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William R. Dorsey

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Florida's Continuing Experiment with the Central Panel Process: The Division of Administrative Hearings

by William R. Dorsey*

I. FLORIDA'S ORGANIZATIONAL MODEL

Political culture is expressed in the structures of government. Nebraska has its unicameral legislature, no doubt for interesting historical reasons unique to itself. Florida's political culture has affected the structure and functions of its central panel of administrative law judges (whom Florida still calls hearing officers). Floridians have a deep distrust of executive power, which they control by fragmenting it. The unusually broad authority assigned to the Division of Administrative Hearings by the Florida Legislature is but another reflection of this culture of distrust of executive authority, and the desire to rein it in. To understand why Florida does things as it does, it is necessary to understand a few things about Florida's political history.

a. Essential Background — Florida's Historical Political Environment: Every Man for Himself.

The chapter on Florida in the classic study of southern politics done by Professor V. O. Key of Harvard University published shortly after World War II, Southern Politics in State and Nation, is entitled "Every Man for Himself." Written when Florida was beginning its tremendous change from backwater to one of the nation's largest states, Key's analysis picked up on several salient points. Long one party rule by the Democrats led to means of competition for power other than through general elections, where Republican candidates were often not to be found, and in any case un-electable. The state was large, and geographic population centers were isolated from each other. There were no "courthouse gangs" in major population centers controlling the local political offices; the incumbents each put together their own organizations ad hoc. Florida lacked a cohesive statewide party structure. Competition and regional jealousies led to constant political realignments.¹

¹ Key, Jr., V. O. Southern Politics in State and Nation, Random House, 1949.

^{*}U. S. Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration; formerly a Hearing Officer, Florida Division of Administrative Hearings. The opinions expressed are the author's, and do not represent those of any state or federal government agency.

b. Distrust of Executive Power Embodied in the Unique Collegial Executive (the Cabinet), Dilution and Fragmentation of Gubernatorial Authority. Executive Power.

This constant competition for power led to distrust among temporary allies, who were always looking down the road to the next election, the next political alignment, and their opportunity for a turn at the top. To keep the victor from enjoying too much in the way of spoils, the Reconstruction era constitution of 1885, which remained in effect until 1968, limited the Governor to a single four year term.² Power passed quickly. What is more, the Governor served only as a "first among equals." Many executive departments were not under the control of the Governor, but of the Governor and the Cabinet.

Florida's Cabinet and its Authority.

The Cabinet is constitutionally established³, although its history goes back to the 1885 constitution. Its members are the Secretary of State, Attorney General, Comptroller, Commissioner of Insurance, Commissioner of Agriculture, and Commissioner of Education. Each is constitutionally the head of their own department. Like the Governor, its members run statewide for election to four year terms and have political bases independent from the Governor. They are not even of Despised by most the same political party as the Governor. Governors, who resent its "intrusion" into what they view as their mandate to govern, the Cabinet has been much criticized as inefficient and fractious. 4 Members have had exceptionally long terms of service, but historically none have been able to use the positions as stepping stones to Governorship, although many have tried.

In conjunction with the Governor, Cabinet officers exercise many of the important executive powers of the state, such as granting executive clemency. 5 Rule promulgation and final order adoption often requires action by a collegial agency head, the Governor and the Cabinet, rather than by the Governor or by a departmental Secretary alone. Of 25 executive departments authorized by the current state Constitution, the Governor heads only 13 through appointment of a Secretary who serves at the Governor's pleasure. 6 The rest are

² Florida Constitution, Article IV, Section 2 (1885).

³ Florida Constitution, Article IV, Section 4 (1968)

⁴ See, e.g., J. Landers, "The Myth of the Florida Cabinet System: The Need to Restructure Florida 's Executive Branch," 19 Fla. St. U. L. Rev. 1089 (1992).

⁵ Florida Constitution, Article 4, Section 8 (1968).

⁶ Morris, A. The Florida Handbook, 1991-92, 7-8.

