedure Act failed to allay are multiplying in local government in California. Already cities are employing hearing officers.[20] The Education Code authorizes school districts to engage hearing officers.[21] A flourishing, well-staffed Department of Administrative Procedure could assume these functions on behalf of local governments[22] and achieve for them the aspirations of the Administrative Procedure Act.

[20] Hicks v. City of Los Angeles, 133 Cal. App.2d 214, 283 P.2d 1046 (1955).

[21] CAL. EDUC. CODE §§ 13583, 14304, 14137.5.

[22] 26 OPS. CAL. ATT'Y GEN. 256 (1955).