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The Central Panel: A Response to Critics

By John Hardwicke and Thomas E. Ewing*

The central panel movement appears to be quickening. Louisiana established a panel in 1996; Oregon and Michigan in 2000; Alaska in 2004. There are now twenty-seven state, and three city, central panels. Other states, in varying degrees of progress, are considering the establishment of their own.

No central panel is created without a champion - it may be the governor or other elected official, legislature, private bar, or citizen organizations. But there is also resistance, often white-hot. The objections are the same: cost, loss of agency expertise, judicialization of administrative hearings, and creation of yet another state bureaucracy. The purpose of this article is to answer those objections, drawing upon the authors' experiences in their own panels and also the many years of interactions with other state chief administrative law judges in the organization and operation of central panels.

The authors have relied considerably on data from Oregon's Office of Administrative Hearings (OAH), which began operations on January 1, 2000. This is a particularly useful laboratory in which to explore central panel issues, especially efficiencies, since it is a relatively new panel. It bills for services on an assessment method, and thus has collected useful information on hours, costs, and referrals. And, finally, as one of the largest panels in the nation (135 permanent employees in 2000), with seven consolidated hearings units ranging from one to forty-five employees, fiscal and other effects can be analyzed at several different levels.

This is intended as a practical guide for governors, legislators, agency heads, and others - anyone either interested in, or threatened

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by, the prospect of a central panel in their state. Accordingly, there will be little of the scholarly gloss that typically accompanies law review articles.¹

I. MISSION OF A CENTRAL PANEL

The mission of a central panel can be simply stated: to provide the public, both citizens and businesses, with an independent forum in which to dispute agency action. Stated differently, in the old system, the judge, generally called a hearing officer, is an in-house employee of the agency. This makes the agency simultaneously the policeman, prosecutor, judge, and jury of its own action. Inevitably, such a system creates, at the very least, an appearance of bias; at worst, the reality of either direct or indirect pressure on these employees to produce decisions favorable to the agency.²

The problem with appearance is obvious. However carefully an agency erects a "Chinese Wall" between its regulatory staff and administrative law judges (ALJs), citizens do not know that. If they do know it, they do not believe it. What citizens know is this: they are fighting the agency, and they want a fair hearing. When they enter the hearing room and learn that the judge presiding over the case is an employee of their adversary, no explanation will persuade them, especially if they lose, that the outcome was not predetermined.

Agency pressure is a more complex question. There is abundant anecdotal evidence of agency hearings managers directing ALJs in individual cases to produce desired outcomes, irrespective of the facts and the law. In the personal experience of the authors, however, such blatant interference is uncommon. What is much more common is indirect pressure, such as the desire of an ALJ to please a supervisor, to rise within agency ranks or to remain friendly

1. Those interested in reading more on central panels may consult John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419 (2001); Thomas E. Ewing, *Oregon's Hearing Officer Panel*, 23 J.NAALJ 57 (2003); and *Oregon's Office of Administrative Hearings: A Postscript*, 24 J.NAALJ 21(2004).

2. An employee is, by legal definition, a "servant" of his or her employer - that is, part of the master-servant relation as presented in law school and referred to by the courts. As such, and different from the independent contractor, an employee is subject in many ways, some subtle, some direct, to the will of the employer.

with agency staff who participated in the decision litigated at the hearing.

It can flow too from hearing managers seeing themselves as a part of, not separate from, the agency management structure. In one Oregon hearing unit, for example, ALJs inspected files prior to hearings to ensure that all documents necessary for the state to prove every element of its case were present. They reviewed jurisdictional notices for legal sufficiency; if insufficient, cases were dismissed without prejudice to allow the agency to refile. They were instructed to ignore a statute which, the agency feared, would give them too much discretion in conducting license suspension hearings. In these examples (there are others), the judges were *not* independent adjudicators. They were active, if invisible to the public, prosecutors of the agency's case.

II. COST

Experience has shown that a central panel is inherently more cost-effective than separate, independent hearings units. There are two reasons for this: economies of scale and flexibility in case assignment. The benefits of economies of scale are most visible for agencies with high-volume hearing needs (perhaps a thousand or more annual referrals). The benefits of flexibility in case assignment are most visible for agencies with low-volume hearing needs (a few hundred referrals a year).

Before examining this subject further, a word about start-up costs. Start-up costs can be a deal-breaker in the establishment of a central panel. In Oregon, in 1997, a bill was passed to create a central panel as a stand-alone agency. It was estimated that the net additional cost to the state would be almost \$2 million. The Governor vetoed the bill, declaring that Oregon could not afford it. In 1999, another effort was made to create a central panel, substantially larger than the one contemplated in 1997. But this time the panel was to be supported by a different agency, and hearing staff were to remain physically located in their former parent agencies, at least for a time. Actual start-up costs were \$92,000.