Executive Director agencies, headed instead by an executive appointed by and answerable jointly to the Governor and the Cabinet. These agencies perform some of the most important functions of government, e.g., the Department of Revenue (tax assessment and levy authority), and the Department of Highway Safety and Motor Vehicles (includes state police force, the Highway Patrol). entities similarly under joint control include the Administration Commission (controls budget transfers among all agencies and the courts); the Trustees of the Internal Improvement Trust Fund (holds the title to all state land and grants leases of sovereignty lands); the Land and Water Adjudicatory Commission (enters final orders in major environmental permitting cases); the State Board of Administration (issues full faith and credit bonds on behalf of the state and controls investments of the state pension funds). In the case of the Department of Education, the department with the largest budget, the Governor and Cabinet serve as the State Board of Education, with substantial control over school boards, community colleges and state universities, and licensing of private colleges, universities, and trade schools, but the Commissioner of Education, who is a statewide elected official and a member of the Cabinet, heads the department.

d. Role and Structure of the Division of Administrative Hearings.

The role legislatively assigned to the Division of Administrative Hearings (Division) is consistent with Florida's history of fragmentation of executive power. The Division was created in 1974 by Chapter 120, Florida Statutes, and enjoys no constitutional status. There had been no comparable agency under the 1961 state Administrative Procedure Act. A new Administrative Procedure Act was carefully drafted in 1973 by a group known as the Florida Law Revision Council, a sort of thinktank for the Legislature, which drew upon the expertise of the newly created Center for Administrative Justice of the American Bar Association: a similar review was undertaken by the Florida House of Representatives' Committee on Governmental Operations. A group of draftsmen from both groups visited the State of California from Dec. 17 to 21, 1973, to study that state's central panel. The Division is substantially patterned on California's system of Hearing Examiners, as it existed in 1974.7,8

⁷ Calif. Gov. Code, Sec. 11370 et seq. (1966), as amended by Calif. Stat. 1971, ch. 1303, sections 1 through 5; Calif. Gov. Code Sec. 11512 (Supp. 1975).

⁸ See, H. Levinson, "The Florida Administrative Procedure Act: 1974 Revision

The Division Director. 1.

The director is appointed by the Governor and Cabinet, sitting as the Administration Commission (which requires the vote of the Governor plus three other members of the Cabinet) and also requires confirmation by the State Senate.9 The Director essentially serves during good behavior, as removal would also require an affirmative vote of the Governor plus three Cabinet members. Functionally the Director is not subject to replacement just because administrations change. The Director is responsible for the operation of the Division, and may hear cases, but ordinarily does not. Annually the Director must file a report with the Administration Commission summarizing the have used Hearing Officers, and agencies recommendations for changes or improvements in the Administrative Procedure Act. 10

2. The Assistant Director.

An Assistant Director is appointed by the Director. classified as a Select Exempt position, so the incumbent serves at the pleasure of the Director, enjoying no tenure rights as Assistant Director. The Assistant Director is also a Hearing Officer, and does hear a small docket of cases. Duties of the position include supervision of all personnel, i.e., the District Hearing Officers, Hearing Officers, employees of the Office of the Clerk, and other administrative personnel. The Assistant Director is also responsible for preparation of the legislative budget request, for all expenditures, procurement, the maintenance of appropriate audit procedures, and the security of the Division's physical facilities and equipment.

Appointment, Qualifications and Compensation of Hearing Officers.

Hearing officers are appointed by the Division Director. Statutorily, they must be members of The Florida Bar in good standing for the previous 5 years. 11 This is the same requirement that is imposed on candidates for positions as state trial judges of general jurisdiction under the Florida Constitution, in Article V, Section 8 (1972). The average legal experience of current Hearing Officers is actually about 15 years, substantially above the statutory minimum. Rules of the division identify criteria for the Director to consider in appointments,

⁹ Florida Statutes, Section 120.65(1).

