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# Oregon's Hearing Officer Panel

By Thomas E. Ewing, Chief Hearing Officer\*

## I. INTRODUCTION

On January 1, 2000 Oregon and Michigan became the newest states in the nation to establish independent central panels of administrative law judges. For Oregon, the effort began twenty years ago. Various attempts to create a central panel were met with agency hostility and legislative indifference. However, legislative indifference changed dramatically when the confidence in the fairness of agency adjudication was shaken. Champions emerged, urging the formation of an independent judiciary of administrative law judges. Agencies fiercely resisted, predicting that their policy-making role would be usurped, their expertise ignored, and their budgets broken.<sup>1</sup> It is a familiar story.<sup>2</sup>

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\* Thomas E. Ewing is the Chief Hearing Officer of the Hearing Officer Panel, appointed on August 31, 1999. The author thanks (in alphabetical order) John W. Hardwicke, formerly Chief Administrative Law Judge, Office of Administrative Hearings, Maryland; David W. Heynderickx (*see infra* note 1); Julian Mann, III, Chief Administrative Law Judge, Office of Administrative Hearings, North Carolina; and Rep. Lane Shetterly of the Oregon General Assembly and sponsor of House Bill 2525, for their review of and comments on this article.

1. The history of Oregon's central panel has been ably chronicled by senior deputy legislative counsel to the Oregon Legislature, David W. Heynderickx. David W. Heynderickx, *Finding Middle Ground: Oregon experiments with a central panel for contested case proceedings*, 36 WILLAMETTE L. REV. 219, 219-63 (2000). Heynderickx attended the meetings of the study group and provided legislative drafting services as House Bill 2525 evolved.

2. For the history of other state central panels, see George R. Coan, *Operational Aspects of a Central Hearing Examiners Pool: California's Experiences*, 3 FLA. ST. U. L. REV. 86 (1975); Jeffrey G. Cokin & Jonathan Mallamud, *Hearing Officers in Pennsylvania: Recommendations for an Independent Central Office*, 15 DUQ. L. REV. 605 (1977); Mark A. Dickerson, *The Georgia Office of State Administrative Hearings*, 19 J. NAT'L ASS'N ADMIN. L.

House Bill 2525, creating Oregon's Hearing Officer Panel (Panel), was the result.<sup>3</sup> It has been described as "probably the most significant modification to Oregon's Administrative Procedures Act (APA) since the law was adopted in 1957."<sup>4</sup> This article traces the

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JUDGES 121 (1999); William R. Dorsey, *Florida's Continuing Experiment with the Central Hearing Panel Process: The Division of Administrative Hearings*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 77 (1995); 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. JUDGES 95 (1994); James F. Flanagan, *Report to the Judicial Council on the Administrative Law Judge Statute*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 371 (1998) (on South Carolina); John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. NAT'L ASS'N ADMIN. L. JUDGES 5 (1994) [hereinafter Hardwicke, *The Central Hearing Agency*]; Duane R. Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 JUDICATURE 257 (1981); Daniel R. E. Jordan, *Opening the Floodgates of Decision-Making at the Missouri Administrative Hearing Commission*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 99 (1995); Marvin Kittrell, *ALJs in South Carolina*, 7 S. CAROLINA LAW. 42 (May/June 1996); Julian Mann, III, *Striving for Efficiency in Administrative Litigation: North Carolina's Office of Administrative Hearings*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 221 (1995); Julian Mann, III, *Administrative Justice: No Longer Just A Recommendation*, 79 N.C. L. REV. 1639 (2001); Christopher B. McNeil, *Due Process and the Ohio Administrative Procedure Act: The Central Panel Proposal*, 23 OHIO N.U.L. REV. 783 (1997); William B. Swent, *South Carolina's ALJ: Central Panel, Administrative Court, or a Little of Both?*, 48 S.C. L. REV. 1 (1996). Sheila Bailey Taylor, *The Growth and Development of a Centralized Administrative Hearings Process in Texas*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 113 (1997).

For central panels generally, see John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419 (2001) [hereinafter Hardwicke, *The Central Panel Movement*]; Allen C. Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75 (1994), reprinted in 14 J. NAT'L ASS'N ADMIN. L. JUDGES 107 (1994); Allen C. Hoberg, *Ten Years Later: The Progress of State Central Panels*, J. NAT'L ASS'N ADMIN. L. JUDGES 235 (2001); Harold Levinson, *The Central Panel System: A Framework That Separates ALJs from Administrative Agencies*, 65 JUDICATURE 236 (1981); Malcolm Rich, *Central Panels of Administrative Law Judges: An Introduction*, 65 JUDICATURE 233 (1981); Malcolm Rich, *Adapting the Central Panel System: A Study of Seven States*, 65 JUDICATURE 246 (1981); Victor Rosenblum, *The Central Panel System: Enhancing Administrative Justice*, 65 JUDICATURE 235 (1981).

3. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

4. Heynderickx, *supra* note 1, at 220. Oregon's APA may be found at OR. REV. STAT. §§ 310-550 (1999). The central panel movement has been described as the "fourth reform movement in state administrative law." Michael Asimow, *The*

history of Oregon's Hearing Officer Panel, with special emphasis on its operations since January 1, 2000. Every state has a story to tell; Oregon's is not over yet. House Bill 2525 is due to sunset on June 30, 2005.<sup>5</sup> The Legislature must decide in 2003 whether or not to make the Panel permanent or to allow its dissolution.<sup>6</sup>

## II. THE HISTORY OF HOUSE BILL 2525

Since 1946, with the passage of the federal Administrative Procedures Act, there has been a movement in the United States to separate agency regulation and enforcement from its adjudicatory function.<sup>7</sup> Proponents argue that there is, at a minimum, the appearance of irregularity when an administrative law judge (ALJ)<sup>8</sup> employed by the agency judicially reviews the agency's action; at worst, there is the reality of improper agency influence. The solution, proponents believe, is to transfer agency ALJs into an independent central panel.<sup>9</sup> The first such central panel was created

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*Forth Reform: Introduction to the Administrative Law Review on State Administrative Law*, 53 ADMIN. L. REV. 395, 398 (2001).

5. H.R. 4053, 71st Leg., 3d Spec. Sess. (Or. 2002). The Panel was originally scheduled to sunset on January 1, 2004. The reason for the extension was to relieve budget analysts in the Department of Administrative Services from the burden of preparing two budgets for all agencies subject to the Panel (Oregon budgets on a biennial basis): one if the sunset provision is rescinded and the Panel becomes permanent; the other if the provision is not rescinded and the Panel dissolves.

6. H.R. 4053, 71st Leg., 3d Spec. Sess. (Or. 2002).

7. John Hardwicke's article, *The Central Panel Movement* nicely synthesizes the driving forces both behind and against state central panels. Hardwicke, *The Central Panel Movement*, *supra* note 2.

8. Although House Bill 2525 uses the term "hearing officer," the designation "administrative law judge" is favored in this article because it has gained common currency both in central panels generally and in the federal administrative judiciary.

9. See Heynderickx, *supra* note 1, at 223-232 for a thorough discussion of the arguments advanced both by proponents and opponents of central panels. Edward J. Schoenbaum points out the public perception that ALJs not in central panels are biased in their adjudicative responsibilities because they are hired, promoted, supervised, and paid by the very agencies whose orders they review. Edward J. Schoenbaum, *Improving Public Trust & Confidence in Administrative Adjudications: What Administrative Law Practitioners, Judges, and Academicians Can Do*, 53 ADMIN. L. REV. 575, 579 (2001).

in California in 1946. There are now twenty five state panels in the nation.<sup>10</sup>

Efforts in Oregon to establish a central panel go back to the early 1980s. In 1983, 1985, and 1987, bills were introduced to create an "administrative hearings office" with a director appointed by the governor. The Oregon Association of Administrative Law Judges (OAALJ) was the moving force behind them all. None of the judges ever received a hearing.<sup>11</sup> In 1987 the Legislature did, however, authorize the creation of a Commission on Administrative Hearings to study the "structures and procedures by which agencies conduct contested case proceedings, including matters relating to centralization."<sup>12</sup> Over the next couple of years the Commission engaged in extensive fact-finding, receiving testimony from a variety of sources. Agency heads were the "most vociferous critics" of the central panel concept.<sup>13</sup> They argued that a panel would deprive them of needed hearing officer expertise; that agencies, not hearing officers, are ultimately accountable for the impartiality of hearings; and that hearing officers, free of agency control, would begin setting agency priorities and policies.<sup>14</sup>

The Commission accepted the agency argument, concluding that a central panel of hearing officers was not needed: "Agencies must be able to interpret, modify, and create their own policies. Turning that authority over to the hearing officer would abdicate responsibility which has been delegated through the political process."<sup>15</sup> The Commission acknowledged some problems with the current system and recommended an "incremental approach" to improvement. The approach included the following provisions: hearing officers should disclose ex parte contacts; agencies should justify the modification or reversal of findings of historical facts in their final orders; hearing officers should apply agency policy but be permitted to comment on that policy if it is contrary to law or produces unjust results; agencies should be encouraged to share

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10. Hardwicke, *The Central Panel Movement*, *supra* note 2, at 441-42.

