Roger Williams University Law Review

Volume 9 | Issue 2 Article 17

Spring 2004

Administrative Injustice: The Rhode Island State Agency Hearing Process and a Recommendation for Change

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In Rhode Island government administration, each state agency is responsible for its own dispute resolution hearing procedure. Agency control over this procedure creates several issues and conflicts discussed throughout this Comment. In response to these issues, Rhode Island should create a Central Hearing Agency (CHA).[1] This CHA would have the sole responsibility of providing independent hearing officers to adjudicate administrative disputes between state agencies and citizens.[2]

Similar to a judge, a hearing officer[3] evaluates written evidence, listens to testimony, and, when necessary, makes factual determinations.[4] A hearing officer's decision may involve the revocation of a license or the imposition of a substantial fine, and is likely to have a significant impact on an individual or entity involved in an administrative dispute.[5] Therefore, like a judge, a hearing officer should be an independent party, free from underlying bias and influences.

Rhode Island's current procedure closely resembles the traditional judicial process,[6] absent one key element: a neutral third-party decision-maker. The hearing officer, appointed to adjudicate agency cases, is an employee of that same agency.[7] Additionally,

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1. The nomenclature for an independent state agency that has a sole responsibility of providing administrative adjudication varies from state to state. Names such as "Central Hearing Panel," "Central Panel," and "Office of Administrative Hearings" (OAH) are also used. Central Hearing Agency (CHA) will be used hereinafter, except when discussing a specific state's agency.

2. Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 76 (1994).

3. Hearing officers are also referred to as "hearing examiners" and "administrative law judges" (ALJ) in different states.

4. Norman Abrams, *Administrative Law Judge Systems: The California View*, 29 ADMIN. L. REV. 487, 487-88 (1977).

5. *See* Hoberg, *supra* note 2, at 75-76.

6. *See* Frederick Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389, 389 (1977); Edwin L. Felter, Jr., *Administrative Adjudication Total Quality Management: The Only Way to Reduce Costs and Delays without Sacrificing Due Process*, 15 J. NAT'L ASS'N ADMIN. L. JUDGE 5, 5 (1995) ("[A]dministrative law adjudications have come to resemble judicial branch adjudications.").

7. These Hearing Officers consider state administrative matters involving licensing affairs, taxes, health issues, environmental management, employment and labor affairs, among other subjects. Hoberg, *supra* note 2, at 76; *see also* Christopher B. McNeil, *The Model Act Creating a State Central*

the agency's director reviews, and may modify or reject, the decision of the subordinate hearing officer. This employment relationship and director review potentially creates an underlying bias, thereby tainting the fairness of the process.[8] Even if a fair hearing is provided, the current process generates the appearance of impropriety in the eyes of the legal community and of Rhode Island citizens.[9] The result of bias and the appearance of impropriety creates an inefficient and costly administrative adjudication process which may backlog the Rhode Island courts.[10] Because of concerns involving real and perceived fairness, half of the states have already changed their administrative hearing processes and created autonomous hearing agencies.[11] These states now have need-based CHA systems that vary in jurisdiction, authority and funding.

To arrive at a potential solution for Rhode Island, Parts I and II will examine the concept of a CHA, and compare and contrast existing CHA systems. Part II will also address arguments against the implementation of a CHA. Part III will scrutinize the traditional administrative hearing process and its inherent difficulties. Part IV more specifically will analyze Rhode Island's current process. Finally, Part IV additionally will recommend that Rhode Island implement a CHA. Rhode Island's CHA should have broad jurisdiction requiring most, if not all, state agencies to use CHA hearing officers. Like any other state agency, the CHA should receive its budget from Rhode Island's general fund. Lastly, the CHA hearing officer's decision should continue to be subject to the final approval of the substantive agency's director.

Hearing Agency: Promises, Practical Problems, and a Proposal for Change, 53 ADMIN. L. REV. 475, 479 (2001).

8. *See* David W. Heynderickx, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for Contested Case Proceedings*, 36 WILLAMETTE L. REV. 219, 224 (2000); *see also* Hon. John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 425 (2001).

9. *See* Hoberg, *supra* note 2, at 76; Heynderickx, *supra* note 8, at 225-26.

10. *See* Hoberg, *supra* note 2, at 76-77; Heynderickx, *supra* note 8, at 227.

11. *See* Hardwicke, *supra* note 8, at 420, 422. California was the first to implement a CHA in 1945. Hoberg, *supra* note 2, at 77; *see also* Abrams, *supra* note 4, at 49; Malcolm Rich, *Adapting the Central Panel System; A Study of Seven States*, 65 JUDICATURE 246, 249 (1981).

I. STATE ADMINISTRATIVE HEARING PROCESSES

The method of state administrative adjudication within the United States is in the midst of an evolution.[12] Among the states, there are currently two different approaches: 1) the traditional approach which leaves the procedure in the hands of each agency; and 2) a centralized hearing agency model. In states without a CHA, each agency is "charged with investigating, prosecuting, and adjudicating cases involving citizens they regulate."[13] This traditional approach leaves the hearing procedure, including the appointment of a hearing officer, in the hands of the agency – the same agency that has a vested interest in the outcome of the hearing.[14] The agency's dual role of policy advocate and referee creates a conflict of interest and other problems.[15] Many states have responded by implementing a CHA.[16]

As one scholar observes, "[t]he judicialization of the administrative process, a phenomenon largely taken for granted by both lawyers and the general public in contemporary America, is probably one of the most mysterious, yet significant, features of American government."[17] In the past, the role of an administrative hearing officer was ministerial in nature and had little bearing on the final outcome of the issue.[18] Throughout history, the hearing officer's role evolved because "judges increasingly took the position that certain types of governmental actions would not be sustained unless the agency itself had extended to the adversely affected parties' procedural protection akin to . . . notice and opportunity to be heard."[19] Because of the judicial nature of the hearing officer's role, the person fulfilling that position should be, like a judge, independent and free from conflict.

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12. *See* Hardwicke, *supra* note 8, at 419-20 ("[T]he central panel movement within the states is a multi-faceted achievement.").
13. Felter, *supra* note 6, at 5.
14. Heynderickx, *supra* note 8, at 224 ("[T]he agency is allowed to act as police officer, prosecutor, and judge, with the hearing process a mere rubber stamp for the agency staff's decision.").
15. These problems will be discussed in detail *infra*.
16. McNeil, *supra* note 7, at 476-77.
17. Davis, *supra* note 6, at 389.
18. *See id.* at 392.
19. Goldsmith v. Bd. of Tax Appeals, 270 U.S. 117, 126 (1926).

II. THE CENTRAL HEARING AGENCY

A CHA provides a forum for state government dispute resolution that is independent, impartial and efficient.[20] The Chief Judge for the Division of Administrative Hearings in Colorado describes a CHA's function as follows:

> Unlike de-centralized [hearing officers], housed in the agencies they serve, independent central panels are geared to one mission only – adjudication. In a nutshell, the only business of a central panel . . . is to hear and decide cases – not to occasionally serve as in-house counsel for an agency or in other legal capacities. Not only do central panels have a vested interest in being efficient and cost effective, they must because they are under a microscope focused on adjudications – to the exclusion of other tasks.[21]

Where a CHA has been established, segregation of the decision-maker from the agency has led to the creation of an equitable forum, the appearance of impartiality, a reduced burden on both state courts and agencies, a uniform system of state administrative justice, and a reduction in overall costs.[22] Positive results are evident in all existing CHA states, fueling a continued evolution in the state administrative process, as more and more states implement a CHA.[23] Many of the issues that led other states to transi-

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20. *See* Hoberg, *supra* note 2, at 76 (The basic purpose of a CHA is to give Hearing Officers "a certain amount of independence from the agencies over whose proceedings they preside."); Gerald E. Ruth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase "Judicialization" in Pennsylvania*, 16 J. NAT'L ASS'N ADMIN. L. JUDGE 221, 245 (1996).

21. Felter, *supra* note 6, at 9.

22. Hoberg, *supra* note 2, at 77. In addition to achieving these higher objectives, expectations in CHA states are to: 1) consolidate a "large number of disparate hearing units into a professional, well managed agency"; 2) create a uniform hearing process with consistent rules – something that will "demystify" the agency hearing process; 3) streamline the process so that issues are heard in a timely manner; 4) reduce the number of hearings; and 5) foster settlement negotiations between parties prior to a hearing. *Id.*

23. *See* Ruth, *supra* note 20, at 244 ("Many of the sister states . . . have had tremendous success in developing central panel systems. These states have proven that the overall effect on individual state agencies has been one of efficiency, effectiveness, and improved quality."); Felter, *supra* note 6, at 7

tion to another model are now being faced by Rhode Island. Examining the transition experiences of other states, and the variations of a centralized approach, is integral in recommending possible changes for Rhode Island.