¹⁰ Florida Statutes, Section 120.70. 11 Florida Statutes, Section 120.65(4).

without imposing additional minimum qualifications for hiring. The rule instructs the Director to evaluate the following in hiring decisions: Academic achievement, past experience, writing ability, and personal qualities. ¹²

The positions are much sought after, and competition for available positions is intense. There are no salary steps for Hearing Officers, as the federal government has for its Administrative Law Judges. Salaries are identical for all line Hearing Officers, without regard to length of service, though there is a small supplement for the managers. This is not typical of other Career Service positions in Florida, and requires adjustment of the salary "rate" in the appropriations process. [Rate is an arcane budgetary concept mastered only by budget officers]. The current annual salary is about \$82,000, which is above that of most agency general counsels, and certainly at the top of Career Service positions.

Hearing Officers write their own interlocutory orders and decisions. The Division employs no staff law clerks. Discovery procedures are essentially the same as those available in the state trial courts, and in major cases, discovery orders may become as complex as those in federal courts. Questions of privilege can be similarly complex. Under Florida's APA parties have the right to submit proposed findings of fact and conclusions of law, but Hearing Officers don't adopt them wholesale. When they are filed, the Hearing Officer must rule specifically on every proposed finding, for Section 120.59 (2), Florida Statutes states: "[T]he order shall include a ruling upon each proposed finding ..."

Administrative duties include tracking hearing hours scheduled and canceled within 30 days of the hearing date, which are reported when each case is closed, to provide the data base for budgetary assessments against user agencies by the Legislature.

4. District Hearing Officers.

District Hearing Officers maintain active case dockets of their own and supervise the work of Hearing Officers. Line Hearing Officers are assigned to one of three geographical districts in which they travel to conduct hearings. There are no regional offices for the Division throughout the state. These supervising Hearing Officers assign cases to Hearing Officers in their districts, coordinate schedules for travel and adjust uneven workloads, which can easily arise from filing of cases which are entitled statutorily to expedited treatment, such as bid

¹² Florida Administrative Code, Rule 60Q-1.008.

protests, road contractor disqualifications, health care certificate of need cases, and emergency license suspension cases. They monitor the timeliness of case dispositions, using management reports which identify cases that have exceeded predetermined time criteria for major steps in case processing. In the eyes of the Legislature, this function is the most important difference between the Division and the courts. which are viewed as black holes from which cases never emerge.

District Hearing Officers also perform pre-issuance review of final, recommended, and non-routine interlocutory orders for such things as logic, grammar, typos, unexplained departure from prior orders of other Hearing Officers, or for failure to address controlling statutes, rules, or judicial precedent. Non-routine interlocutory orders include those that:

- 1) involve novel questions of substantive law or procedure, or issues of first impression.
 - 2) would impact or depart from prior practices of the Division.
- 3) are at variance with previous administrative orders or judicial precedent,
 - 4) involve remands from user agencies or from appellate courts,
 - 5) recuse or disqualify the Hearing Officer. 13

Review is collegial; the District Hearing Officers have no authority to require any changes by the Hearing Officer. Hearing Officers are not judges under guardianship.

The Division Enjoys Functional Independence.

The Division is not a separate department because the state constitution limits state government to 25 departments. Florida The Division has been. Constitution, Article IV, Section 6 (1968). placed in the Department of Management Services, which does not even appear on the Division's letterhead. The Division hears cases involving that Department's substantive role as the state purchasing, personnel and general services agency. Statutorily, the Division "shall not be subject to control, supervision, or direction by the Secretary of the Department of Management Services in any manner, including, but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters". 14

Separate budget entity.

The Division does not submit its budget to the Department of Management Services, or even to the Executive Office of the Governor, but directly to the presiding officer of each house of the

¹³ DOAH Hearing Officer Manual, p. 34-35.

¹⁴ Florida Statutes, Section 120.65 (1).