11. Heynderickx, *supra* note 1, at 238-39.

12. *Id.* at 239.

13. OREGON STATE BAR, REPORT OF THE COMMISSION ON ADMINISTRATIVE HEARINGS, 6 (1989) [hereinafter COMMISSION REPORT].

14. *Id.* at 6-8.

15. *Id.* at 11.

hearing officers in order to produce efficiencies; a code of professional conduct should be established for hearing officers (written by the Department of Justice); and the title of "hearing officer" should be changed to "administrative law judge."<sup>16</sup> The Commission's report, including all of its recommendations, was ignored by the Legislative Assembly.

The central panel issue was reawakened in 1995. There was considerable legislative discontent over interference by the Director of the Department of Revenue in ALJ decisions, particularly when the Department lost their hearings.<sup>17</sup> The politics became white-hot, with ALJs, fearing Department retribution, refusing to testify before the Legislature unless they did so under subpoena. The legislative solution was to place them in a specially created Tax Magistrate Division within the Oregon Tax Court.<sup>18</sup>

There was now new momentum for the creation of a central panel. In 1997 Senator Neil Bryant and Representative Lane Shetterly, both attorneys, sponsored House Bill 2948.<sup>19</sup> They objected to agency interference in hearing decisions, done in order to ensure compliance with agency "policy"; they wanted to improve both the quality and timeliness of orders; and they were concerned about the degree of familiarity between ALJs and assistant attorneys general.<sup>20</sup> House Bill 2948 proposed to establish an office of administrative hearings, headed by a director appointed by the governor with Senate confirmation for a four-year term.<sup>21</sup> House Bill 2948 would have consolidated the hearing units of five agencies, with forty one employees.<sup>22</sup>

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16. *Id.* at 12-29.

17. Telephone interview with Neil Bryant, Senator (April 20, 2001); Heynderickx, *supra* note 1, at 240.

18. Heynderickx, *supra* note 1, at 240-41.

19. H.R. 2948, 69th Leg., Reg. Sess. (Or. 1997).

20. Interview with Neil Bryant, *supra* note 17.

21. H.R. 2948, 69th Leg., Reg. Sess. (Or. 1997).

22. LEGISLATIVE FISCAL OFFICE FOR H.R. 2948, FISCAL ANALYSIS OF PROPOSED LEGISLATION 1 (May 5, 1997) [hereinafter LEGISLATIVE FISCAL OFFICE FOR H.R. 2948]. House Bill 2948 borrowed heavily from the MODEL ACT CREATING A STATE CENTRAL PANEL HEARING AGENCY (1997), reprinted in Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMINISTRATIVE LAW REVIEW 475, app. at 541-49 (2001); see also Ed Schoenbaum, *A brief History*

Testimony before the House Judiciary Committee was sharply divided. Members of the Oregon State Bar strongly favored the bill. The representative of the Oregon Litigation Reform Coalition, representing business interests, stated: "I can tell you from experience that many parties who appear before agencies in contested cases feel the deck is stacked against them. And why shouldn't they? How would you feel if the party investigating making a charge against you was also empowered to decide your fate?"<sup>23</sup>

Private practitioners testified to the difficulty of persuading clients that they could expect a fair hearing before an employee of the very agency whose order the client was appealing.<sup>24</sup>

Agency response was quite different. Not surprisingly, the chief roadblock to the creation of central panels in almost every state has been the objections raised by executive branch agencies.<sup>25</sup> For example, the Commissioner of the Real Estate Agency complained about the following: the agency had not budgeted for the increased hearing costs (the Commissioner himself heard all real estate cases); it would be difficult to find ALJs with real estate expertise; assistant attorney general costs would increase because of the additional testimony needed "to educate the hearing officers"; and hearings would be delayed. He concluded that "[t]he Agency has an excellent track record both in the decisions of the contested case hearings and results of the appeals process. There appears to be no savings, only expense, and no documented benefit to the consumer and licensees."<sup>26</sup>

Reaction from other agencies—especially the smaller licensing boards that traditionally had used their own board members,

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*of the Model Act to Create a State Central Hearing Agency*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 309 (1997).

23. *Hearing on H.R. 2948 Before the Civil Law Subcomm. of the House Comm. on the Judiciary*, 69th Leg., Reg. Sess. (Or. 1997) (testimony of John DiLorenzo, Jr., attorney) [hereinafter *Hearing on H.R. 2948*].

24. *Id.* (testimony of Janice Krem, attorney, and Gary P. Harrell, Harrell & Nester, LLP).

25. Hardwicke, *The Central Panel Movement*, *supra* note 2, at 423.

26. *Hearing on H.R. 2948*, *supra* note 23 (written testimony of Scott Taylor, Commissioner, Real Estate Agency). Interestingly, the Commissioner testified that in 1996 he had heard eighteen contested case hearings. *Id.* The agency prevailed in all of them. *Id.*

administrators, or contract hearing officers<sup>27</sup> to preside over contested case hearings--was quick and similar. The President of the Board of Optometry argued that it was more efficient and less costly for the Board to use its own members to preside over licensing cases because they are "already familiar with optometry and the nature of the type of complaints that go to contested case hearings."<sup>28</sup> The Board of Chiropractic Examiners also requested that it be excluded from House Bill 2948: "The Board's professional expertise is relevant and necessary in the proper drafting of a board order."<sup>29</sup> If there is a factual error, the Board will have to incur additional attorney general costs in appealing the case to the Court of Appeals, where a correction in the findings of fact can be made.<sup>30</sup>

The stiffest opposition came from the Governor himself. He was concerned that the bill would create a "new and powerful" bureaucracy within state government, able to direct state policy in significant ways and, as stated by his legal counsel, "answerable neither to the Governor, nor to agency heads, nor even to the General Assembly."<sup>31</sup> He expressed suspicion that the instances of improper agency influence on ALJs were more likely the exception than the rule. "The bill, in short, is not a sound policy choice, for it will make government less accountable, more cumbersome in complex cases,

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27. Employment of contract hearing officers is probably preferable to using board members or agency administrators to ensure an impartial hearing, but barely. Early in the life of the Panel, a couple of agency heads urgently requested permission from the Chief Hearing Officer to use their former hearing officers. Although the requests were denied, those conversations certainly provided support for the suspicion, expressed by two commentators, that agencies hire contract hearing officers with certain outcomes in mind, and that these hearing officers "tend" to rule in favor of agencies in order to increase their chances of being hired in the future. See Cokin & Mallamud, *supra* note 2, at 621.

28. E-mail from David Plunket, to Rep. Lane Shetterly (Mar. 26, 1997) (on file with author).

29. *Hearing on H.R. 2948*, *supra* note 23 (written testimony of Bethanne Darby, Policy Analyst of the Oregon Board of Chiropractic Examiners).

30. *Id.*

31. John Hardwicke has observed that most objections to the creation of a central panel--however expressed--turn ultimately on a fear of a "new, gigantic bureaucracy, a semi-judicial replacement of the independent, expert agency." Hardwicke, *The Central Hearing Agency*, *supra* note 2, at 48. Oregon's experience supports the accuracy of Hardwicke's observation.



less exact when technical expertise is required, and will increase litigation in an already litigious process."<sup>32</sup>

Notwithstanding agency opposition, and in the face of a likely veto, the House of Representatives passed House Bill 2948 by a vote of 39 to 20, and the Senate by a vote of 20 to 3.<sup>33</sup> The Governor did veto the bill, although his message was milder than the remarks delivered earlier through his legal counsel. He expressed support for the "idea of independent hearings officers who can provide a fair hearing for citizens who want to affect agency decisions."<sup>34</sup> However, in his mind, the bill had not adequately provided for a funding mechanism. He was also concerned about its *ex parte* provisions, which "are too much like a legal trial and less like a more informal setting for citizens to be heard by their government."<sup>35</sup> Finally, he doubted the truth of the perception that ALJs, employed by agencies, are biased and cannot be fair to citizens.<sup>36</sup> Nevertheless, he was prepared to work for the reform of administrative hearings. To that end, he declared his intention to create an interim study group—comprised of legislators, ALJs, agency heads, and members of the Department of Justice—to recommend changes to the current system.<sup>37</sup>

The core of the study group created by the Governor consisted of Representative Lane Shetterly, Chair of the Interim House Judiciary Committee; H. Henry "Chip" Lazenby, Governor's Legal Counsel; and David Schuman, Deputy Attorney General. This group, meeting with agency representatives, administrative law judges, and others, toiled through 1998 and into 1999.<sup>38</sup> The House Bill 2525 emerged from these discussions,<sup>39</sup> sponsored at the request of the Governor by Representative Lane Shetterly, and Senators Neil Bryant and Kate Brown.