A. *Economies of Scale*

Just as an automobile plant can produce 1000 cars more

efficiently than one producing 100, a hearings unit issuing 1000 orders a month can do so more efficiently than one issuing 100. This is the result of shared resources: case management systems, operational staff, vehicles, office space, and so on. Moreover, a larger hearing unit has the capacity, simply by virtue of its size, to absorb a greater amount of additional work than does a smaller one.

Here are some examples of the “macro” efficiencies gained in Oregon at the OAH and individual (large-volume) hearing unit levels:

- In fiscal year³ 2000-01, the average number of OAH hours per referral was 8.55. By 2002-03, it had dropped to 7.13, a reduction of seventeen percent. Similarly, in 2000-01, the average cost of a referral was \$322. In 2002-03, it was \$285, a reduction of eleven percent. This was a total cost savings to the state of Oregon in 2002-03 of \$1.4 million.
- In addition to the hearings of the seven agencies whose hearings units were consolidated into the OAH, the legislature mandated that another sixty-two agencies were to use the services of the OAH. In calendar year 2000, this was the equivalent of 3.5 full-time equivalents (FTEs).⁴ That work was absorbed into the OAH without the addition of any permanent employees.
- The average cost of Department of Transportation referrals (about 6000 annually) dropped by six percent, from \$581 in 2000-01 to \$544 in 2002-03. The average hours per referral dropped by nine percent, from 14.8 to 13.4. In 2002-03, the Department saved \$232,158.⁵

3. Oregon's fiscal year is July 1 to June 30. Unless noted differently, all years are fiscal years.

4. FTEs are calculated on the basis of 2088 hours available to an employee in a year.

5. Cost savings for individual agencies are calculated on the basis of salaries plus benefits. Because they do not include associated services and supplies, the savings are understated.

- The average cost of Department of Human Services referrals (about 3000-4000 annually) dropped by twenty-three percent, from \$401 in 2000-01 to \$309 in 2002-03. The average number of hours per referral dropped by twenty-six percent, from 9.4 to 7.0. In 2002-03, the Department saved \$371,600.

B. Flexibility in Case Assignment

For low-volume hearings, economies of scale are less visible; certainly they are harder to document. But, membership in a central panel brings no less of a fiscal benefit. The reason is this: with high-volume hearings, increases or decreases in referrals tend to be slower and less dramatic, allowing management to respond more efficiently by making appropriate staffing assignments. With low-volume hearings, however, there is much greater volatility, upwards and downwards. Aggravating this is the fact that low-volume hearings (often licensing-type cases) tend to be the lengthier kind of case. There is never a perfect mathematical equation between the work to be done and the people to do the work. When cases decline, the agency has capacity; when they increase, either the agency suffers a backlog or it hires new staff. But, when cases decline again, as they surely will, there is capacity once more.

A central panel cures this. Case referrals in different parts of a panel are continually oscillating: going up and down. Staff can easily be assigned where the need exists. Here are some examples:

- The Water Resources Department (WRD) transferred one ALJ to the OAH. At the time of transfer, only about thirty percent of her time was actually used for hearings, yet the WRD was paying for a full-time ALJ. The OAH assigned her to other agency hearings, which was an annual salary savings for the Department in 2000-01 of \$48,000.
- In 2001 and afterwards, the WRD became involved in a very complex water-rights litigation, requiring 1.75 (ALJ and clerical) FTEs worth of work. The Department would have been forced to hire additional staff, but the OAH was able to absorb the cost.

- The Department of Consumer and Business Services transferred four ALJs and two clerical staff to the OAH. However, it had only 3.75 FTEs worth of work at the time of transfer. The OAH turned this excess capacity, 2.25 FTEs, to other hearings, which was a salary savings in 2000-01 of \$180,000.
- The Oregon Liquor Control Commission transferred three ALJs and one clerical staff to the OAH. However, it had only 3.3 FTEs worth of work. The excess capacity was assigned to other cases in the OAH, which was a salary savings of \$56,000 in 2000-01.
- In 2000-01 the Liquor Control Commission referred 129 cases to the OAH, using the services of 4.2 FTEs. By 2002-03, the number of referrals dropped to eighty-five cases, requiring the services of 2.7 FTEs. Without the OAH, this excess capacity would either have been laid off or (more likely) remain idle. This capacity was assigned other cases in the OAH, saving the Commission approximately \$140,800 in 2002-03 alone.