A. *The Transition Experience*

Prior to the implementation of a CHA, these states faced similar problems and concerns arising from the use of in-house hearing officers. Consequently, after the creation of a centralized process, all transition states experienced similar benefits. Maryland and Minnesota are typical examples of states that have implemented a centralized administrative hearing process resulting in a more efficient and superior agency hearing process.

1. *Maryland – "The Model"*[24]

In 1990, Maryland implemented the Office of Administrative Hearings (Maryland OAH), which is the largest hearing agency in the country.[25] Other states considering adopting a CHA view Maryland as the model for administrative adjudication and often visit its headquarters for guidance.[26] Because Maryland learned from the experiences of other states, it "was able to capitalize on an opportune situation."[27] The implementation of Maryland's OAH was "relatively easy" politically, as it received a strong recommendation from a task force and was tenaciously supported by the Governor.[28] The Maryland task force reported to the Governor and legislature, "Since hearing examiners are employed by, and under control of, the agency where contested case or disputed action arises, there is an appearance of inherent unfairness; citizens be-

("Improved efficiency, and cost effectiveness of central panels, has been documented in all of the states that have such a panel.").

24. MD. OFFICE OF ADMIN. HEARINGS, ABOUT THE OFFICE OF ADMINISTRATIVE HEARINGS, http://www.oah.state.md.us/Main%20Sections20of 20Home%20Page/About%20OAH/About%20OAH%20Index.htm (last visited May 3, 2004); Hoberg, *supra* note 2, at 84.

25. MD. OFFICE OF ADMIN. HEARINGS, *supra* note 24 Hoberg, *supra* note 2, at 83.

26. MD. OFFICE OF ADMIN. HEARINGS, *supra* note 24 Hoberg, *supra* note 2, at 84 ("Maryland continues to be the vanguard of central panel jurisdictions.").

27. Hoberg, *supra* note 2, at 84.

28. *Id.* at 82-83.

lieve they do not receive impartial adjudication."[29] As a result, the legislature established a strong central panel.[30]

Since implementation, the Maryland OAH has been viewed as a success:

> Four years of experience with the central hearing agency in Maryland proves that the new system provides both perceived and real impartiality. The Bar Association, individual practitioners, agencies, union representatives appearing on behalf of state employees, legislators, the courts, and, above all, citizens, express satisfaction with this new system of administrative justice.[31]

Real and perceived fairness were not the only achievements. Maryland's OAH improved and streamlined the hearing process, and at the same time reduced costs.[32] It resulted in cost-effective government such as improved agency function, better use of the constitutional courts, legislative streamlining, and superior hearing officers.[33]

2. *Minnesota*

In 1975, "against a backdrop of concerns about agency impartiality, consistency, and accountability" the Minnesota legislature established an independent central panel.[34] Before the implementation of an independent hearing officer, the hearings "resulted in 'kangaroo courts' or at least created the appearance of unfair-

29. Hon. John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. NAT'L ASS'N ADMIN. L. JUDGE 5, 22 (1994).

30. Hoberg, *supra* note 2, at 83.

31. Hardwicke, *supra* note 29, at 80.

32. MD. OFFICE OF ADMIN. HEARINGS, *supra* note 24. In addition, Maryland, Missouri, New Jersey, Tennessee, and Wisconsin, to name a few, "became more efficient and realized economic benefits as a consequence" of creating a Central Hearing Agency. Ruth, *supra* note 20, at 253.

33. Hardwicke, *supra* note 29, at 81-82. To measure the results, the Maryland OAH publishes a detailed annual report which includes the average case duration, the number of hearings, and a survey of participant satisfaction. MD. OFFICE OF ADMIN. HEARINGS, *supra* note 24. A comparison of this annual report to past results illustrates the success of Maryland's OAH and why it serves as a model to other states. *See* Hoberg, *supra* note 2, at 84.

34. Hon. Bruce H. Johnson, *Strengthening Professionalism Within an Administrative Hearing Office: The Minnesota Experience*, 53 ADMIN. L. REV 445, 448 (2001).

ness."[35] In some extreme cases, the agency attorneys would advise the hearing officer on the final decision or even sit in on the proceeding and provide guidance on each ruling.[36] Ultimately, because the legislature concluded that to ensure a fair hearing an independent third-party decision-maker was needed, it created the Office of Administrative Hearings (Minnesota OAH).[37]

Minnesota's OAH has dramatically reduced costs and accelerated the administrative process.[38] Minnesota Chief Judge Duane R. Harves found "a reduction of hearing costs for the Minnesota Public Utilities Commission from $400,000 in fiscal year 1976 to $311,330 in fiscal year 1977, and to $184,219 for fiscal year 1982."[39] Prior to the creation of Minnesota's OAH, agency hearings were sometimes delayed for six to twelve months.[40] Since implementation, an agency is able to obtain a hearing date within twenty-four hours of requesting a hearing officer.[41] The hearing is usually set thirty to forty-five days after requesting hearing examiner appointment.[42] Harves concludes:

> [T]he central panel system has resulted in a more efficient, effective administrative hearing process. Costs have dropped dramatically and cases can now be both heard and decided more promptly. And, it appears that in most cases all parties are satisfied with the process and the fairness of that process even if not necessarily satisfied with the decision.[43]

The triumph in Minnesota is indicative of the success other states have experienced as a result of a change to a centralized hearing process.[44] The consensus in states now using a CHA is that this

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35. Duane R. Harves, *Making the Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel Works in Minnesota*, 65 JUDICATURE 257, 258 (1981).

36. *Id.*

37. *Id.* (citing 1975 Minn. Laws 380).

38. *Id.* at 257, 263-64.

39. Ruth, *supra* note 20, at 254 (citing Duane R. Harves, *The Minnesota Experience*, MD. BAR. J., Dec. 1986, at 11).

40. Harves, *supra* note 35, at 264.

41. *Id.*

42. *Id.*

43. *Id.* at 265.

44. Hoberg, *supra* note 2, at 78 ("The general consensus is that central panel systems have worked well in the states. Not one state that has adopted the central panel system has repealed the implementing legislation.").

system results in a fairer and more efficient administrative process – one that breeds satisfaction. Although the general CHA model has been universally successful, wide variation in the CHA process exists.

B. *Central Hearing Agency Differences: A Closer Look*

Differences in the centralized process arose from many factors, including the size of the state, the structure of the state government, and preference. The three principal areas in which CHAs vary are: 1) the jurisdiction of the CHA; 2) the decision-making autonomy of the independent hearing officer; and 3) the funding process for the CHA.[45]

1. *Jurisdiction*

There are three approaches to CHA jurisdiction. Some states take an "expanded jurisdiction" approach and require almost all state agencies to use the CHA during the hearing process.[46] Under the "middle" approach,[47] states usually exempt the larger agencies within the state from using the CHA and, thus, the CHA has a reduced caseload.[48] However, the CHA is authorized to hear a case involving an exempted agency upon request of that agency.[49] In these "middle" states, the CHA possesses enough jurisdiction to remain an integral part of the state's administrative system.[50] Fi-

45. The Federal system and some states have agency specific hearing officers. This means that each agency has a separate division within the agency that is dedicated entirely to the function of a hearing officer. In Rhode Island for example, the Department of Environmental Management has been purposefully organized this way by statute. While this is better than the "agency staff" approach, many of the same issues still apply. Moreover, it would not seem feasible or efficient for Rhode Island to have a hearing officer within every agency. *See* Ruth, *supra* note 20, at 237.

46. Hoberg, *supra* note 2, at 78-80; *see* Rich, *supra* note 11, at 251. Three states that clearly fall into this category are Maryland, Minnesota and New Jersey. Hoberg, *supra* note 2, at 83 n.60.

47. *Id.* at 87 n.93 (noting that Colorado, Florida, Iowa, North Carolina, Virginia, and North Dakota fall into this "middle" category).

48. *Id.* at 87.

49. *Id.*; Rich, *supra* note 11, at 251.