Legislature, just as the Chief Justice of the Supreme Court of Florida does for the judicial branch.¹⁵ The Director of the Division of Administrative Hearings may appeal to the Administration Commission any adverse budgetary or personnel action which the Executive Office of the Governor proposes to take.¹⁶ The Governor cannot block a matter from the Commission's agenda. And unlike most matters on the Administration Commission agenda, it is not necessary for the Governor to vote with the majority for the Division's appeal of an adverse action to succeed.¹⁷

2. Legislative Suspicion of Executive Power is Inherent in Florida's APA and the Division's Role.

Under Florida's Administrative Procedure Act, persons whose substantial interests are affected by proposed executive actions, whether taken by rule or by order, may challenge them in trial type proceedings conducted by the Division of Administrative Hearings. These proceedings create a record, amenable to judicial review, resolving disputed issues of material fact, describing the formulation of agency policy if it has not been adopted in rule-making, and testing whether the rule or order is within the authority legislatively delegated to the agency. This process also allows for more effective legislative oversight of executive decisions implementing a program.

A. Recommended Orders.

Cases generally are heard on referral from agencies, and closed with a recommended order sent back to the agency. A very few agencies are exempted and have their own fact-finders in house (Workers' Compensation, Unemployment Compensation, and the Public Employees Relations Commission). Formal evidentiary proceedings arise when a state agency proposes to adversely affect the "substantial interests" of a person. ¹⁸ Cases involve subject matters as varied as the reach of substantive state authority. The agency may decline to refer a case involving a disputed issue of material fact only if the agency head personally conducts the proceeding, but professional licensing boards must refer all disciplinary cases involving their licensees. ¹⁹ In one unusual case an agency head (the Commissioner of Insurance, a Cabinet member) tried to conduct a proceeding

¹⁵ Florida Statutes, Section 216.032 (2).

¹⁶ Florida Statutes, Section 120.65 (2).

¹⁷ Id

¹⁸ Florida Statutes, Section 120.57.

¹⁹ Florida Statutes, Section 120.57 (1) (a).

personally, and the proceeding went badly procedurally because the agency head had no experience conducting trial type proceedings. The appellate court directly remanded the matter to the Division to conduct the proceeding anew, American Insurance Association v. Dep't. of Insurance, 518 So. 2d 1342 (Fla. App. 1987). Over time the Division has earned the respect of the courts for the quality of its hearings, and the courts expect administrative hearings from all agencies to meet those standards.

B. Declaratory Statements.

The Division may also conduct declaratory statement proceedings under Section 120.54 (3) (a), Florida Statutes, when some other statute requires the Division to conduct them. These are quite rare. They are similar to declaratory judgment actions.

C. Final Orders.

A few types of proceedings are directly filed with the Division, and closed with a final order, directly appealable to Florida's intermediate appellate courts. The agency involved can take no action itself to alter the Hearing Officer's decision. This is a further example of the fragmentation of executive power, for as an independent agency, the Division has direct authority to modify or invalidate the actions of other executive agencies. There are several varieties of these cases.

- 1). Petitions challenging the procedural validity of, substantive authority for, or constitutionality of proposed agency rules published in the Florida Administrative Weekly for public comment. proceedings must be filed within 21 days of the publication of the notice of rule-making.20
- 2). Petitions challenging the substantive validity of an adopted rule as an invalid exercise of delegated legislatively authority, which may be filed at any time.21
- 3). Petitions challenging a policy of an agency which has not been adopted as rule, but should have been, under the Florida APA's definition of a rule. 22 This is a legislative attempt to deal with the vexing problem variously known as "non-rule policy" or "underground rules." This same problem is dealt with in Section 2-104 (4) of the 1981 Model State Administrative Procedure Act, which requires agencies to adopt through rule-making, as soon as feasible and to the extent practicable, principles of law or policy declared as the basis for decisions in

²⁰ Florida Statutes, Section 120.54 (4).

²¹ Florida Statutes, Section 120.56.

²² Florida Statutes, Section 120.535.

particular cases. This provision has not proven to be satisfactory, for it provides agencies with no incentives to engage in what they regard as a laborious rule making process, after they have settled on policies through a course of adjudications, nor does the Model Act impose any penalties on agencies which fail to engage in the rule making contemplated by that section.²³

- 4). Petitions seeking reimbursement from state agencies of costs and attorneys fees incurred in successful defense against agency actions by small business parties, on the basis that the agency position was not substantially justified in law and fact.²⁴
- 5). Petitions filed by parents challenging the appropriateness of individual education plans for special education students under the federal Individuals with Disabilities Education Act, 20 USC Section 1601, et seq., and the state counterpart, Section 230.23 (1) (m), Florida Statutes.
- 6). Petitions seeking approval of the continued involuntary placement of mentally ill patients in public or private hospitals or institutions under section 394.467 (4), Florida Statutes.