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32. *Hearing on H.R. 2948*, *supra* note 23 (testimony of H. Henry Lazenby, Governor's Legal Counsel).

33. Heynderickx, *supra* note 1, at 243.

34. Governor's Office Veto Message, to Phil Keisling, Secretary of State, H.R. 2948, 69th Leg. (August 15, 1997) [hereinafter Governor's Office Veto Message].

35. *Id.*

36. *Id.*

37. *Id.*

38. Heynderickx, *supra* note 1, at 243.

39. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

Agencies were no more happy with this bill than with House Bill 2948, although reaction was more muted than in 1997, perhaps because of the Governor's support.<sup>40</sup> But there were still loud and hostile voices, particularly from real estate brokers (regulated by the Real Estate Agency) and building contractors (regulated by the Construction Contractors Board).<sup>41</sup> Despite this opposition, the "truly remarkable characteristic" of the legislative progress of House Bill 2525 was the support of the key players: the Governor, the Attorney General, the chairs of both the Senate and House Judiciary Committees (Senator Bryant and Representative Lane Shetterly respectively), and powerful business interests.<sup>42</sup> "[I]t was clear that the time had come for a central hearing panel in Oregon."<sup>43</sup> The Oregon Legislature passed the bill and the Governor signed it into law.<sup>44</sup> The Hearing Officer Panel (Panel) became operational on January 1, 2000.<sup>45</sup>

### III. HOUSE BILL 2525

#### A. *Structure of the Hearing Officer Panel*

The single issue that had bedeviled previous efforts to create a central panel in Oregon was cost.<sup>46</sup> House Bill 2948 (as was the case with previous bills proposing to create central panels) had contemplated the establishment of an independent, stand-alone agency with an annual budget of \$5.1 million for the 1997-99 biennium. It was projected that the office would require an additional 18.5 employees in addition to those transferred from the hearing units of the affected agencies. These new employees would perform all the support functions required by an agency, such as personnel and information technology. The total additional net cost to the state was estimated to be \$1.96 million; of that, \$1.0 million

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40. Heynderickx, *supra* note 1, at 246.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 219.

45. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

46. *See* Heynderickx, *supra* note 1, at 238.

was for start-up costs, which could not be recovered by billing client agencies but would have to come from the General Fund. Moreover, because the agency had no cash reserves or fund balance, it would require \$2.5 million to ensure sufficient cash flow for personal services, supplies, and capital outlay.<sup>47</sup> The Governor had vetoed this bill, largely because of cost.<sup>48</sup>

With this history very much in mind, cost was the first issue addressed by the study group.<sup>49</sup> It made three key decisions.<sup>50</sup> The first was to place the central panel in the Employment Department rather than create a new agency.<sup>51</sup> The second was to transfer to the Employment Department not only the personnel but also the associated operating budgets of those agencies whose hearing units were now consolidated.<sup>52</sup> And the third was to require those hearing units to remain housed in their former agencies.<sup>53</sup>

### 1. Housed in the Employment Department

Having decided that the Panel should be housed in an agency in order to reduce costs, the question became: which one? The study group preferred the Department of Administrative Services because it conducted few hearings and provided general administrative support to all state agencies.<sup>54</sup> However, the department director was cool to the idea.<sup>55</sup> The group then revived the suggestion, first floated by the 1989 Commission on Administrative Hearings,<sup>56</sup> of making greater use of the Employment Department. The Employment Department provided hearing services on a contract basis for several other

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47. LEGISLATIVE FISCAL OFFICE FOR H.R. 2948, *supra* note 22. The Legislature appropriated from the General Fund \$1.6 million to pay for implementing House Bill 2948. H.R. 2948, 69th Leg., Reg. Sess. (Or. 1997).

48. *See* Governor's Office Veto Message, *supra* note 34.

49. Heynderickx, *supra* note 1, at 244.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Hearing on H.R. 2948*, *supra* note 23 (testimony of H. Henry Lazenby, Governor's Legal Counsel); *see also* Heynderickx, *supra* note 1, at 244.

55. Interview with Henry Lazenby (n.d.).

56. COMMISSION REPORT, *supra* note 13, at 16.

agencies, and already served as something of a mini-central panel.<sup>57</sup> The Employment Department was selected as the host agency for the panel, with the chief hearing officer appointed by its director and serving at the director's pleasure.<sup>58</sup>

## 2. Panel Structure

House Bill 2525 consolidated the hearings units of seven different agencies under the Employment Department: Adult and Family Services (13), Construction Contractors Board (6), Oregon Liquor Control Commission (4), Water Resources Department (1), Department of Transportation (46), Department of Consumer and Business Services (6); and the hearings unit of the Employment

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57. Heynderickx, *supra* note 1, at 244.

58. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999). Typically, central panels (a division of an agency, rather than being independent, stand-alone agencies) are housed in agencies requiring no hearing services from the Panel (*e.g.*, Colorado, Iowa, Massachusetts, Tennessee, and Wisconsin). Central Panel Overview, prepared for the Hearing Officer Panel Oversight Committee (January 17, 2002) (on file with author) [hereinafter Central Panel Overview]. Oregon is an exception. Like many other compromises of the study group, the choice to house central panels in agencies requiring no hearing services produced its own interesting problems. Experience has taught, at least in Oregon and under administration of the Employment Department prior to 2002, that conflicts of interest can occur when a central panel is placed in an agency which itself is the largest user of hearing services, especially without some statutory guarantee of the Panel's independence. David Heynderickx recommends that the chief hearing officer be appointed by the governor. Heynderickx, *supra* note 1, at 247. House Bill 2948 had provided for a director appointed for a four year term by the governor with senate confirmation. H.R. 2948, 69th Leg., Reg. Sess. (Or. 1997). The Model Central Panel Act recommends that the chief administrative law judge either be appointed by the state's governor for a specific term or be appointed through the civil service process and removable only for cause. McNeil, *supra* note 22, at 543. The Model State Administrative Procedure Act proposes that the Panel be placed in a "department," without identifying it. MODEL STATE ADMIN. PROC. ACT, 15 U.L.A. § 4-301(a) (1981). The Commission's intent is to "place the office in the most neutral possible organizational position, so as to maximize the independence of the office." *Id.* Duane R. Harves severely criticized this proposal, arguing that "[o]nly where the central panel is a totally separate and independent agency is true independence achieved." Symposium, *The 1981 Model State Administrative Procedure Act: The Impact on Central Panel States*, 6 W. NEW ENG. L. REV. 661, 665 (1984). He did, however, congratulate the Commission on recommending that the director be appointed for a fixed term removable only for cause. *Id.*

Department itself (43).<sup>59</sup> In addition, the legislature appropriated funds for eight new positions to operate the Panel: a chief hearing officer, a secretary to the chief, two program technicians, a trainer, a personnel officer, a budget officer, and an information technology specialist.<sup>60</sup> The total number of Panel employees was 135.<sup>61</sup>

### 3. Physical Location of the Panel

When House Bill 2525 was passed, Panel employees were housed in eleven different agency facilities located across the state (twenty one ALJs were permanently "out-stationed" at home doing telephone hearings—principally unemployment insurance and child support cases). The study group recommended that these employees remain where they were, a recommendation which would reduce the fiscal effect of the bill.<sup>62</sup> Presumably, this would also ease dissolution of the Panel should it fail.