50. Regardless of whether a state falls into an "expanded" or "middle" category, states such as Colorado, Florida, Minnesota and New Jersey require all agencies to use the Central Hearing Agency, except those specifically excluded by state statute. Which category the state falls into depends on how many agencies are excluded. Rich, *supra* note 11, at 251.

nally, "low maintenance" states require very few agencies to use the CHA. Therefore, the CHA functions mostly in a voluntary capacity with very little, if any, jurisdiction.[51]

Proponents of a mandatory jurisdiction system, or "expanded jurisdiction," claim that allowing an agency to decide which cases should be brought before the independent hearing officer corrupts the system.[52] Their concern is that sensitive cases – ones that may either largely impact agency policy or that may lead to large monetary fines – will be heard by the substantive agency and "thus destroy the appearance of justice the central panel is designed to support."[53] Advocates of the voluntary system used in "low maintenance" states assert that such a process is less threatening and implementation of a central panel will be smoother.[54] Thus agencies which voluntarily use the CHA will become more comfortable with the procedure and experience its advantages.[55] The end result of a voluntary system, however, is that agencies prefer to use their own employees as hearing officers.[56]

2. *Autonomy*

In addition to varying jurisdiction, there are differences in the amount of autonomy given to the hearing officer in rendering final decisions. An effective hearing officer must have a "significant substantive voice" independent of an agency.[57] In some CHA states, the decision of the CHA's hearing officer is the final decision and not subject to agency review.[58] This structure represents

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51. *Id.*; Hoberg, *supra* note 2, at 87-88 (stating that Texas and Massachusetts are low maintenance states).

52. Rich, *supra* note 11, at 251.

53. *Id.*

54. *Id.*

55. *Id.*

56. Abrams, *supra* note 4, at 495.

57. *Id.* at 498.

58. McNeil, *supra* note 7, at 497 (quoting MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY § 1–10(a) (1997)). Twelve states issue final decisions only in certain cases and "Missouri is the only state where decisions of the ALJs are final agency action in every case." Edwin L. Felter, Jr., *The Hidden Executive Branch Judiciary: Colorado's Central Panel Experience – Lessons for the Feds*, 14 J. NAT'L ASS'N ADMIN. L. JUDGE 95, 97 n.17 (1994); *see also* William B. Swent, *South Carolina's ALJ: Central Panel, Administrative Court, or a Little of Both*, 48 S.C. L. REV. 1, 2 (1996) ("At the extreme high level of independence, the 'administrative court' system generally grants exclusive jurisdiction over statutorily defined, contested cases.").

a vast amount of CHA independence.[59] Conversely, many more states allow the director of the substantive agency to have final approval of any decision – similar to the process before the creation of a CHA. The decision of the independent hearing officer is subject to approval, rejection or modification by the agency's director.[60] Even though control over the final decision is placed in agency hands, this grant of authority is not as drastic as it seems, because the agency "is not free to manipulate the report to suit itself."[61] The director is less likely to reject or modify a CHA decision because 1) there is a "structurally independent" hearing officer, [62] and 2) the director may only do so "for specified reasons in accordance with law."[63]

If an agency director arbitrarily overturns an independent decision, he or she will be viewed negatively by the judiciary who may hear an appeal, the legal community, and the general public. Therefore, the director "will ordinarily have to disagree strongly" with a CHA decision before rejecting it.[64] In California, a state with a CHA system that leaves final approval in the hands of an agency director, decisions of hearing officers are very rarely rejected.[65] The relatively minimal interference by the director may be attributed to the "structural independence" of the hearing officers, which "insures that the agency may be exposed to a different viewpoint, one which cannot be ignored and can be rejected only for sound reasons."[66] Thus, even when the director has approval, CHA hearing officers retain significant autonomy.

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59. There is still a question of the amount of agency influence on a matter. For example, in Minnesota the agency must create a policy in the form of a rule. In the words of one director: "Once established, and the rule is in effect, the office of administrative hearings is bound to follow that rule. Only the courts may find the rule illegal; a rule may not be challenged in a hearing." Rich, *supra* note 11, at 256. Some states are bound to regulations but not agency interpretations. Florida finds "agency interpretations as persuasive but not binding." *Id.* "As a practical matter, hearing officers are probably not greatly influenced by agency interpretations simply because it's the agency interpretation." *Id.*

60. Swent, *supra* note 58, at 2.

61. McNeil, *supra* note 7, at 497.

62. Abrams, *supra* note 4, at 506.

63. McNeil, *supra* note 7, at 497-98 (citing the Model Act).

64. *Id.*

65. Abrams, *supra* note 4, at 499 (Only about five-percent of Hearing Officers' decisions were overturned by agencies.).

66. *Id.*

3. *Funding*

Another difference between CHA states is the means by which the CHA is funded. There are two major methods of funding: 1) through the general fund of a state; or 2) through a "revolving fund" that charges agencies for the use of hearing officers' time.[67] Both methods shift some financial control from the individual agency to the CHA.[68]

In the "general fund" approach, as with any other state agency, the legislature appropriates a lump sum for the CHA, which is charged with preparing its own budget.[69] The CHA provides hearing officers to the individual agencies as needed.[70] The "revolving fund" approach creates a more "businesslike" atmosphere.[71] Instead of a lump sum allocation, the CHA bills the agency for the services rendered by the hearing officers, usually on an hourly basis.[72] The CHA is therefore funded through the budgets of other state agencies using the CHA's services.

There is a split in opinion as to which method is more effective.[73] The argument for the "revolving fund" method is that it puts the "budgetary decision for these costs where it ought to be – at the individual agency level."[74] Advocates suggest that this method will lead to fewer hearings by encouraging the state agencies to settle issues to avoid tapping into the agency's budget.[75] Opponents argue that this incentive to settle, while economical, is a drawback, as fewer hearings may "threaten the notion of due process that central panels are supposed to protect."[76] The agency's motivation to pursue a hearing is based on budgeting concerns rather than considerations of fairness. Conversely, under the "general fund" method, the substantive agency has little incentive to reduce the amount of hearings through settlement, because budgeting is not an issue. Moreover, when the CHA is given

67. Abrams, *supra* note 4, at 506; Rich, *supra* note 11, at 250.
68. Rich, *supra* note 11, at 250.
69. *Id.*
70. Abrams, *supra* note 4, at 506.
71. *Id.* at 507.
72. Rich, *supra* note 11, at 250.
73. *Id.*
74. Abrams, *supra* note 4, at 508.
75. Rich, *supra* note 11, at 250.
76. *Id.*

a lump sum budget, the substantive agency also has less motivation to expedite a matter through the hearing process.

A positive aspect of the general fund approach is that the relationship between the agency and the CHA, while less "business-like," is less strained. The CHA's budget is not dependent on the number of hearings requested by state agencies. Even though the CHA and the agency have different roles in the hearing process, the two are on a more equal footing within state government, and would receive budgeting in a like manner. Moreover, without the pressure to resolve one case quickly in order to move on to the next, the hearing officer may focus on quality rather than on quantity. Based on its own priorities, each state must decide on its own which method of funding is most appropriate.

These variations in jurisdiction, autonomy, and funding result from differences in state size, organization, and constituency. However, the major premise is the same: a required separation between the decision-maker and the agency. Despite success in CHA states, opposition to such change remains.

C. *Arguments Against Implementing a Central Hearing Agency*

The primary arguments against a CHA most often originate from the agencies losing the ability to decide cases.[77] The opposition's major arguments fall into two categories: 1) the issue of expertise; and 2) the role of the agency in policymaking.[78] Additionally, opponents invoke fears of increased bureaucracy, the creation of a "Super Agency" responsible to no one, and agency issues falling into the hands of novices.[79] These concerns appear to

77. Heyndericx, *supra* note 8, at 229 ("State agencies frequently oppose the use of central hearing panels."); *see also* Hardwicke, *supra* note 8, at 423 ("The roadblock to the creation of the central panel encountered in almost every state arises from objections raised by executive branch agencies."); Swent, *supra* note 58, at 9 ("Those states having recently adopted a central panel approach . . . report significant hostility from the affected agencies. The complainants most often stem from a sense of lost authority."). Notwithstanding these arguments, states continue to migrate to a CHA system – perhaps the opposition has slowed this migration over the past fifty-eight years. The first was California in 1945. Hoberg, *supra* note 2, at 77. The last appears to be Oregon in 1999. Heyndericx, *supra* note 8, at 219.

78. Heyndericx, *supra* note 8, at 229-32.

79. Hardwicke, *supra* note 29, at 49; Heyndericx, *supra* note 8, at 229-32; Swent, *supra* note 58, at 9-10.

be exaggerated and are outweighed by the importance of having a neutral decision-maker and, subsequently, a fair process.

Undeniably, agency employees acting as hearing officers have the most substantive expertise on the subject matter at issue.[80] This expertise argument is summed up in a 1989 report by the Commission on Administrative Hearings before the Oregon Legislature:

> [A]gencies are highly dependent on the specialized knowledge of the hearing officers regarding such matters as specific administrative rules and regulations, medical terminology, regulatory schemes, and substantive legal knowledge, such as knowledge of labor law. These agency representatives believe agency hearing would be far less efficient without the benefit of the expertise of the hearing officers employed by the agency.[81]

Despite these assertions, the argument that not having an "agency expert" as a hearing officer would create inefficiency is unsubstantiated. First, in states that have created a CHA, efficiency has improved as the duration of the hearing process has decreased.[82] Second, CHA states have reduced the cost of the

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80. *See* Heynderickx, *supra* note 8, at 230-31 (citing REPORT OF THE COMMISION ON ADMINISTRATIVE HEARINGS TO THE SIXTY-FIFTH LEGISLATIVE ASSEMBLY, THE CHIEF JUSTICE OF THE OREGON SUPREME COURT AND THE GOVERNOR OF THE STATE OF OREGON 7-8 (APR. 21, 1989)).