II. ECONOMICS.

a. Original Funding of the Division.

The original funding mechanism for the Division in 1975 was General Revenue (GR) appropriations, which are highly subject to holdbacks (across the board budget cuts) if quarterly projections for state tax collections do not meet assumptions used in legislative budget. No deficit spending is permitted by the state constitution.

b. Intermediate Funding Mechanism.

Two large user agencies (Transportation and Professional Regulation), which are heavily funded with trust funds of their own, were required to contribute directly to the Division's Administrative Trust Fund, in return for the assignment of Hearing Officer full-time equivalents to handle work for those agencies (this pre-dated the district Hearing Officer system.) Contributions to this Trust Fund would not be subject to holdbacks, and were more stable income sources for the Division. By FY 87-88 the GR/ Trust Fund split was 78%/22%.

²³ See also, A. Bonfield, "State Administrative Rule Making, Section 4.4.1," (Little, Brown 1994 Supp.); P. Dore, "Florida Limits Policy Development Through Administrative Adjudication," 19 Fla. St. U. L. Rev. 437 (1991), and the general discussion in W. McGrath, et al., "Project: State Judicial Review of Administrative Action," 43 Admin. L. Rev. 571, 733 through 741 (1991).

²⁴ Florida Statutes, Section 57.111.

These two agencies complained to the appropriations committees, and questioned the equity of being singled out to contribute to the Division's budget when other user agencies did not.

Cost Apportionment Study.

Beginning in May 1987, the Division tracked, as cases were closed, the hours Hearing Officers spent in pre-hearing conferences, motion hearings, hours scheduled for hearings canceled/continued within 30 days of the assigned hearing date (which could not be used for hearing other cases), and hours spent in final hearings.

d. Study Results and Recommendations.

Based on the data collected, the Division recommended to the Legislature that studies should be done annually on use of hearing officer time by user agencies, attributing hearing hours scheduled or used in each case to the year the case closed, (even though the hours actually may have been scheduled or used in an earlier year), and that the Legislature should require agencies to contribute their pro rata share of the Division's budget to the Administrative Trust Fund when their utilization reached 2.9% or more of the total hearing hours scheduled by the Division.

The ratio of canceled/continued hearing hours to actual final hearing hours was 2.5:1. The Division wanted to reduce the number of cancellations and continuances. Hearing hours are like airline seats when the hearing time comes, if a hearing slot goes unused due to settlement or continuance, that hearing capacity is gone. It can't be utilized by another litigant or user agency. Agencies should pay for time scheduled for their hearings unless the hearing is canceled soon enough for the Division to devote that time to hearing other cases. The legislative staff understood that hearing hours were only a proxy for total Hearing Officer time devoted to cases, and that the Division depended on hearing cancellations to provide some of the time used by Hearing Officers to write final and recommended orders. never anticipated that continuances would be eliminated, and they have not been.

Current Funding Mechanism. e.

The appropriations committees of the Legislature adopted the suggested funding mechanism. Over time the minimum utilization percentage of scheduled hours used to identify agencies required to contribute to the Division's Administrative Trust fund has declined to much less than 2.9%. This brings more agencies into the process as contributors to the Division's Trust Fund. Transfers from agency budgets to the Division's Administrative Trust Fund are made directly in the General Appropriations Act itself, based on the latest available utilization data. An important advantage of this system is that no bills are sent to agencies by the Division, which would be risky. Without timely payment, the Division would have budget shortfalls, and the agencies would have passive-aggressive ways of tweaking (if not punishing) the Division for any decisions the agencies didn't like. Even without considering any element of retribution, agencies always have internal incentives to "stretch their payables" in times of tight money and delay payment, which would cause the very cash flow problems for the Division which the trust fund system is designed to avoid. In FY 1987-88 the GR/Trust Fund ratio in the Division's budget was 16%/84%. By FY 92-93, the Division operating budget was fully trust funded. Later some General Revenue was appropriated to the Division for special projects, e. g., creation of an executive branch network for computer access to agency orders and other archival materials. See the following comparison of General Revenue to trust funding for each FY from FY 87-89 through 93-94.