But this decision produced its own problems. From an appearance point of view, it is questionable whether ALJs, now independent, should remain in their offices located at their former agencies. Each of the sending agencies had different computer operating systems (e.g., Novell, Windows NT) servers, case management systems, word processing applications, e-mail programs, and Internet browsers. Panel-wide communication was (and still is) difficult. Without a centralized docketing and scheduling system, it is impossible to efficiently assign cases across the lines of the former hearing units. Statistical data from the hearing units has to be manually collected and keyed into a common database. And finally, creation of a common identity and culture is problematical.

### 4. Jurisdictional Scope of HB 2525

The study group spent a good deal of time discussing the question of which agencies should or should not be exempted from

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59. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999); *see also* Heynderickx, *supra* note 1, at 248 n.150-52.

60. *Id.*

61. *Id.*

62. Heynderickx, *supra* note 1, at 244, 251.

House Bill 2525. Unlike House Bill 2948, which expressly named all agencies subject to the bill, House Bill 2525 expressly named only those that were excluded.<sup>63</sup> This gave the Panel an enormous jurisdictional breadth, encompassing the contested cases of almost eighty agencies, including unemployment insurance, motor vehicle licensing, social services (Medicaid, food stamps, etc.), licensing boards and commissions, forestry, environmental quality, agriculture, child support, and others. In 2002 the Panel issued 32,400 orders. This represents perhaps ninety percent or more of all state contested case orders issued in Oregon.<sup>64</sup>

One criterion of exemption, much discussed by the study group, was the distinction between agencies conducting "one-party" cases and those conducting "two-party" cases.<sup>65</sup> In the former, an agency takes disciplinary or enforcement action against a citizen by suspending or revoking a license, imposing a penalty, and so forth.<sup>66</sup> In the latter, at least in the study group's opinion, an agency performs a "judicial" function, merely serving as a disinterested forum for citizens to resolve disputes.<sup>67</sup> The argument for including the latter in the panel was less compelling because the dual role of enforcement and adjudication was absent.<sup>68</sup> Nevertheless, the group decided not to adopt the distinction, in part for a fiscal reason—

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63. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999) Henry Lazenby commented that it was the Governor himself who was responsible for this philosophical change. His position was: "If you want a central panel, you've got a central panel."; *see also* Heynderickx, *supra* note 1, at 244.

Rep. Lane Shetterly noted that practical and political considerations governed the choices: Agencies headed by elected officials (*e.g.*, the secretary of state, superintendent of public instruction, state treasurer, attorney general, labor commissioner), or whose subject matter was regarded as too specialized (Public Utilities Commission), or too political (Workers' Compensation Board) were exempted; *see also* Heynderickx, *supra* note 1, at 248-49 n.153-54; *cf.* H.B. 2948, § 5 69th Leg. (Or. 1997).

Other agencies excluded are the Employment Relations Board (state, city, and county employee labor disputes), Land Conservation and Development Commission (land use), and the Bureau of Labor and Industries (civil rights). H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

64. Data from Hearing Officer Panel (on file with the author).

65. Heynderickx, *supra* note 1, at 248 n.154

66. *Id.*

67. *Id.*

68. *Id.* at 250 n.161-62.

exempting agencies having "two-party" cases would have resulted in fewer agencies sharing the cost of the panel.<sup>69</sup>

Rejecting the distinction was wise for other reasons as well. Agencies conducting "two-party" cases also often perform regulatory enforcement functions. Moreover, personal experience has shown that no agency which has issued an underlying administrative order, currently on appeal, is ever completely disinterested in the outcome at hearing. Employees who decide the case below often want to be vindicated. Also, these cases frequently involve questions of the interpretation, application, or even validity of agency administrative rules. Agencies are very attentive indeed.

## 5. Panel Procedural Rules

Another problem faced by the study group was procedural rules for the Panel. The result was yet one more compromise. Almost all central panels write their own procedural rules;<sup>70</sup> Oregon took a different path. Discussion in the study group centered around the use of the Attorney General's "model rules"<sup>71</sup> for state contested cases. These rules were specifically designed for "one-party" regulatory cases; however, no agency was required to use them.<sup>72</sup> Nonetheless, the Attorney General's representative advocated that rules of procedure be standardized for Panel hearings, and that the existing model rules serve as the basis for the Panel rules.<sup>73</sup> The

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69. *Id.*

70. The central panels of Arizona, California, Florida, Georgia, Iowa, Louisiana, Maryland, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Wisconsin, and Wyoming write all their own procedural rules. Central Panel Overview, *supra* note 58. The panels of Colorado and Washington write rules for some agencies but not for others. *Id.* In Michigan, each agency writes its own rules. *Id.*

The Model Central Panel Act is silent regarding the authority of the chief administrative law judge to adopt procedural rules, despite the Commission's preference for it to do so. McNeil, *supra* note 22, at 544. The American Bar Association has proposed model rules for central panels: Model Administrative Procedure Rules for Central Panel Agencies (State Practice and Procedure Committee, National Conference of Administrative Law Judges, August 8, 1987).

71. OR. ADMIN. R. 137-003-0000 - 0092.

72. Heynderickx, *supra* note 1, at 258 n.154.

73. *Id.*

study group agreed. The Attorney General was authorized to write the Panel's rules.<sup>74</sup>

A small committee of assistant attorneys general began feverish work to have rules in place by January 1, 2000. In the late fall of 1999 draft rules were submitted for public comment. There was instant criticism. Agencies were concerned that they were too complex and were designed more for formal litigation than for informal administrative adjudication and dispute resolution.<sup>75</sup> The private bar criticized the rules as imbalanced, favoring agencies over citizens, especially in discovery. Both objections had some merit. Nevertheless, as a practical matter, these rules have operated rather effectively and even-handedly over the last three years.

## 6. Ex Parte Contacts

The issue of ex parte contact had been especially lively in testimony over House Bill 2948 in 1997. That bill expressly prohibited direct or indirect communication between an ALJ and any other person on a legal or factual issue in the proceeding.<sup>76</sup> Several agencies were deeply worried that a prohibition against contact with ALJs would force them to communicate only through their assistant attorneys general. This would result in additional and unanticipated costs, possibly requiring agencies to go back to the Legislature for increased spending limitations.<sup>77</sup> The Governor was even clearer: A prohibition against ex parte contact would prevent agencies from developing accurate technical facts necessary for complex cases. Because the true goal of administrative hearings, in his mind, is to provide a forum for the development of good policy, not for

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74. House Bill 2948, by contrast, authorized the director of the office to write procedural rules "[i]n consultation with the Attorney General." H.R. 2948, 69th Leg., Reg. Sess. (Or. 1997).

75. Michael Zimmer, Director of the Michigan Bureau of Hearings, reviewed the procedural rules of twenty-two central panels (including those of Washington, D.C.). Only four panels had more total pages of rules, and three had more rules than Oregon. Although certainly unscientific, the study is nonetheless suggestive. See Michael Zimmer, *A Comparison of Rules* (Dec. 2001) (on file with author).

76. H.R. 2948, 69th Leg., Reg. Sess. (Or. 1997).

77. LEGISLATIVE FISCAL OFFICE FOR H.R. 2948, *supra* note 22, at 2.



competition, forbidding *ex parte* contacts would result in delays and additional hearing costs.<sup>78</sup>

House Bill 2525 approached the matter differently. *Ex parte* contacts are not prohibited. Rather, ALJs are required to disclose on the record the name of the person from whom the communication was received, and then permit the other parties to respond.<sup>79</sup> Notwithstanding this, at the inception of the Panel, both agencies and ALJs alike were in a state of severe consternation. One agency went so far as to cut off all e-mail and intranet service to the ALJs housed in the agency for fear of unintended communications between ALJs and agency staff (the service was soon restored). ALJs, for their part, worried about inadvertently seeing letters from parties (especially *pro se* litigants) after they had issued orders. All this anxiety proved unnecessary. There have been few *ex parte* contacts. The "problem" disappeared.

## 7. Modification of Hearing Officer Orders

The "heart" of House Bill 2525 is section 12, which prescribes the conditions under which agencies may change ALJs' proposed orders.<sup>80</sup> House Bill 2948 had limited the ability of agencies to alter findings to circumstances in which the ALJ's finding was not supported by substantial evidence in the record.<sup>81</sup> House Bill 2525 established two more lenient standards.<sup>82</sup> The more general standard is a disclosure requirement.<sup>83</sup> It is applicable when an agency changes a proposed order "in any substantial manner," and requires the agency merely to "identify the modifications and provide

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78. *Hearing on H.R. 2948, supra* note 23 (testimony of H. Henry Lazenby, Governor's Legal Counsel).

79. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

80. Heynderickx, *supra* note 1, at 255. Of the total of roughly 29,000 orders issued in 2001, only 592 were proposed orders. Hearing Officer Panel, Types of Orders Issued, 2001 (on file with author). However, they tend to be the most "political" because most are issued on behalf of licensing boards and commission. Hearing Officer Panel, Types of Orders Issued, 2001 (on file with author).

81. H.R. 2948, 69th Leg., Reg. Sess. (Or. 1997).

82. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

83. *Id.*

an explanation to the parties to the hearing as to why the agency made the modifications."<sup>84</sup>

The second standard is a limitation on findings of fact. This had been a challenging problem for the study group. It wanted to protect independent fact-finding by ALJs; on the other hand, it wanted to protect agencies' policy-making role. The group's solution was to distinguish "historical" facts from "predictive" facts. In trying to understand the distinction, the study group puzzled over the following riddle: Is a determination that air is unsafe for humans if it contains more than x parts per million of particulate matter a historical or predictive fact? The study group concluded that it is predictive because of its policy nature, and that agencies should be free to make such a finding.<sup>85</sup> House Bill 2525 itself does not mention "predictive facts;" rather, it speaks only to "historical facts."<sup>86</sup> An agency may change findings of historical fact only if it determines that the finding is not supported by a preponderance of the evidence in the record.<sup>87</sup> Changing "predictive facts" (*i.e.*, interpretations of law) is presumably subject to the easier disclosure requirement that the agency need only identify and explain the change.

Judicial review of agency modification of proposed orders was rather controversial within the study group. The general standard of review under Oregon's Administrative Procedures Act is for "substantial evidence,"<sup>88</sup> a rather low one which arguably does not offer much protection from capricious modification of ALJ fact-finding by an agency. The study group decided that disputed historical facts should be subject to *de novo* judicial review of the

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84. *Id.* David Heynderickx commented that one of the reasons for this requirement was the practice of some agencies to alter proposed orders without notifying the parties. The Model Central Panel Act forbids agencies from modifying, reversing, or remanding ALJ orders "except for specified reasons in accordance with law," certainly an ambiguous limitation, if a limitation at all. McNeil, *supra* note 22, §§ 1-11 at 547.

85. Heynderickx, *supra* note 1, at 258.

86. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

87. A "historical fact" is one in which the ALJ "determines that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing." H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

88. OR. REV. STAT. § 183.482(8)(c) (2001).

record as a whole.<sup>89</sup> Although there was some concern that de novo review would result in an increased use of judicial resources, the group concluded that such instances would be rare.<sup>90</sup> Thus far, this has proven to be correct.

In retrospect, the controversy over "historical" versus "predictive" facts - driven by a fear that ALJs would supplant their own policy choices for those of agencies - was probably needless. That has not happened. What has changed, however, is that agencies are no longer completely free both to set policy and to decide whether, under the facts, citizens have complied with that policy. However, in some instances House Bill 2525 has not been quite the deterrent to agency action as some had hoped. Subsection 12(2) requires only that the agency identify and explain the modification. Occasionally, that "explanation" can be rather casual (it is rarer for agencies to alter findings of fact).

## 8. Oversight Committee

House Bill 2525 provided for the creation of an Oversight Committee. It was the reflection of yet another political compromise. Because the Panel was to be placed in the Employment Department, Representative Shetterly was concerned that it might be entirely "swallowed up" by the agency and its director. The Oversight Committee was a way to prevent that and to provide a public forum for the discussion of Panel operational issues.<sup>91</sup>

The Committee is composed of two members of the Senate, two of the House of Representatives, two gubernatorial appointees, two persons appointed by the attorney general, and the chief hearing officer serving ex officio.<sup>92</sup> The Committee is charged with the tasks of studying the "implementation and operation" of the Panel,

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89. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

90. Heynderickx, *supra* note 1, at 257.

91. Email from Representative Lane Shetterly (September 28, 2002) (on file with author).

92. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999). House Bill 2948 made no provision for an advisory committee. See H.R. 2948, 69th Leg., Reg. Sess. (Or. 1997). The Model Central Panel Act proposes, as an optional provision, the creation of a State Advisory Council on Administrative Hearings. McNeil, *supra* note 22, §§ 1-12 at 547-48.

recommending to the governor and legislative assembly improvements in the "effectiveness, fairness and efficiency" of Panel operations, and suggesting additional legislation governing operations.<sup>93</sup>

The Committee has been chaired by Representative Shetterly, sponsor of House Bill 2525 and its tireless champion. It met four times in 2000 but only once in 2001. Meetings consisted primarily of reports from the Chief Hearing Officer on implementation of House Bill 2525. The pace of the Committee's work quickened somewhat in 2002 in preparation for the 2003 legislative session. The Committee identified seven issues requiring study: whether or not the Panel should be made permanent; who should appoint the chief hearing officer (the governor or agency head); the nature of that appointment (at will, for cause or term), structure of the Panel (independent and stand-alone agency, independent agency but housed in another agency for administrative support, or division of an agency), what agencies should be subject to or exempted from House Bill 2525, title of the chief hearing officer and name of the Panel (possibly "office of administrative hearings"), and the role of the Oversight Committee in 2004 and beyond if the Panel is continued. A subcommittee was created to review these matters and make recommendations to the Committee at large.<sup>94</sup>

### III. HEARING OFFICER PANEL OPERATIONS

#### A. *Hearing Officer Panel Budget*

##### 1. Budget

On the passage of House Bill 2525, the six agencies that transferred employees to the Employment Department were instructed to estimate the current cost of supporting their respective hearing units, and to transfer this money to the Employment Department. The agencies' numbers were the product more of intuition than of science, for few had ever separated out the cost of hearings from other agency operating expenses. The total budget for

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93. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).

94. Minutes, Oversight Committee (March 21, 2002).

the Panel was \$20,163,680.<sup>95</sup> Of this, \$2.1 million was projected for indirect expenses (Panel administration and a charge by the Employment Department for administrative support).<sup>96</sup>

Costs of the Panel were much less than feared. Start-up expenses (incurred from September 1 to December 31, 1999) were only \$97,515,<sup>97</sup> not the \$1 million estimated by House Bill 2948 in 1997. Attorney General expenses were also less: The Department of Justice had anticipated that the more "formal process" of litigation under House Bill 2525 would increase requests for attorney general advice. It estimated that eleven additional positions (eight of which were assistant attorneys general) would be needed, at a cost of \$1.6 million for the 1999-01 biennium.<sup>98</sup> This fear did not materialize and Department staffing was unaffected.

## 2. Billing

The Panel is funded principally by the "assessment" method.<sup>99</sup> The Panel bills agencies based on their usage of hearing services (ALJs and staff electronically record their time). Charges are calculated either on the basis of "actual costs" or "hourly costs." Agencies whose hearings needs equal or exceed one full-time ALJ (there are eight such agencies) are billed actual costs--that is, salaries plus benefits of all employees who work on their cases, and all other costs directly associated with providing hearings for those agencies ("services and supplies"). In addition, the indirect costs of the Panel

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95. 1999-2001 Legislatively Approved Budget (no date) (on file with author).

96. Fiscal Performance (September 7, 1999) (on file with author). This number is somewhat misleading, for it suggests costs which, but for the creation of the Panel, would not have been incurred. In fact, it includes the salaries of administrators of the transferred hearings units, as well as other administrative costs (e.g., personnel, budget and billing, information technology) now borne by the Employment Department but not by the "sending" agencies.

97. Hearing Officer Panel Record (on file with author).

98. LEGISLATIVE FISCAL OFFICE, FISCAL IMPACT STATEMENT OF PROPOSED LEGISLATION, HB 2525A 5 (May 17, 1999).

99. There are three funding mechanisms for central panels: direct appropriations (in Oregon, "General Funds"); assessment, by which agencies are allocated their respective share of direct costs and overhead; and hourly billings. Bruce H. Johnson, *Methods of Funding Central Panels: The Fiscal, Management, and Policy Implications*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 301, 302 (2000).

(Panel administration and Employment Department administrative support) are charged to those agencies in proportion to their monthly usage of Panel services. Perhaps ninety percent of the Panel's revenue is derived from billings based on actual costs. All other agencies are billed on an hourly basis of \$63.00 for ALJ time and \$40.00 for operational support staff time. This charge is calculated to cover both direct and indirect costs.