Other central panel states have experienced the same cost reductions. Maryland went from a total of ninety ALJs prior to the establishment of its central panel in 1991, to fifty-three by 1993; there was a corresponding reduction in operational staff. By the second year of its existence, the OAH saved the state of Maryland almost \$828,000.⁶ Colorado also saw a reduction in staff. New Jersey went from 136 ALJs (hearing examiners) to forty-three. Without the panel, New Jersey would have spent \$20 million on hearings; in the event, it spent only \$7.5 million. In late 1994, the Texas State Office of Administrative Hearings reported a seventy percent drop in cost of its hearings.⁷ In Minnesota, the cost of hearings for the Public Utilities Commission pre-panel was \$400,000.

6. John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J.NAALJ 5, 40-41 (1994).

7. Gerald E. Ruth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase "Judicialization" in Pennsylvania*, 16 J.NAALJ 221, 252-53 (1996).

In the first year of the panel's operation, it dropped to \$311,330; it dropped again in the following year to \$234,000. The state of Minnesota saved \$100,000 (out of a budget of approximately \$900,000) in 1978 alone.⁸

III. LOSS OF AGENCY EXPERTISE

Mythology and false assumptions surround this issue. The mythology is that only "expert" ALJs can handle the particular agency's subject matter. The false assumptions are, first, that "non-experts" will be hearing agencies' cases; second, that these non-experts will ignore agency policy and agency law. These propositions, like all unexamined propositions, have gained a truth in the retelling.

A. *The Mythology of Expertise*

Typically, agency employees at all levels believe that their particular subject matter is sufficiently esoteric that only expert ALJs can truly understand it. For example, in 1999, the Commissioner of the Real Estate Agency (REA) sought exemption from Oregon's OAH, arguing that only judges with a real estate background were qualified to handle REA hearings. Two years later, he conceded that OAH ALJs were doing a good job. The Director of the Veteran's Administration (VA) testified that VA cases required special expertise in federal law and that Oregon's bonding authority would be jeopardized without exemption. Four years later, that authority is intact. The Board of Optometry, the Veterinary Medical Examining Board, and others sought exemptions based on the same argument of expertise.

Pride is a commendable thing. But the authors of this article have never seen a case so complex that only an agency expert could judge it. After the establishment of Oregon's OAH and thereafter, ALJs were competently handling agency hearings - so competently, in fact, that in 2003, when the legislature was considering making the OAH permanent, not a single agency voice was raised in opposition. Nor

8. Duane R. Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 JUDICATURE 257, 263-64 (1981).

did a single agency head complain that expertise had eroded over the previous three years. This is because there had been no erosion. Agencies continued to apply their expertise – in the rules they wrote, the inspections they conducted, and the penalties they imposed. Nothing changed.

"Loss of agency expertise," when correctly understood, is the loss of insider knowledge. It is the bundle of shared beliefs regarding industry practices. It is the knowledge, gained by employees over the years, of the agency's culture, the industry it regulates, and the law it applies. Insider knowledge may strengthen agency performance, but it threatens fundamental fairness. If relevant to a decision, this knowledge should be presented openly at a hearing and be subject to cross-examination. It must be tested by an independent judge, not by an insider.

B. False Assumptions

False assumptions are also at work. The first false assumption is that ALJs, wholly ignorant of the statutes and rules governing the agency and the industry it regulates, will be assigned to its cases. In fact, in the formation of every central panel, ALJs who specialized in a particular agency's subject matter pre-panel, continued to hear those cases post-panel. The conversion was transparent. Moreover, all chief ALJs endeavor to assign only those ALJs knowledgeable in the agency's subject, especially if that knowledge is necessary to an efficient hearing.

The other false assumption is that only an ALJ specially trained in the agency's subject matter can produce a legally correct order. It is true that special training can be helpful, even necessary, in some particular areas. For example, in those involving the complex intersection of federal and state statutes and rules, special training can be extremely helpful. Central panels provide that training. But in most other areas, outcomes depend less on knotty legal analyses than on complicated factual situations. One does not need to be a forester to competently decide a forestry case; a scientist to decide an environmental case; a physician to decide a medical board case. Fundamentally, what is required is an ability to apply the law

accurately, and to analyze facts and weigh them appropriately.⁹

C. Conclusion

A study by Oregon's OAH clearly demonstrates how extravagant are agencies' fear of "loss of expertise." The study reviewed 344 proposed orders issued by the OAH during the first three years of its existence, from 2000-2002, on behalf of licensing boards and commissions. Eighty-seven percent (299) of the orders affirmed the agencies' proposed actions. Thirteen percent (45) disaffirmed. Half (22) of the disaffirmances were on legal grounds - that is, there was no dispute regarding the facts, only their legal effect. The other half (23) were on factual grounds. Agencies issued 299¹⁰ final orders from those proposed orders. Ninety-five percent (283) affirmed the proposed orders, although in a few instances the agencies either increased (16) or reduced (12) the sanctions recommended by the ALJs. Only five percent (16) of the final orders disaffirmed the proposed orders. Of that number, ten disaffirmances were on legal grounds, and six were on factual grounds (generally, the agency preferring to rely on the evidence of its own witnesses).