Florida Division of Administrative Hearings Comparison of General Revenue to Trust Funding for Fiscal Years 1987-88 through 1993-94 and Average Cost per Case Closed

	FY 87-88	FY 88-89	FY 89-90	FY 90-91	FY 91-92	FY 92-93	FY 93-94
Actual Expendi- tures:							
General Revenue	\$2,842,448	\$2,274,228	\$1,175,985	\$585,014	\$574,656	\$0	\$344,058
Trust Fund	\$803,457	\$1,520,599	\$3,108,015	\$3,699,969	\$3,952,596	\$4,578,161	\$4,660,885
TOTAL	\$3,645,905	\$3,794,827	\$4,284,000	\$4,284,983	\$4,527,252	\$4,578,161	\$5,004,943
Number of Cases Closed	6,012	6,911	7,135	7,675	8,312	7,076	6,720
Average Cost per Case Closed	\$606	\$549	\$600	\$558	\$545	\$647	\$745

Source: Budget Officer, Florida Division of Administrative Hearings, 10/20/94

f. Current Breakdown of Appropriated Funds.

Salaries and Benefits are about 80% of the Division's current budget. This is the main reason budget shortfalls are such serious problems. The Expense category (including travel costs of about

\$150,000, as all Hearing Officers live in Tallahassee and travel around the state to conduct hearings) makes up another 13% of the budget. The remainder is made up of Other Capital Outlay and Other Personnel Services, which combined equal 7%. Historical percentages are similar.

Current Case Processing. q.

The Division is able to keep up with the case filings by closing about as many cases as are filed annually. The statistics on case closures in recent years is set out in the following table.

FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS FY 1986-87 through 1993-94

Cases opened, Closed, Standing Caseload per Hearing Officer, and Percentage Change by Category

	86-87	87-88	88-89	89-90	90-91	91-92	92-93	93-94
Cases Opened	5,407	6,271	6,847	7,708	8,468	8,651	7,418	7,190
Percent Increase/ (Decrease)		15.98%	9.19%	12.57%	9.86%	2.16%	(14.25%)	(3.07%)
Cases Closed	5,528	6,012	6,911	7,135	7,675	8,312	7,076	6,720
Percent Increase/(D ecrease)		8.76%	14.95%	3.24%	7.57%	8.30%	(14.87 %)	(5.03%)
Adjusted Hearing Officer Strength	24.54	26.65	29.11	31.00	30.00	30.00	30.00	28.66
Percent Increase/ (Decrease)		8.60%	9.23%	6.49%	(3.23%)	0.00%	0.00%	(4.47%)
Standing Caseload Per Hearing Officer	97.31	93.02	92.61	107.55	99.47	92.90	107.83	121.74
Percent Increase/ (Decrease)		(4.41%)	(0.44%)	16.13%	(7.51%)	(6.61%)	16.07%	12.89%

Source: Florida Division of Administrative Hearings, 7/27/1994

III. POLITICAL IMPLICATIONS OF FLORIDA'S STRUCTURE.

Statutory Prohibition Against Ex parte Contacts.

Politics is largely removed from the administrative hearing process by the state's statutory prohibition on ex parte contact. Under Section 120.66, Florida Statutes an agency head, public employee, party, or official involved in advocacy in a matter under consideration by a Hearing Officer, or factually related to it, may not:

1), communicate about the merits of the case;

- 2), make any threat to a Hearing Officer;
- 3). offer any reward to a Hearing Officer;

under penalty of fine. Legislators and program administrators generally (though erroneously) believe it is a crime to do these things. Administrators contact the Division Director, not the Hearing Officer assigned to a case, if they feel a Hearing Officer has been guilty of inappropriate conduct in one of their cases. Most of these complaints are only sour grapes, and are not the basis for any adverse personnel action involving Hearing Officers. After all, the likelihood of agency managers interpreting rejection of their positions during the course of litigation as Hearing Officer misconduct is one of the major reasons the Division of Administrative Hearings became a separate entity.

b. Remedies for Ex parte Contacts.