81. *Id.* at 231.

82. *See* Felter, *supra* note 6, at 7; Harves, *supra* note 35, at 264; Ruth, *supra* note 20, at 244. Additionally, independent hearing officers in CHA states receive specialized training and naturally become more familiar with certain issues as time passes. To facilitate this learning curve and provide a center of knowledge, Maryland's OAH contains a fully staffed library. MD. OFFICE OF ADMIN. HEARINGS, LIBRARY SERVICES, http://www.oah.state.md.us/Library/library_services.htm (last visited May 3, 2004). Use of new technology, such as the Internet, could also help minimize the effect of having a non-agency employee hear and decide issues. Another idea is to create a database, or use one in existence such as Lexis or Westlaw, that would allow hearing officers, attorneys, and the public to access decisions. A centralized database would provide the most access and would help educate the independent hearing officer on scientific and technical issues and provide guidance to the general public. Some Rhode Island Agencies individually post decisions on their websites facilitating public access. R.I. DEP'T OF LABOR. RHODE ISLAND BOARD OF REVIEW, http://www.dlt.ri.gov/bor/searchcases.htm (last visited May 3, 2004). Others, pursuant to the Freedom of Information Act, allow the public to physically enter the agency to research past decisions.

administrative process.[83] Even if implementing a CHA were less efficient – which has proven not to be the case – impartiality and fairness should be "stronger considerations than that of expertise."[84]

The expertise argument is a double-edged sword. The expertise of an agency employee is usually "intermeshed with agency policy or agency political directive."[85] The employee is intimately familiar with the agency's affairs because it is his or her job to advocate agency policy. While this "expertise" may theoretically diminish hearing time[86] and assure the agency's policy objectives are represented, it creates a problem: the hearing officer, as an agency employee, has preconceived ideas that may prejudice a decision and undermine the process.[87] A fairer solution is to allow the agency to introduce technical expertise as evidence in the course of a CHA hearing; evidence that will be weighed properly by an independent hearing officer.

Secondly, proponents of a non-CHA system argue that agency policy will be ignored if that agency is unable to appoint one of its own as a hearing officer.[88] However, the adversarial hearing process is well-equipped to document and consider agency policy, and give it the appropriate deference it deserves.[89] The substantive

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Sometimes prior decisions are given to the parties by a hearing officer, which might be relevant to the case at hand.

83. Ruth, *supra* note 20, at 253; Harves, *supra* note 35, at 263.

84. Davis, *supra* note 6, at 401 (citing COMM. ON ADMIN. PROCEDURE, ADMIN. PROCEDURE IN GOV'T AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 45-50 (1941)); HOOVER COMM'N REPORT 88-93; HOOVER COMM'N TASK FORCE REPORT 257-69).

85. Hardwicke, *supra* note 29, at 62.

86. Contrary to this argument, hearing times have been diminished in states that have enacted a CHA. *See* Harves, *supra* note 35, at 264.

87. Heynderickx, *supra* note 8, at 232.

88. Opponents of CHAs argue that a transfer of authority to the central panel may lead to a lower level of accountability and cause an undermining of agency policy. "[W]itnesses, many of them agency heads, expressed concern that hearing officers, free of agency control, would render decisions undercutting their prerogatives to set agency priorities and decide agency policies." *Id.* at 229 (quoting Report of the Commission on Administrative Hearings to the Sixty-Fifth Legislative Assembly, the Chief Justice of the Oregon Supreme Court and the Governor of the State of Oregon 7-8 (Apr. 21, 1989)).

89. Swent, *supra* note 58, at 10.

> True agency expertise, that is to say matters of science and technology, can be put in the record through appropriate expert testimony in the course of the hearing, and where such expert

agency appoints a well-qualified representative to advocate its position, usually an agency attorney. Therefore, agency policy should be introduced through the hearing process itself, not through the preconceived notions of the hearing officer.[90] Moreover, the argument that a CHA undercuts agency policy is not as strong in the majority of states that allow the agency's director to review the decision and "modify, reverse or remand the proposed decision of the administrative law judge . . . in accordance with law."[91] The decision by a neutral and independent hearing officer would be difficult to overturn on the facts. The director, however, would still be able to reverse on policy interpretation grounds, ensuring that agency policy is not overlooked. This agency review creates a system of checks and balances.

Contrary to the argument that a CHA undercuts agency policy, the decision of an independent hearing officer instead legitimizes it; "In a real sense the central panel is a collaborator with the substantive agency for which it holds hearings."[92] The agency's representative, who is also integrally familiar with any agency issue at controversy, has every opportunity to present evidence and convince a neutral hearing officer of the agency's position. Both the substantive agency and the hearing agency are "governmental ministries created to promote public purposes, and in this sense they are collaborative instrumentalities, rather than rivals or competitors, in the paramount task of safeguarding the interests of our citizens."[93] As a former Maryland Chief Administrative Law Judge observes, "the creation of a [CHA] recognizes the benefits of unbundling the adjudicative function of the agency without offending the executive mission of the substantive agency."[94] In sum, the decision of a neutral hearing officer would legitimize, rather than ignore or undercut, agency policy.

A shift in power, such as one created by the implementation of a CHA, creates controversy among the state agencies who feel

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conclusions are debatable, contrary scientific evidence may be considered and decided as a factual matter by an ALJ.

Hardwicke, *supra* note 29, at 60 (citations omitted).

90. Heynderickx, *supra* note 8, at 232.

91. *Id.* at 230; McNeil, *supra* note 7, at 497-98 (quoting MODEL ACT TO CREATE A STATE CENT. HEARING AGENCY § 1–11 (1997)).

92. Hardwicke, *supra* note 8, at 434.

93. *Id.*

94. *Id.*

they are surrendering authority. This has occurred in many states and has been overcome by the basic proposition that "there can hardly be a more important component of fair procedure than the requirement that the [decision-maker] be neutral or unbiased towards the parties and the issues before him or her."[95]

III. THE TRADITIONAL HEARING PROCESS APPROACH

> *"I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time."*[96]
>
> *Representative John Dingell*

It is axiomatic that whoever controls the procedure has a clear advantage over the process. Many states, including Rhode Island, provide for agency control over administrative adjudication procedure. This control leads to an abusive system.[97] The "judicial-like" hearing process employed in these states demands an independent decision-maker to "maintain both the appearance and reality of unbiased decision-making."[98] Approximately half of the states empower individual agencies to appoint their own employees as hearing officers. This control gives rise to several serious issues: 1) fairness and equity; 2) the appearance of fairness; 3) the timeliness of the process; 4) lack of conformity; 5) overlapping jurisdiction between agencies; and 6) a potential for a backlog in the judiciary.

A. *Fairness and Equity*

The United States Supreme Court has suggested that separation of the decision-making and investigative functions can be a

95. RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 426 (2D ED. 1992) (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975)).

96. *Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess 312 (1983) (statement of Rep. John Dingell).

97. *See* Heynderickx, *supra* note 8, at 224 ("[P]roponents argue that allowing the agency to control the fact-finding portion . . . gives the agency an unbeatable hand and leads to abuses of the agency's power over regulated individuals and businesses.").

98. Abrams, *supra* note 4, at 522.

necessary component of due process.[99] In *Goldberg v. Kelly*, the Court stated:

> We agree with the District Court that prior involvement in some aspects of the case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.[100]

To comply with *Goldberg*, agencies have erected interoffice barriers. Even this semblance of separation, however, does not allay several problems including conflicts of interest and resulting bias. As a general rule:

> [T]here can hardly be a more important component of fair procedure than the requirement that the [decision-maker] be neutral or unbiased towards the parties and the issues before him or her. The proposition that no person should be the judge in his or her own case has been an integral part of natural justice . . . since the Seventeenth Century and it is the basic underpinning of the concept of separation of powers.[101]

A hearing officer is prohibited from having a personal financial interest in the outcome of a decision.[102] The existence of a financial interest, even an indirect one, "violates the concept of due process because it denies . . . the right to a fair hearing."[103] As discussed in the sections immediatley below, a hearing officer may have several interests that conflict with her role as an adjudicator.