The conclusion is clear. Oregon's ALJs did not run amok with agency statutes and rules as was feared.¹¹ On the contrary, OAH orders overwhelmingly affirmed agency actions. Of the agency disaffirmances of OAH proposed orders, only seven percent were for legal reasons. What may be even more interesting is that ninety-five percent of agency final orders affirmed OAH proposed orders, demonstrating that, in a number of instances, agencies preferred the contrary outcomes proposed by ALJs. This data is further supported by the customer satisfaction surveys completed by agencies during the same period covered by the study: of the 285 agency responses, ninety-eight percent were either satisfied (37 percent) or very satisfied (61 percent) with OAH services. Only two percent indicated dissatisfaction.

9. One solution to ease agency concerns is to give ALJs only proposed, or recommended, order authority in selected cases.

10. The OAH was unable to collect all final orders issued from its proposed orders. This failure explains the discrepancy between the number of OAH proposed orders and agency final orders.

IV. JUDICIALIZATION

Another fear is that a central panel will “judicialize” administrative adjudication and that administrative hearings will come to resemble circuit court proceedings, with Byzantine pleadings, complex motion practice, and protracted discovery. All this, according to the argument, undermines what should be the nature of an administrative proceeding: that it is informal, swift, and accessible to the average citizen.

There is no question that in the last sixty years, there has been a trend in administrative law toward a more court-like process: cross-examination, *ex parte* communications, discovery, notice of agency action, and so on. However, this has not been caused by central panels. It has been the result of the adoption of federal and state administrative procedure acts beginning in 1945 and the elaboration by the United States Supreme Court of due process safeguards for citizens since the early 1970s. Judicialization has occurred with the same vigor in states both with and without central panels.

If anything, a central panel produces some simplification in administrative adjudication. States without central panels have different hearings programs, each with its own procedures, ALJ job descriptions, hiring practices and standards, websites, etc. With a central panel, there is now one set of procedures, more consistency in the quality of decisions, a single website to visit, and so on.

V. A “NEW BUREAUCRACY”

Finally, opponents argue that creation of a central panel produces yet another “bureaucracy” which state governments cannot afford. The issue of cost has already been addressed. Here, the authors will look solely at the question of bureaucracy.

In general, a central panel does not create *additional* government. Rather, it reduces the structure, and often the size, of a government by consolidating several different bureaucracies into one. In Oregon prior to the OAH, there were seven separate agency hearings units with nine supervisors. After the OAH, there was a single bureaucracy with eight managers – a reduction of one manager.

A consolidated central panel bureaucracy brings distinct benefits to administrative adjudication. As a practical matter, hearings units embedded in agencies are tolerated as necessary evils. This is

understandable since no one likes being second-guessed. Often, and as a result, hearings management is populated by agency insiders – personnel intimately familiar with agency law and practices. It is this background, agencies often believe, that guarantees legal accuracy in hearings decisions. Accordingly, knowledge of the general principles of administrative law and a preference for hiring ALJs with formal legal training are regarded as less important, sometimes even a handicap, to furthering the agency mission.

A central panel changes this. Professionals are now in charge (all chief ALJs of central panels are required at a minimum to have law degrees). This produces a different emphasis. ALJs are no longer valued as "technocrats," but as professional judges. The quality of training improves. Hiring standards often become more rigorous. Collection and analysis of data become more important (in Oregon, only a small fraction of the agencies requiring hearing services kept any data whatsoever; of those that did, much of it was unreliable). Timeliness improves. The quality of the work, rather than the outcome, becomes more important.

VI. CONCLUSION

Perhaps the most convincing argument is that no state that has adopted a central panel has abolished it, reverting to the old system. These states have discovered that central panels improve government. The public trust is enlarged because citizens now have an independent forum in which to litigate their cases. Agencies benefit too. They are able to distance themselves from hearing orders (as in "We didn't write this order; it's the OAH's fault."). They are spared the fractious relationships that sometimes occur between agency staff and ALJs (two Oregon agencies were delighted to have their ALJs supervised by others). Costs are lower. The quality of decisions does not deteriorate; generally it improves. Timeliness does not deteriorate but often improves substantially.

Whether or not a state adopts a central panel should not depend on the fears of cost, loss of expertise, judicialization, or bureaucratization. These are groundless. Rather, it should depend on the answer to a fundamental policy question: Is it the function of administrative law judges to independently, *truly independently*, review agency action, applying the law with the same neutrality and outcome-indifference as does a judicial court? Or is it their function

merely to meet the minimal due process requirements of notice and hearing? If the former is true, only a central panel is sufficient. If the latter is correct, agency hearings units will do. Every state must decide for itself.