The billing system depends upon ALJs and staff accurately recording their time. Fortunately, at the end of 1999, the Employment Department had just developed a computerized time-entry system. However, it was designed to meet federal auditing requirements, not the billing needs of a central panel. Last-minute modifications were needed to meet the Panel's start-up date of January 1, 2000. But then, it was discovered that few employees were able to access the Employment Department's time-entry system because of the different internet and computer operating systems used by Panel employees still housed in their respective agencies. That was corrected. In the meantime, and in preparation for the Panel's launch on January 1, 2000, an invoicing system, databases for the collection of various statistical information, a cash flow report, and an "aged accounts report" were all created.

In a billing system such as this, there is always a lag-time between services provided, the invoicing for those services, and the receipt of cash. This creates an operating deficit. The answer was to require each of the "actual cost" agencies to make an advance payment equal to an estimated three months' billings. In the last three months of the biennium, billings would be credited against the advance payment reserve, leaving (in a perfect world) a zero balance. However, in late 1999 and early 2000 agencies refused to make advance payments until interagency agreements were in place. Negotiating these agreements was laborious and protracted, largely because of the uncertainties (and, one must add, a degree of mistrust) associated with the new central panel. The Employment Department was forced to front the costs of the Panel with a loan of one million dollars (repaid later). This provided the operating cash to cover the deficit. In the next biennium (2001-03), the problem was more manageable. Agencies by then had learned that working with the Panel was not nearly as disagreeable as expected, and the Panel proved not to be the horrible expense that was feared. Interagency

agreements were negotiated smoothly, and advance payments were made timely. There was no operating deficit.<sup>100</sup>

One question, for which there will likely never be a satisfactory answer, is the relative merits of the three different funding mechanisms: direct appropriations, assessment, or hourly billing.<sup>101</sup> One criticism of the assessment and hourly billing systems is that agencies, especially the smaller licensing boards and commissions, might forego litigation in order to reduce costs, particularly in the close cases. This may not be desirable from a public policy point of view.<sup>102</sup> On the other hand, scarce resources can be the perfect incentive for triage. Moreover, there is no evidence in Oregon that cases that should have gone to hearing did not. Nor is there any evidence in Oregon of a public perception that the Panel is under pressure to produce results favorable to the agencies because they pay the bill.<sup>103</sup>

In fact, the assessment method has operated very well for three reasons. First, it is a fairly predictable source of revenue. When billing by the hour, that hour must be case-specific; training and other non-case-specific time must be included in the hourly rate. In an assessment system, training and other panel activities are treated as overhead and allocated to the agencies based on their respective use of hearings services. Second, the assessment method (like hourly billing) rationally apportions costs among agencies based on usage, not unlike the free market itself. Agencies themselves decide how much service they require. As caseloads in a particular subject matter decline, ALJ and operational staff time are directed to other areas of the Panel; the agency is not charged for services not used. Conversely, as caseloads rise, the agency has to make some policy choices over how many resources the agency can and should devote

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100. House Bill 2525 was largely silent on issues relating to the funding of the Panel, perhaps because of the Governor's previous reaction. By contrast, House Bill 2948 had appropriated \$1.6 million from the General Fund, and had directed the Office to estimate at the beginning of every biennium the expenses it would incur for the provision of hearing services and to bill each agency accordingly. H.R. 2948, 69th Leg., Reg. Sess. (Or. 1997).

101. See Johnson, *supra* note 104, for an excellent discussion of this subject.

102. See Cokin & Mallamud, *supra* note 2, at 642. These commentators view this form of billing as a "glaring negative feature" of the assessment method, and therefore endorse direct appropriations as the preferable way to fund central panels.

103. See Johnson, *supra* note 104, at 305-06.

to litigation. (Of course, the larger the central panel, the more flexible management can be in assigning work across subject matters.) Third, agencies funded by direct appropriations are subject to the closest, sometimes harshest, legislative scrutiny during tight budgetary times. A central panel such as Oregon's, whose revenue originates from a variety of sources—federal funds, licensing fees, dedicated funds (*e.g.*, highway), and the General Fund—is spared to a degree.<sup>104</sup>

### *B. Assignment of Administrative Law Judges*

#### 1. Expertise

Prior to the Panel actually becoming operational, agencies expressed genuine alarm that ALJs would be randomly assigned to their cases. They feared that this would result in increased costs because of the "learning curve" needed to become conversant with their law. The provision in House Bill 2525, requiring the chief hearing officer "whenever practicable, [to] assign a hearing officer that has expertise in the legal issues or general subject matter of the proceeding,"<sup>105</sup> did little to allay anxiety. In the event, however, the transition from December 31, 1999 to January 1, 2000 was seamless for the overwhelming bulk of cases: ALJs transferred to the Panel continued to hear the cases of their former parent agencies. Little changed.

The problem was different and greater for those agencies that had not transferred ALJs to the Panel, especially the occupational licensing boards and commissions. They had historically used either their own board members, or agency heads, or contract hearing officers to preside over contested case hearings. Each believed, often quite passionately, that its subject matter was more complex, more mysterious perhaps, than that of any other agency. Panel management greeted this with some (quiet) skepticism. Nevertheless, perception trumps reality. In response, therefore, these

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104. To the extent that there is a problem with the way in which Oregon's panel is funded, the problem lies with the hourly billings. Only the very small agencies are billed by the hour. They watch those billings closely. More than once, management has had to write-off excessive time billed by ALJs.

105. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999).



agencies were aligned into eight divisions (for example, Natural Resources, Construction, Health Licensing) based on related subject matter. Small teams of hearing officers were assigned to each division, and within the teams ALJs were assigned to specific agencies where possible. The underlying notion (and what was advertised) was that agencies in each division shared a common vocabulary and regulatory practice. Expertise in one was readily transferable to others in the same division. Formation of the teams would promote expertise and reduce costs. Like other worries, the concern about limited expertise in the various areas too soon went away.

Related to this is the interesting question of generalists versus specialists.<sup>106</sup> At least one central panel encourages cross-training in all agency cases.<sup>107</sup> Oregon's approach is different. Management does encourage cross-training, but not for everyone and not in everything. There are several reasons. Not all ALJs are confident trying a variety of cases. Not all ALJs are adept at mastering a variety of different law. Efficiency declines, moreover, when ALJs move between too many subject matters, especially when the subject matters have complex statutory or regulatory legal schemes. Finally, there is a "political" problem with promoting generalists, at least for a young panel such as that of Oregon having to prove itself: agencies suffer over the thought of "non experts" handling their cases.<sup>108</sup> Instead, Panel management encourages specialization in one or two large areas (*e.g.*, motor vehicle licensing, social services, and liquor control) and then gradual exposure to other areas, depending on interest and aptitude.

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106. See generally Symposium, *This Year's Reform is Next Year's Need for Reform*, 6 W. NEW ENG. L. REV. 587 (1984).

107. Hardwicke, *The Central Hearing Agency*, *supra* note 2, at 32.

108. See the comment of Bruce H. Johnson for the argument that treating all ALJs as generalists undermines agency confidence in the administrative law process. Bruce H. Johnson, *Strengthening Professionalism Within an Administrative Hearing Office: The Minnesota Experience*, 53 ADMIN. L. REV. 445, 451 n.30 (2001). The better course, Johnson urges, is to assign ALJs with expertise in the subject matter, and to provide other ALJs with opportunities to acquire expertise. *Id.*

Another issue is that of attorney versus non attorney ALJs.<sup>109</sup> None of the minimum qualifications for ALJs, inherited from the original agencies, affirmatively requires either graduation from law school or a bar license, although perhaps eighty percent meet either one or both standards.<sup>110</sup> Understandably, this is a sensitive issue—those with law degrees believe that the value of their education is diminished by the fact that a degree is not required; those without believe that the value of their skills is diminished by those who believe a law degree is necessary.

There is no clear answer. Some ALJs without law degrees perform exceptionally well in their particular subject matter. Some ALJs with law degrees occasionally perform questionably. Nonetheless, there is a persuasive argument that minimum qualifications for ALJs should include either a current or past bar license, and perhaps some minimum years of practice. There are several reasons. Persons who have actually practiced law can be trained more quickly in how to conduct a hearing. They already understand procedure, motion practice, evidence, and so forth. They can be cross-trained in different subject matters more readily because they are accustomed to working in different areas of law: perhaps a contract case in the early morning; later in the day, a domestic relations question; later yet, a tort case. In Oregon's Panel, persons who have not practiced are, in general, the least eager to move between subject matters; they prefer to remain in their specialty. Attorneys—by virtue of their law school training and practice—have

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109. Of twenty-two state central panels surveyed, only Oregon does not require ALJs to be bar-licensed. Central Panel Overview, *supra* note 58. The Model Central Panel Act recommends that admission to practice law be a minimum qualification of central panel ALJs; optional requirements are admission in the state of the central panel and admission for a minimum of five years. McNeil, *supra* note 22, at 544. The Model State Administrative Procedure Act recommends that ALJs be admitted to practice law, but this is an option. MODEL STATE ADMIN. PROC. ACT, 15 U.L.A. § 4-301(b) (1981).