In many instances, the appointed hearing officer is a staff attorney who, as an employee, represents the interests of the agency. This staff attorney has an attorney-client relationship with the agency. The Model Rules of Professional Conduct state, "[A] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own

99. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).
100. *Id.*
101. PIERCE ET AL., *supra* note 95, at 426.
102. PIERCE ET AL., *supra* note 95, at 426 (citing Ward v. Village of Monroeville, 409 U.S. 57 (1972); *see also* Tumey v. Ohio 273 U.S. 510 (1927)).
103. *Id.*

interests . . . ."[104] In acting as a decision-maker, this attorney may have to make a decision contrary to the best interests of his or her client, the agency. By not acting in the agency's best interests, the attorney/hearing officer theoretically violates this model rule because his representation of the agency has been materially limited, or even overcome, by his actions as hearing officer. A CHA model segregating the agency from the hearing officer would prevent such a conflict between the agency and its employee.[105] Furthermore, the hearing officer has personal interests which create an additional conflict and may interfere with his or her roles as attorney and the decision-maker.

1. *Friend or Foe?*

The hearing officer is often a colleague of the agency's prosecutor. This co-worker relationship creates an unfair process. The prosecutor is likely to have an intimate understanding of the hearing officer's thought process, placing an outside party at a disadvantage. Additionally, the individuals serving as prosecutor and hearing officer sometimes wear multiple hats; the prosecutor may serve as a hearing officer for the agency, while the current hearing officer becomes the prosecutor in another matter. One hearing officer judging another creates conflict and bias. Inherent in this relationship between colleagues are "[d]angerous influences [that] may be subtle and difficult to ferret out . . . [and] the decision-making process is harmed when there is even a risk that its integrity has been compromised."[106] There is a dangerous undercurrent when a decision in one case might impact the decision of another case. A CHA eliminates prejudice and inequity by providing hearing officers free from bias created by co-worker relationships.[107]

2. *Bias Toward Agency Policy*

Two situations may cause bias in agency hearings. First, the primary job of any agency employee, including hearing officers, is

104. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001).

105. *See* Hardwicke, *supra* note 8, at 422 ("The genesis of the [CHA] movement arose from concerns that an employee of a substantive agency could not be trusted to render a fair and impartial decision involving controversy between the agency and citizen.").

106. Abrams, *supra* note 4, at 522.

107. *See* Heynderickx, *supra* note 8, at 224.

to facilitate agency policy. Advocating agency policy conflicts with a hearing officer's duty of impartiality. Secondly, the decision of the hearing officer is presented to the director of the agency, the hearing officer's superior.[108] The potential for undue influence exists when a factual determination must be presented to an agency's director for approval. The employee is in a position where the decision presented to the director may adversely affect career advancement. The same biases exhibited by the hearing officer may appear in the director's review of the decision.[109]

Even though a hearing officer might be acting with the utmost impartiality under the circumstances, these underlying conflicts are ingrained in his or her thought process. [110] In every decision, whether it involves deciding a motion, issuing a subpoena, or making a final determination, these biases run deep. To expect anyone to be neutral in this situation is naive. A CHA system would prevent bias towards the agency: "Proponents of the [CHA] approach . . . claim that detachment of judges from their respective agencies makes them less likely to blindly honor agency policy."[111] A CHA hearing officer, by contrast, is not subject to the authority of the director of the agency involved in the underlying matter.[112] A CHA hearing officer's career advancements are dependent on providing a fair and expedient process, not appeasing the involved agency's director.[113]

108. R.I. DEP'T OF BUS. REGULATION, RULES OF PRACTICE AND PROCEDURE IN ADMINISTRATIVE HEARINGS BEFORE THE DEPARTMENT OF BUSINESS REGULATION § 18(F), http://www.dbr.state.ri.us/pdf_forms/Regs/Admin%20Hearings%20Refile.pdf (Dec. 27, 2001).

109. The director, as the agency head, is likely to be more determined to further agency policy than the hearing officer.

110. In my limited experience as an intern at the Department of Business Regulation, all of the employees acting as hearing officers attempted as best they could to act impartially and in good faith toward all parties.

111. Swent, *supra* note 58, at 7.

112. Abrams, *supra* note 4, at 491.

113. Felter, *supra* note 6, at 9.

3. *Budget Concerns*

> *"Some day, when things are tough, maybe you can ask the boys [and girls] to go in there and win just one for the Gipper."*[114]

The cyclical nature of the economy will sometimes elevate the fiscal stress on the traditional hearing process. In a depressed economy, state government agencies are more susceptible to budgetary cuts. During these times, hearing officers, who make decisions on the amount of fines and sanctions, are put under pressure. Their decisions may affect the agency's budget.[115] Therefore, a decision may be tainted by this underlying economic pressure.

For example, the Rhode Island administrative process is under strain because of the current economy. Governor Carcieri's Fiscal Fitness program is an attempt to deal with this issue. The Fiscal Fitness program is intended to "mak[e] Rhode Island a model for the delivery of cost efficient service to taxpayers."[116] Governor Carcieri describes the program as a "far reaching initiative [that] will focus on how to cut costs, improve efficiencies and reduce waste – both in time and materials."[117] To ferret out government inefficiency and cut potential costs, "[n]o one agency or department will be singled out," and "[n]othing is off limits."[118] As

114. KNUTE ROCKNE: ALL AMERICAN (1940). In this movie, Ronald Reagan was portraying George Gipp, a legendary football hero also known as the "Gipper." Here the reference to the "Gipper" refers to Rhode Island Governor Carcieri. Use of this quote implies that executive branch agencies, and their hearing officers, will be faced with financial pressure, and as a result, may rule in favor of their agency. In essence, the hearing officer would be "winning one for the Gipper," by ruling for the agency. As a consequence, the decision would be tainted.

115. The productivity of an agency is sometimes measured by the amount of fines collected. An agency that is extremely active and generates revenue through these fines is unlikely to be reduced or cut. The amount collected is often credited to the agency, and sometimes to inter-agency departments. The inherent competitiveness and desire to be productive may ultimately result in an unfair process.

116. Press Release, Office of the Governor, Carcieri Launches Governor's Fiscal Fitness Program (Apr. 22, 2003), http://www.ri.gov/info/press/pr.php?ID=11 (last visited May 3, 2004) [hereinafter Carcieri Press Release].

117. *Id.*

118. *Id.*

agency employees, the hearing officers are subject to the Governor's program.[119] Faced with cost cuts, a hearing officer may increase fines and sanctions to augment the agency's budget. Ironically, as discussed below, the current administrative hearing process itself leads to inefficiency.[120] Implementing a CHA system would minimize adverse economic effects on the administrative process, and at the same time provide the Governor an opportunity to create a more efficient system.

B. *The Appearance of Fairness and Equity in the Eyes of the Legal Community and the General Public.*

Even if using agency employees as hearing officers results in a fair process, agency employees rendering decisions creates a "loss of public trust."[121] The current procedure creates an appear-

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119. The Governor's goal of creating efficiency and reducing costs for the Rhode Island taxpayer is noble. Additionally, there is currently a movement in Rhode Island to change the structure of the state government. This movement has resulted in the formation of the Separation-of-Powers Bill ("SOP Bill") which was approved by the General Assembly and is pending a voter referendum in November 2004. The SOP Bill would prevent "lawmakers . . . from serving on or appointing colleagues to state boards and commissions." *Governor, Lawmakers Praise Separation-Of-Powers Bill: Measure Would Change 340 Years Of R.I. Government,* NEWS CHANNEL TEN, http://www.turnto10.com/politics/2308637/detail.html (July 2, 2003). Additionally, "[t]he bill approved by the General Assembly . . . would also strengthen the governor's appointment powers." *Id.* In assessing the SOP Bill, Roger Williams School of Law Professor Carl Bogus states: "This [Bill] will have profound implications, though no one can predict what they all will be. This is about avoiding a concentration of power in one governmental department, and about checks and balances among the branches." *Rhode Island May Change Power Structure*, ASSOCIATED PRESS, http://www.jsonline.com/election2000/ap/jul03/ap-rhode-island-go072 103.asp (July 21, 2003) (copy on file with author). The passage of the Bill was fueled by the view that Rhode Island's "current system has encouraged political patronage." *Id.* While the exact implications are unclear, "many say it can only help the image of a state known for corruption and political dealmaking." *Id.* Even though its implications are uncertain, the passage of the SOP will benefit Rhode Island as a whole. It is unlikely, however, to have any significant impact on the agency hearing process discussed here. The same paradigm of creating a "form of government our founding fathers envisioned," should be applied to changing agency adjudication and creating a fair and equitable process. Press Release, Office of the Governor, Carcieri Celebrates Transmittal of Separation of Powers Resolution, http://www.gov.state.ri.us/pr.php?ID=87 (Apr. 22, 2003).

120. *See infra* Part III.C.

121. Heynderickx, *supra* note 8, at 225.

ance of impropriety in the eyes of the legal community, judiciary and general population. Because of the judicial nature of the process, a person or entity summoned before an agency for a hearing expects to receive a fair and impartial determination.[122] Once the respondent learns that the hearing officer is an agency employee, any prior expectation of fairness quickly evaporates.[123] This mistrust of the hearing officer might increase the likelihood of an appeal to the superior court. Additionally, the judiciary is aware that the hearing officer is an employee of the agency and may not give proper deference to the agency's decision.[124] Even if the hearing officer is able to maintain an impartial state of mind, there is still the appearance of inequity that causes public mistrust. Appearance of impropriety is reason enough to implement a new system.

C. *The "Timeliness" Issue*

The "judicial" nature of the administrative process and the ensuing appeal may cause an undue delay in the resolution of a case. For example, one such delay led a Rhode Island Superior Court Judge to question the fairness of such a drawn-out process:

> Although the issue of timeliness was never raised, it is discomforting that the disciplinary hearing, threatening a license, took so long to wind its way through the Department . . . In reviewing whether court imposed deadlines were an appropriate remedy for delays in departmental application our Supreme Court stated: "Moreover, the trial justice's finding is in accord with the general rule of administrative procedure under which, absent a specific

122. *Id.* at 226.

123. *Id.* As an intern at the Department of Business Regulation (DBR), the author witnessed several respondents at agency preconference hearings and hearings question the role of the hearing officer as an employee of the agency. In response, the hearing officers cited Kent County Water Authority v. Rhode Island, 723 A.2d 1132 (R.I. 1999) as a case upholding this procedure. *See infra* Part IV.C.

124. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (requiring federal courts to give deference to federal agencies).

> time frame, public hearings must be held within a reasonable time."[125]

The judge invoked a decision where the Department of Environmental Management ("DEM") was overturned purely because of the length of the administrative process.[126] He concluded, "Such an extensive delay when one's license is at risk may be unfair."[127] Simply put, the current hearing process is inefficient and often takes too long. Having an agency solely dedicated to administrative hearings, such as a CHA, will streamline and shorten the process.[128]

D. *Lack of Standardization*

The amount of time it takes to resolve an agency issue is further adversely affected by a lack of standardization among agencies. Because the procedures vary from agency to agency, attorneys may be unfamiliar with a particular agency's procedures. Justice Scalia observed in a letter to Congressman John Dingell:

> While absolute standardization, of course, is not desirable, the basic principle of a uniform administrative practice, with only such variations as operational differences justify, serves several important values. It is indispensable to the retention of an administrative system that can be fathomed by the general public and penetrated by lawyers who are not specialists . . . .[129]

While most agencies use director-appointed hearing officers and allow the director final approval of the decision, they differ in their procedures. These procedural differences may include notice, evidence, motions, and the hearing process itself. Familiarity with these procedural differences may impact the final outcome of an

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125. Annarumo v. Department of Business Regulation, 2003 WL 22389585, at *4 n.7 (R.I. Super. Ct. Sep. 30, 2003) (citing Vito v. DEM 589 A.2d 809, 813-14 (R.I. 1991)).

126. *Id.*

127. *Id.*

128. Harves, *supra* note 35, at 265.

129. McNeil, *supra* note 7, at 481-82 (citing Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 344-45 (1986) (quoting Letter from Antonin Scalia, Chair, Admin. Conf. of the U.S., to Congressman John Dingell (May 23, 1974))).

agency hearing. The staff attorney has a clear advantage by being intimately familiar with that agency's procedure. As an Administrative Hearing Examiner in Ohio observed:

> An honest evaluation of the status quo without the central panel may likely produce the recognition that procedures vary so dramatically from agency to agency as to leave the bar and the general public wholly without useful guidance as to the manner by which agency matters are litigated. Scattered and obscure rules and inconsistent procedures in force within state agencies . . . create a substantial drag on the process of resolving regulatory disputes.[130]

The hearing officer, while well-schooled in the agency issues at hand, might not be well-versed in the art of courtroom procedure and decorum. Therefore, the lack of standardization between hearing officers creates inefficiency. Even though the process has been "judicialized," there is little or no precedent for hearing officers or parties to follow. While establishing identical procedures in all agencies is impossible, some standardization is desirable and would allow attorneys and the public to become familiar with the process.[131] Using a centralized system would standardize the process.[132]

E. *Controversies Involving Multiple Agencies*

Issues involved in a single controversy may not be exclusive to one state agency. If an issue arises invoking the jurisdiction of more than one agency, a respondent may be required to face more than one hearing officer. A CHA would resolve all administrative issues in a single proceeding. The CHA hearing officer would have authority to summon multiple agencies to appear before her. All of the issues related to the controversy could be resolved, at once creating a more efficient process.

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130. *Id.* at 480-81.
131. *Id.* at 481-82.
132. *See* Hoberg, *supra* note 2, at 77.

F. *Judicial Backlog*

A consequence of the traditional approach and the resulting appearance of impropriety is the potential for backlog in the courts caused by agency appeals. Many of these appeals require further time on the part of agency employees to write briefs and appear in court. Judges, clerks and courtroom personnel now become involved in the dispute, adding to the state government's costs. Implementing an equitable and fair administrative hearing system – one with an independent decision maker – would likely reduce the amount of appeals to the superior court.

Issues of fairness, the appearance of fairness, efficiency, cost, timeliness and credibility plague the traditional administrative process. These issues lead to global government inefficiency, a taxpayer burden and public mistrust. A closer look at Rhode Island's traditional process reveals an opportunity for change.

IV. THE RHODE ISLAND ADMINISTRATIVE HEARING PROCESS: A "JUDICIALIZED" PROCESS MINUS THE JUDGE

Rhode Island's administrative adjudication resembles a judicial process with a major caveat; the hearing officer is not an independent third-party judge. A Rhode Island agency's director will appoint a hearing officer who is his or her subordinate and is employed by that individual agency.[133] The hearing officer conducts a

133. R.I. DEP'T OF BUS. REGULATION, *supra* note 108, at § 2 (F). Other state agencies similarly require the appointment of a hearing officer by the individual agency's Director. R.I. DEP'T OF MENTAL HEALTH, RULES AND REGULATIONS GOVERNING THE PRACTICES AND PROCEDURES BEFORE THE RHODE ISLAND DEPARTMENT OF MENTAL HEALTH, RETARDATION, AND HOSPITALS § 4.1 (2002), http://www.rules.state.ri.us/dar/regdocs/released/pdf/MHRH/MHRH_1747_.pdf (last visited May 12, 2004); R.I. DEP'T OF LABOR AND TRAINING, RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING RULE 15: REVOCATION HEARING PROCEDURE UNDER 28–42–63.1 § 4(a) ("Hearings shall be conducted by a hearing officer appointed by the Director who shall have authority to examine witnesses, to rule on motions, and to rule upon the admissibility of evidence"), http://www.rules.state.ri.us/rules/released/pdf/DLT/DLT_345_.pdf (last visited May 12, 2004); R.I. DEP'T OF ADMIN., RULES AND REGULATIONS OF THE DEPARTMENT OF ADMINISTRATION, § 2.06 ("Hearing Officer" means the person authorized by law or duly designated by the Director or Administrator to hear, conduct and recommend decisions, or render final determinations in contested cases."), http://www.rules.state.ri.us/rules/released/pdf/DOA/DOA_478_.pdf (last visited May 12, 2004); R.I. DEP'T OF HEALTH, RULES AND REGULATIONS OF THE RHODE ISLAND DEPARTMENT OF HEALTH REGARDING PRACTICES AND PROCEDURES BEFORE THE DEPARTMENT OF HEALTH § 1.2 (1980)

judicial-like proceeding and makes important factual determinations impacting Rhode Island citizens. These decisions involve licensing, taxes, health, environmental management, and employment and labor, among other administrative subjects. In short, the administrative hearing process has developed into a mini-trial where an agency employee is functioning as a scheduling clerk, judge and jury.[134]

A. *A Closer Look at Rhode Island Agency's Hearing Process: The Department of Business Regulation*

This section examines the Department of Business Regulation's (DBR) administrative procedure. The DBR employs a garden-variety[135] agency hearing process to enforce regulations that fall under several broad categories such as banking, securities,

("AHO means the Administrative Hearing Officer authorized by law or duly designated by the Director and/or Board, to hear and decide, or to make a recommended order and/or decision to the Director or Board."), http://www.rules.state.ri.us/rules/released/pdf/DOH/DOH_2454.pdf (last visited May, 12 2004); R.I. DIV. OF TAXATION, ADMINISTRATIVE HEARING PROCEDURES REGULATION AHP 97–01 § B(8)(a) ("Hearings shall be conducted by a hearing officer appointed by the Tax Administrator who shall have authority to examine witnesses, to rule on motions, and to rule upon the admissibility of evidence."), http://www.rules.state.ri.us/rules/released/pdf/DOTAX/DOTAX_752_.pdf (last visited May 12, 2004). The DEM's process is specifically governed by Rhode Island Law pursuant to R.I. GEN. LAWS § 42–17.7. DEM is mandated by statute to have an independent inter-agency department that is allocated entirely to adjudicative hearings – a solution that still has many of the same issues and is not effective in Rhode Island. A Pennsylvania Administrative Law Judge gives five reasons why "[t]his solution . . . does not address the fact that there cannot be a truly autonomous and independent adjudicatory body within an agency . . . (1) the offices are in the same building; (2) the agency seals are the same; (3) the assignment of the adjudicator is made by the same agency; (4) the staff and personnel are hired, promoted, disciplined, and paid by the same agency; and (5) the same agency approves or disapproves the purchase of the equipment, furniture, paper, bills, utilities, travel, education, and the like." Ruth, *supra* note 20, at 237.