110. Only the chief hearing officer is required to be an active member of the Oregon State Bar. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999). The reason is the legislative belief that the chief hearing officer should have a strong background in procedural rules, evidence, and conduct of hearings. Interview with Neil Bryant, *supra* note 17. The Model Central Panel Act recommends licensure by the central panel's state bar for a minimum of five years. McNeil, *supra* note 22, §§ 1-4 at 543. Three years experience as Chief Hearing Officer of Oregon has certainly shown the value of having practiced law.

confronted a greater variety of legal issues than those persons with law degrees but who have never practiced. A bar license enhances the professional image of a central panel. And, finally, attorneys and their clients have an expectation that the judge is licensed by the bar. They are often disagreeably surprised when they discover that is not the case.<sup>111</sup>

## 2. Recusal

An interesting feature of House Bill 2525 is the peremptory right of a party or agency to recuse an ALJ assigned to a case; the requester must show "good cause" for the second request.<sup>112</sup> Initially, Panel management was apprehensive that it would face a deluge of recusal requests on January 1, 2000. In anticipation, the first rule adopted by the Panel in December 1999 set rather strict timelines for making such requests.<sup>113</sup> Fears proved groundless, however, as recusal requests were very infrequent. At the end of the year, the rule was substantially relaxed.

## 3. Hiring and Training

Management recognized from the beginning that the success of the Panel depended in large measure upon sound hiring practices. A new screening process was instituted. All applicants for ALJ positions are given a fictitious fact situation, statutes, rules, and a couple of appellate decisions. They are asked to write a proposed order addressing three or four issues. These writing samples are then evaluated anonymously for clarity of writing and quality of legal analysis. Successful applicants are invited for interviews (in general, one out of three applicants are interviewed). This has been a

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111. Cokin & Mallamud, *supra* note 2, at 635 (recommend that ALJs be attorneys). The chief hearing officer does have the authority to establish the minimum qualifications for ALJs. H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999). This is a decision that must wait until completion of the "pilot" phase of the Panel. *Id.*

112. *Id.*

113. OR. ADMIN. R. 471-060-0005 (1999).

remarkably successful device to ensure that only qualified persons are hired.<sup>114</sup>

Training is an important feature of House Bill 2525.<sup>115</sup> The challenge was, and is, to produce training that is both efficient and effective. This is probably easier for central panels with relatively few ALJs, all of whom sit in the same place. It is tougher for a panel such as Oregon's with eighty ALJs scattered throughout the state. Bringing this many people together for a single day of training may be efficient and may help promote Panel solidarity. But, it is not especially effective—attention, interaction, and genuine learning are all diminished.

Panel management and a small group of ALJs designed a comprehensive curriculum of administrative law. Every conceivable subject is listed. Much like a buffet dinner, the purpose is to pick and choose what to serve without fear of overlooking anything. The more difficult question is how to deliver the training. Both management and the ALJ committee agreed that training in small groups is more effective than in large ones. But it is also less efficient. The Panel is experimenting with the following mix of tools: videotapes, CDs overlaid with voice, written materials, self-study, and in-person classrooms. All-panel training will continue to occur, but less often and with more emphasis on building organizational cohesiveness.

One of the more effective training tools for Panel ALJs has been the "Model Proposed Order" and the "Model Disorder" (a name suggested by an especially creative ALJ). Both are fictitious cases from imaginary boards. The Model Proposed Order represents everything that an excellent order should be. The Model Disorder,

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114. Hiring has not been without its complications, however. The Panel inherited four different civil service classifications, two pay ranges (for the same work), and two unions from the consolidated hearing units.

115. See H.R. 2525, 70th Leg., Reg. Sess. (Or. 1999) (requiring the chief hearing officer to "design and implement a standards and training program for hearing officers on the panel and for persons seeking to serve as hearing officers on the panel"). For more on this subject, see J. W. Maurer & M.B. Lepp, *Hiring, Training and Retention of Administrative Law Judges in Central Panel States*, 7 J. NAT'L ASS'N ADMIN. L. JUDGES 5 (1987); Kenneth Nickolai, *Strengthening the Skills of Administrative Law Judges*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 263 (2000).

by contrast, represents everything that an excellent order should not be. Both use pedagogical endnotes, where the trainee can find explanations for the points being made. ALJs greeted the concept without a great deal of enthusiasm when it was introduced, but a year later, opinion shifted. These orders have succeeded far beyond management's expectations in improving—even remarkably improving—the quality of Panel proposed orders. Model orders and model disorders are now being developed for specific subject matters.

Training in specialized subject matters (such as special education, motor vehicle licensing, and so forth) is a related but different problem. Prior to Panel, hearing units offered either no formal training at all or, more commonly, training lasting one to two weeks with binders three inches thick. The former was too little. The latter was too much. Extensive training programs in particular subject matters also discourage internal cross-training because of lost productivity and the resources needed for the training itself. Also, tracing the consequence further, the failure to cross-train thwarts one of the key advantages of a central panel: the ability to nimbly assign ALJs between different programs in order to address fluctuating case loads.

The Panel is now experimenting with a new concept of cross-training. It focuses on the “bread and butter” areas of law within any particular subject matter (e.g., “separation” in unemployment insurance; breath test/breath test refusals in implied consent). It assumes that the trainee is an experienced ALJ. The training lasts no more than a single day and has the limited goal of producing a working knowledge, not mastery, of the subject matter, sufficient that the ALJ can competently develop the necessary record with the aid of a “hearing guide.” The ALJ is provided with a “hearing guide” for every issue or claim within the area of law. This guide sets out all the necessary elements, a script with recommended questions, and a “model order” that demonstrates by example what a quality decision should look like.

### *C. Decisional Independence and Quality Assurance*

One of the more vexing issues faced by management was the conflict between ALJ decisional independence and ensuring quality

decision-making.<sup>116</sup> The problem was especially critical in the occupational licensing cases of boards and commissions. Although representing no more than one percent of the total number of Panel orders, they were (and are) the most politically sensitive. The difficulty was that most Panel ALJs came from agencies whose hearings and orders were subject to strict and compressed timelines imposed by federal or state law. There is little time to reflect. One finds a statute or rule, applies it, and then moves on quickly to the next case. The interstices of the law are filled more by intuition rather than by legal research (indeed, at the beginning of the Panel only a small percentage of ALJs had access to any legal research tools at all; that has since been corrected). Moreover, oftentimes a certain staleness sets in, and a commensurate decline in the quality of work occurs, when an ALJ handles the same kind of cases year-in and year-out.<sup>117</sup>

Then, suddenly, these same ALJs were being assigned licensing cases, among others, with different law and unfamiliar issues. Not surprisingly, they applied the same methodology: find a statute or rule, apply it; rely on one's intuition when the statute or rule fails to directly answer the question; and then move on to the next case. This practice, unavoidable for the high-volume cases, produced quite questionable results for licensing cases.

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116. Much has been written on this subject. See, e.g., Edwin L. Felter, Jr., *Maintaining the Balance Between Judicial Independence and Judicial Accountability in Administrative Law*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 89 (1997); R. Terrence Harders, *Striking A Balance: Administrative Law Judge Independence and Accountability*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (1999); Arthur Fried & Ronald G. Bernoski, *Panel Discussion on Independence and the Federal ALJ: Fried, Bernoski*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 47 (1998); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986); Penny J. White, *Judicial Courage and Judicial Independence*, 16 J. NAT'L ASS'N ADMIN. L. JUDGES 161 (1996); Ronnie A. Yoder & John Hardwicke, *Yoder-Hardwicke Dialogue: Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence, Due Process, or Ex Parte Prohibitions?*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 75 (1997); Ann Marshall Young, *Evaluation of Administrative Laws Judges: Premises, Means, and Ends*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (1997); Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 101 (1999).