134. As discussed throughout, the hearing officer's employment relationship creates inherent problems.

135. In creating procedures, many state agencies appear to copy each other. The DBR is one of the smaller state agencies. The DBR is, however, one of the more active agencies in respect to hearings and it serves as a good example of the typical hearing process employed in other state agencies. Throughout this section, some of the important similarities or differences between agencies will be noted.

commercial licensing, racing and athletics, and insurance.[136] Controversies involving the DBR may arise either from a complaint against a DBR licensee from an outside party, or as a result of a DBR investigation.[137] If a potential issue comes to light, the DBR may prosecute on its own. This initial, investigative stage is comparable to the actions of a police department in a criminal investigation or a private investigator preparing for a civil lawsuit.

Once a "contested case" develops, the DBR's director appoints a hearing officer employed by the DBR – usually a member of the legal staff.[138] A hearing officer is "authorized by law or duly designated by the Director to hear, conduct and recommend decisions to the Director in Contested Cases."[139] The hearing officer is now in control of any matters before her.

The next phase involves a "prehearing conference."[140] In a judicial proceeding, the trial judge will meet with the parties to "improve the quality of the trial through . . . preparation" and "facilitate the settlement of the case."[141] Similar to a Rule 16 Conference in a court, the prehearing conference is a semi-formal meeting, conducted by a hearing officer to present, simplify and

136. R.I. DEP'T OF BUS. REGULATION, ABOUT THE AGENCY, http://www.dbr.state.ri.us/depart_descrip.html (last visited May 12, 2004).

137. R.I. DEP'T OF BUS. REGULATION, *supra* note 108, at §§ 3(A-B). An "investigation" usually originates through the findings of one of the DBR's examiners through an audit, through the initial licensing process, or as a result of information provided to the agency by a third-party.

138. Once the hearing officer is appointed, notice is provided to parties involved. For example, if the case of controversy arises from a "Department Investigation," notice shall be in the written form "setting forth specific allegations, informing Respondent of the intended action or penalty contemplated by the Department and advising Respondent of the right to request a hearing." R.I. DEP'T OF BUS. REGULATION, *supra* note 108, at § 4(B)(2). If the DBR requests in its notice, the respondent must answer within 20 days. *Id.* This answer may either be an admission or a denial of the accusation – or an assertion that the "Respondent is without sufficient knowledge or information to form a belief with respect to the allegations." *Id.* This stage is almost identical to the "pleadings and motions" phase of a civil trial pursuant to Rule 16 of the Federal Rules of Civil Procedure. *See, e.g.*, FED. R. CIV. P. 7-8.

139. R.I. DEP'T OF BUS. REGULATION, *supra* note 108, at § 2(F).

140. *Id.* at § 5.

141. FED. R. CIV. P. 16(a)(4-5). Similarly, a "Prehearing Conference" is used by the DBR as a "means of making more effective use of hearing time," and facilitating settlement negotiations to dispose of the matter if possible. R.I. DEP'T OF BUS. REGULATION, supra note 108, at § 5.

clarify the issues involved.[142] Although this conference is designed for similar purposes as its courtroom counterpart, the hearing officer is not a judge. Scheduling, framing of the issues, and preliminary motion decisions, therefore, are all subject to the discretion of an agency employee.[143]

The hearing is like a trial, even according to the agencies themselves: "All Parties, witnesses and other Persons at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any courtroom."[144] At the hearing, "Parties shall have the right to present evidence, cross-examine witnesses, object, make motions and present arguments."[145] However, the rules of evidence used during the proceed-

142. *Compare* R.I. DEP'T OF BUS. REGULATION, *supra* note 108, at § 5(1), *with* FED. R. CIV. P. 16(c)(1). In addition to "simplification or clarification of the issues," many of the other "Pretrial Conference" considerations apply equally to the agency's "Prehearing Conference." *Compare* R.I. DEP'T OF BUS. REGULATION, *supra* note 108, at § 5(2-10), *with* FED. R. CIV. P. 16(c)(2-16).

143. Several elements of the administrative process closely resemble elements in judicial proceedings. Parties may make motions pursuant to the Rhode Island Rules of Civil Procedure. R.I. DEP'T OF BUS. REGULATION, *supra note* 108, at § 10(A). Motions may be made either in writing or orally at the prehearing conference or the hearing. Within ten days, the Party opposing the motion may request an oral argument of the motion. Any motion must be accompanied by written memorandum ". . .specifying the legal and factual basis for the Party's position." *Id.* at § 10(B). Once the arguments have been fully presented, the hearing officer – an agency employee – decides the motion. Like a trial, the hearing process involves discovery. Each of the parties may request a production of documents from the opposition and also depose witnesses. *Id.* at § 11(B) (DBR's rules do not explicitly allow depositions. However, depositions are allowed and utilized by the prosecuting agency in many instances.) To comply with discovery, the hearing officer may issue subpoenas "requiring the attendance and testimony of witnesses and to compel the production and examination of papers, books, accounts, documents, records, certificates and other evidence that may be necessary or proper for the determination and decision of any question before the hearing officer." *Id.* at § 12. Additionally the hearing officer may "*sua sponte* . . . issue such protective orders, grant such motions to quash and grant such other motions as justice or fairness may require." *Id.* The role played by the hearing officer is parallel to the position of a judge or magistrate. However, unlike a judge, a hearing officer lacks the safeguards applicable to the judiciary.

144. *Id.* at § 14(A); R.I. DEP'T OF HEALTH, *supra* note 133, at § 12.4 ("All parties, authorized representatives, witnesses and other persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any statewide R.I. court.").

145. R.I. DEP'T OF BUS. REGULATION, *supra* note 108, at § 14(D). The order of proceedings is similar to a trial, with complainant first presenting his or her case followed by the respondent.

ing slightly differ from those of a trial court: "While the rules of evidence as applied in civil cases in the Superior Courts of this state shall be followed to the extent practicable, the Hearing Officer shall not be bound by the technical evidentiary rules."[146] In other words, the hearing officer has more latitude in hearing evidence than a traditional judge, exacerbating the conflicted role of the hearing officer agency employee. While the decorum and the procedure of a hearing might be the same as that of a trial, the fatal difference is that the agency employee hearing officer is not a neutral third-party arbitrator.

After the hearing has been completed, a decision is rendered pursuant to section 42–35–12 of Rhode Island General Laws.[147] This decision is passed on to the director of the DBR who "shall then enter an order adopting, modifying or rejecting the decision

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146. *Id.* at § 13(A); *see also* R.I. DEP'T OF ADMIN., *supra* note 133, at § 8.01 ("[A]ll relevant and material evidence is admissible which in the opinion of the Administrator is the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness.").

> In contested cases the Rhode Island rules of evidence as applied in civil cases in the Superior Courts of this state shall govern. Irrelevant, immaterial or unduly repetitious evidence shall be excluded in all proceedings wherein evidence is taken. (ii) While the Rhode Island Rules of Evidence as applied to civil cases in the Superior Courts of this state shall be followed to the extent practicable, the AHO shall not be bound by technical evidentiary rules. Evidence not otherwise admissible may be admitted, unless precluded by statute, when necessary to ascertain facts not reasonably susceptible of proof under the rules, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The rules of privilege recognized by law shall apply.

DEP'T OF HEALTH, *supra* note 133, at § 12.11; R.I. DIV. OF TAXATION, *supra* note 133, at § (8)(c) (using similar language).

147. Section 42–35–12 states:

> Any final order adverse to a party in a contested case shall be in writing or stated in the record. Any final order shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If a party, in accordance with agency rules, submitted proposed findings of fact, the order shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any order. Upon request, a copy of the order shall be delivered or mailed forthwith to each party and to his or her attorney of record.

R.I. GEN. LAWS § 42–35–12 (2002).

of the Hearing Officer."[148] After director approval, the decision is delivered to the parties. Any "aggrieved" party may file an appeal with the Rhode Island Superior Court pursuant to section 42–35–15 of Rhode Island General Laws.[149] However, the scope of an appeal is limited: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."[150] Thus, the factual determination of a hearing officer, an agency employee, is not subject to a complete judicial review. Rather, the decision may only be overturned under limited circumstances.[151] In Rhode Island, the employment relationship between hearing officer and agency creates the same issues

148. R.I. DEP'T OF BUS. REGULATION, *supra* note 108, at § 15; *see also* DEP'T OF ENVTL. MGMT., ADMINISTRATIVE RULES OF PRACTICE AND PROCEDURE FOR THE ADMINISTRATIVE ADJUDICATION DIVISION FOR ENVIRONMENTAL MATTERS § 16.00(b) ("Every final decision shall be in writing and shall be signed by the Director. The Director may in his/her discretion, pursuant to R.I.G.L. § 42–17–7.6, adopt, modify or reject such findings of fact and/or conclusions of law provided, however, that any such modification or rejection of the proposed findings of fact or conclusions of law shall be in writing and shall state the rationale therefore."), http://www.rules.state.ri.us/rules/released/pdf/DEM/DEM_851_.pdf (last visited May 3, 2004).

149. R.I. DEP'T OF BUS. REGULATION, *supra* note 108, at § 18. Section 42–35–15(a) states:

> Any person who has exhausted all administrative remedies available to him within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review under this chapter. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. Any preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency order would not provide an adequate remedy.

R.I. GEN. LAWS § 42–35–15(a) (2002).

150. R.I. GEN. LAWS § 42–35–15(g) (2002).

151. *Id.* The court may only reverse an agency decision if "substantial rights . . . have been prejudiced because the administrative findings . . . are:

> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error or law
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

R.I. GEN. LAWS § 42–35–15(g) (2002).

concerning fairness and efficiency found in the traditional hearing process.[152]

C. *The Administrative Hearing Process and the Rhode Island Judiciary*

Despite the inefficiency and unfairness, the Rhode Island courts have upheld the current system in *Kent County Water Authority v. Rhode Island*[153] and *La Petite Auberge, Inc. v Rhode Island Commission for Human Rights*.[154] In *Kent County*, the Rhode Island Supreme Court held the "hearing officer was not required to recuse himself from hearing this matter solely because of his employment with [the Department of Health]."[155] The court used a two part test:

> To overcome the presumption in favor of an adjudicator's honesty and integrity, a party claiming bias or some other disqualifying factor must adduce evidence that: (1) the same person(s) involved in building one party's adversarial case is also adjudicating the determinative issues; and/or (2) other special circumstances render the risk of unfairness intolerably high.[156]

The court "refuse[d] to infer risk of adjudicative bias or impropriety based solely on the Hearing Officer's government-employment status."[157] The court reasoned that "[s]uch a contention proves too much, because . . . virtually all administrative adjudications involving governmental entities in this and other jurisdictions would grind to a halt."[158] While a holding to the contrary might have facilitated a change in the administrative hearing process, it is not the court's role to change the system of state government. As it has in other states, the change must come from the legislative and executive branches; the branches that have the power to implement a new CHA system.

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152. *See* discussion *supra* Part III.A.1.
153. 723 A.2d 1132 (R.I. 1999).
154. 419 A.2d 274 (R.I. 1980).
155. *Kent County*, 723 A.2d at 1137.
156. *Id.* (citing *La Petite Auberge,* 419 A.2d at 285).
157. *Id.* at 1137.
158. *Id.* at 1138.

In 1980, the court in *La Petite Auberge* acknowledged the problem, stating, "The appropriate resolution of investigatory, inquisitorial, and adjudicative roles in a single administrative body has been one of the most problematic features of state and federal administrative law."[159] Again however, the court went on to uphold administrative adjudication in its current form, noting, "It has come to be accepted that the mere existence of a combination of these functions does not establish the unconstitutionality of the agency's structure or operations."[160] Even though a current system is constitutional, many states have not accepted the status quo and have created a CHA in response.[161] Rhode Island should follow suit.

D. *A Recommendation for Rhode Island*

Rhode Island's administrative adjudication process leaves much to be desired. Rhode Island faces many of the issues involving real and perceived unfairness and lack of efficiency that have been confronted by other states. The economic slowdown over the past three years has provided an opportunity for the government to take a closer look at its own processes in search of efficiency and cost reduction – an example is Governor Carcieri's Fiscal Fitness program.[162] The Governor and General Assembly should take advantage of this opportunity to implement a Rhode Island CHA.

This new agency should take an "expanded jurisdiction" approach, similar to Maryland, requiring most state agencies to use an independent hearing officer.[163] Requiring the use of the CHA will prevent agencies from strategically withholding certain issues from the independent hearing officer.[164] Initially, a grace period allowing agencies to voluntarily use the CHA may help the transi-

159. *La Petite Auberge,* 419 A.2d at 284 (citing Withrow v. Larkin, 421 U.S. 35, 51 (1975)).

160. *Id.*

161. The states that have enacted such a panel since 1980 include Alabama, Arizona, Georgia, Iowa, Louisiana, Maine, Michigan, North Carolina, Oregon, South Carolina, South Dakota, Washington, and Wyoming. Hardwicke, *supra* note 8, at 441-43. Other states are Maryland, North Dakota and Texas. Hoberg, *supra* note 2, at 82, 84, 87.

162. *See* discussion *supra* Part III.A.3.

163. *See* discussion *supra* Part II.B.1.

164. *See* discussion *supra* Part II.B.1.

tion.[165] This initial voluntary period would 1) allow agencies to become familiar and more comfortable with the new CHA, and 2) ease the acrimony caused by a shift in power by helping the agencies realize that an independent decision-maker will allow them to become more efficient and more effective.[166] Ultimately, however, because of the potential for abuse and because of Rhode Island's size, most agencies, if not all, should be required to use the CHA.

The budget for a CHA should be directly allocated by the General Assembly, rather than from a "revolving fund."[167] This will place all agencies on a more equal footing and cause less strain between them, because the CHA will not be dependent on the substantive agencies for its funding. The CHA and the substantive agencies, even though separated in the decision-making process, must be interdependent parts of the system as a whole.

The decision of the independent hearing officer should be considered a strong recommendation to the agency's director. Though the director retains final approval, he or she will be unlikely to overturn a decision rendered by a structurally independent third party.[168] Moreover, allowing the director final approval will lessen the tension caused by a power shift. While some sort of appeal process within the administrative system might yield a more equitable final decision, it appears to be unnecessary. The structural independence of having a CHA hearing officer who is not under the supervision and influence of the substantive agency will produce an equitable result – one in which both the agency and the public will have faith.[169]

CONCLUSION

Many of the concerns and issues that have fueled change in other states currently plague Rhode Island. Amid the "judicialization of the administrative process," the role of the hearing officer

165. Tennessee implemented an "intermediate stage of development," to avoid some conflict and ease the transition. Swent, *supra* note 58, at 9-10. Initially, some agency use of the CHA was voluntary. Later, Tennessee's system "evolved into a full-fledged central panel with broad, mandatory jurisdiction." *Id.* at 10.

166. *Id.; see also* Rich, *supra* note 11, at 251.

167. *See* discussion *supra* Part II.B.3.

168. *See* discussion *supra* Part II.B.2; *see also* Abrams, *supra* note 4, at 499.

169. *Id.*

has expanded and the Rhode Island hearing process must also evolve.[170] The employment relationship between the hearing officer and the agency creates several conflicts undermining the current system. The solution for Rhode Island is to implement a CHA with an "expanded" jurisdiction, to provide funding from the general fund, and to leave final approval in the hands of the substantive agency's director. As in other states, such an adoption will lead to a more fair and more efficient process.

As with any change, especially with one involving a shift in power away from individual state agencies, there will be opposition and dissent.[171] In discussing the difficulty of change, Governor Carcieri stated:

> Change is never easy . . . . Transforming government will be a significant challenge. No doubt, there will be roadblocks along the way. But the time is right to make us lean and efficient . . . . For the sake of the next generation of taxpayers, we must get down to business and deliver a State government that works for all of its citizens.[172]

While change is difficult, creating an unbiased and independent administrative hearing process will provide a better government that works for all of its citizens.[173]

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170. Davis, *supra* note 6, at 289.
171. Heynderickx, *supra* note 8, at 229; Swent, *supra* note 58, at 9-10.
172. Carcieri Press Release, *supra* note 116.
173. *Id.*
174. The Author would like to thank Brian Stern, Executive Counsel for the State of Rhode Island Department of Administration, for helping select this topic and for his insight. The Author would also like to thank Professor Lisa McElroy for her assistance.