117. See Cokin & Mallamud, *supra* note 2, at 627.

After several months, it became clear that changes were necessary. Three were made. First, no order for the licensing boards or commissions issued without management review for legal sufficiency—that is, the conclusions of law needed to be supported by the findings of fact; relevant law must be applied; the relevant law must be applied reasonably; and, finally, outcome was not considered. Second, these cases were assigned to ALJs who were especially adept at managing the different legal issues presented by these cases. Third, ALJs were required to write their orders applying the standards set out in the model proposed order (discussed above).

In 2001, OAALJ raised with Panel management concerns about the appropriateness of pre-issuance management review. OAALJ understood the importance of accurate decision-making. It also conceded that management was zealous in avoiding review for outcome as opposed to legal sufficiency. OAALJ's principal concern was one of appearance. The issue was legitimate. It was also timely, inasmuch as the quality of proposed orders had improved so greatly that management review had become perfunctory.

A committee was formed with representation from OAALJ, the ALJ community at large (two of the three ALJs came from outside the Panel), and the Oregon State Bar. After several meetings, the committee proposed a form of peer review. In sum, it recommended that two peer reviewers be appointed. They would review for both quality assurance and legal sufficiency (written standards have been established for both). Every order issues as written unless both reviewers conclude that the order is legally insufficient and the author refuses to make the necessary changes. If this occurs, the case is reassigned to a different ALJ who reviews the entire record and writes a draft order for peer review. In the meantime, a copy of the rejected order is sent to the parties in the Notice of Reassignment. Panel management accepted this recommendation.<sup>118</sup>

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118. For more on peer review, see Robert Robinson Gales, *The Peer Review Process in Administrative Adjudication*, 21 J. NAT'L ASS'N ADMIN. L. JUDGES 56 (2001). At the time of writing, there was too little experience with this process to report either success or failure.

## V. EFFICIENCY AND PROFESSIONALISM

### A. Efficiency

Oregon's central panel has produced considerable savings for the state of Oregon over the last three years. In 2000, the average number of hours per referral per ALJ was 4.01; in 2001, it had declined to 3.80; in 2002, it declined further to 3.56.<sup>119</sup> This is an efficiency improvement of eleven percent between 2000 and 2002. Improved efficiency translates into lower unit costs. The average cost of a referral in 2000 was \$292.<sup>120</sup> In 2002, it had dropped by \$15 to \$277.<sup>121</sup> The number of referrals in 2002 was 37,400.<sup>122</sup> This represents a savings in 2002 alone of \$560,000; over a biennium, if referrals remained steady, it would be \$1,120,000. For the biennium 2001-03, the Panel will be \$1.6 million under the amount budgeted by agencies for hearings. Panel management expects to reduce the number of FTEs by at least eight, perhaps ten, in the next biennium.

There are two reasons for these reduced costs. The first is that generally, the larger the central panel, the more capacity it has to absorb work—there are just more people available to do it. For example, when the Panel became operational on January 1, 2000, five fewer employees (two managers and three ALJs) were transferred to it than were handling hearings on December 31, 1999. Those positions were eliminated and the work was easily absorbed, resulting in a savings of over \$900,000.

The second reason for reduced costs is different. Experience in Oregon has shown that separate and independent hearings units—especially small hearing units—are inherently inefficient and costly. Again, the explanation is simple: caseloads fluctuate. The work never precisely equals the staff to manage it. If the work diminishes, there is capacity. If it increases, say, to 1.3 FTEs, two employees are hired. Again, there is capacity. Here are three examples:<sup>123</sup>

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119. Cost Efficiencies, Hearing Officer Panel, 2000-2002 (April 10, 2003).

120. *Id.*

121. *Id.*

122. *Id.*

123. Estimated savings are based on salary and benefits in the biennium 2001-03. These numbers are conservative, because they do not include other associated expenses ("services and supplies"). All of this data is on file with the author.



- The Water Resources Department transferred one ALJ to the Panel, but it had only .33 FTE worth of work. Seventy percent of that ALJ's time was assigned to the Department of Human Services cases. This saved the Water Resources Department over \$96,000. The next year, complex water rights litigation developed, requiring another 1.75 FTE worth of work, for a total of 2.08. To avoid a backlog, the Department would have had to hire another two ALJs. With the Panel, however, the additional work was absorbed without hiring more staff.
- The Department of Consumer and Business Services ("DCBS") transferred six persons: four ALJs and two clerical staff. However, it had only 3.75 FTE worth of work. At one time, no doubt, that entire staff was needed. But the number of DCBS hearings declined over time; the number of ALJs did not. That capacity (2.25 FTEs) was used in other parts of the Panel. This saved the Department over \$360,000.
- The Oregon Liquor Control Commission transferred three ALJs and one clerical staff, but it had only 3.3 FTE worth of work. One ALJ was assigned to Division of Child Support cases, which had developed a backlog because ALJs formerly handling those cases were assigned unemployment insurance cases, which had grown considerably with the recession. This saved the Commission \$112,000.

### *B. Professionalism*

A central panel is not just about efficiency but also about quality and professionalism. A Code of Ethics was adopted.<sup>124</sup>

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<sup>124</sup> Credit goes to OAALJ for drafting the Code. However, because performance standards in Oregon are set by civil service laws and union contract, the Code is expressly "aspirational" only. Edwin L. Felter, Jr., *Special Problems of State Administrative Law Judges*, 53 ADMIN. L. REV. 403, 408-410 (2001), has surveyed the codes of ethics used by state central panels; see also Bruce H. Johnson, *Strengthening Professionalism Within an Administrative Hearing Office*:

Training for some hearings units consolidated into the Panel was nonexistent prior to 2000. It has assumed new importance today. Standards of conduct for hearings and the writing of decisions have increased. As standards have increased, so has the quality of hearings and decisions. There is a greater sense of professionalism. Before, an ALJ was merely the employee of one of many agency hearing units. Today, ALJ is part of an organization known to the legislature, the state bar, and to agency heads.

## VI. CONCLUSION

The story of Oregon's central panel is no different from that of most other central panels. Agency heads fiercely and emotionally resisted House Bill 2525. There were predictions of ALJs running amok with agency statutes and rules; cost overruns; pestilence and famine. Their dire predictions were continuous, insistent, and often extreme.

But by 2002, the earth had not tilted off its axis. Agencies continue to make policy and they continue to apply their expertise. The only difference is that agency policy and expertise are now tested by independent judges.<sup>125</sup> Indeed, some agencies, formerly opponents, today support making the Panel permanent. The costs have been much less than feared. They have come to see the advantage of separating their adjudicatory from their regulatory function. Orders are timelier and, for some, the orders are of a higher quality than before. However, those agencies which formerly used their own executive directors or board members to preside over hearings continue to resist—it costs them more, but they especially have lost control. This resistance, however, is proof of the need for a central panel. For the first time, Oregon citizens have an opportunity to adjudicate their disputes with agencies before judges who are truly independent and impartial. This is not simply good government. It is best government.

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*The Minnesota Experience*, 53 ADMIN. L. REV. 445, 462-70 (2001) for an interesting discussion of the development of a Code of Judicial Conduct for the Minnesota central panel (Office of Administrative Hearings).

125. John Hardwicke said it well: "The true governmental process [due process] . . . should no longer be protected by the 'mystique' of expertise." Hardwicke, *The Central Hearing Agency*, *supra* note 2, at 60.

The challenge of transforming seven hearing units into a consolidated central panel, ready for operation on January 1, 2000, was daunting, at least in retrospect. Most central panels in this country have perhaps ten to 15 administrative law judges—a relatively large one has 40. Oregon, with 80, was the largest in the country in 2000-01.<sup>126</sup> There were many problems to address and to solve.<sup>127</sup>

Of course, almost three years later, the Panel continues to have problems but very much has been accomplished. It would not have been but for the skill, dedication, and patience of all of the Panel's administrative law judges and operational support staff. It is to them that this article is gratefully and respectfully dedicated.

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126. See Central Panel Overview, *supra* note 58.

127. A personal comment: When I was appointed on August 31, 1999, I felt that I had entered a dense, impenetrable fog. There was so much to learn, so much to do. I did not know where to begin. Quite by chance, I learned of the existence of an annual conference of directors and chief ALJs of central panels. By remarkably good fortune, the conference was scheduled to meet two weeks later in Madison, Wisconsin, hosted by David Schwartz, Administrator of the Division of Hearings and Appeals. For three days, I listened intently, took voluminous notes, and asked endless questions. The fog lifted. I doubt it would have but for the guidance and advice of my colleagues. I continue to rely upon them.