If any of the persons named above attempt to engage in an ex parte contact, the Hearing Officer must make any such written communication, or a summary of any oral communication, part of the record in the proceeding, and offer adversaries the opportunity to rebut the communication. Essentially all case files are public documents, and the aggressive Florida press would likely treat such a disclosure as evidence of an agency attempt to "fix" a case. Because the Division's proceedings look like non-jury trials, almost always involve lawyers, and in many cases involve final orders directly appealable to the intermediate appellate courts, non-lawyers regard the Division's cases as if they were judicial proceedings. Most politicians live and die by their press coverage. The real potential for bad press and for needless public embarrassment by other members of the collegial body who will participate in the final action in the matter, should ex parte contacts occur and be discovered, plus the likelihood of disqualification from participating in any final action in the case, all lead agency heads and their support personnel to keep out of adjudicatory proceedings.

c. Implications.

The Governor and Cabinet members are the agency head in many cases pending at the Division. They (and their staff) fall under, and do respect the *ex parte* restrictions. Lesser agency heads do as well. All have discovered:

1. The joy of buck passing. Ex parte communications statutes, and restrictions against agency modification or alteration of fact findings which are based on record evidence (if carefully enforced by reviewing courts), permit political officers to commiserate with supporters/constituents, but to avoid becoming involved in their cases. They can truthfully tell supporters, "I'd love to help you, but after what

the Hearing Officer did, there is just nothing the law lets me do for vou."

- 2. The perils of involvement. Politicians often have their own friends/contributors on both sides of important or cutting edge controversies, and are glad for a reason to stay out of such troublesome situations.
- 3. The benefits of a neutral forum. When an agency takes an action which is challenged as politically motivated, if that action is upheld by a neutral Hearing Officer after a trial-type proceeding, as a practical matter, the agency is absolved of charges of improper motivation. This can be a substantial benefit in situations, for example, where an agency head's political supporters are legitimate low bidders, and the bid award is challenged by a disgruntled unsuccessful bidder.
- 4. Functional Insulation of the Division Director. Although no statute forbids contact with the Director about a pending case, because politicians and agency personnel perceive the proceeding as a judicial one, they limit their inquiries of the Director to "When will the decision be out?", not unlike the actions Members of Congress may undertake for constituents involved in federal administrative cases, which is not pressure to decide a case any particular way. Occasionally an agency head may call the Division Director to complain about an unfavorable decision, but by that point, the case is over and there is nothing for the Division Director to do about it anyway. The Director has no appellate authority over the decision of a hearing officer.

d. Legislative Insulation from Agency Overreaching in Cases Referred for Adjudication.

In addition to the risk of improper pressure being directed to a neutral factfinder, there is another risk of unfairness — that the referring agency will merely re-write a recommended order adverse to The substantial competent evidence rule, Section its position. 120.57(1) (b) (10), Florida Statutes, prohibits agency modification of findings of fact, unless there is no evidence in the record to support a This had been carefully enforced by reviewing appellate courts, and most agencies have grudgingly come to accept it. Another provision of the Florida APA provides that the referring agency shall take no further action with respect to a formal proceeding, except as a party litigant, as long as the Division has jurisdiction of a case.²⁵

²⁵ Florida Statutes, Section 120.57(1) (b) (3).

IV. EVALUATION OF HEARING OFFICERS.

a. Performance Standards.

Annual performance appraisals are required for all Career Service Employees, Rule 60K-8, Fla. Admin. Code, and they are done for Hearing Officers. Rating categories for each of the performance standards for the position are Exceeds Standards, Achieves Standards, and Below Standards. The rating is done by the District Hearing Officer, and must be countersigned by the Assistant Director. For an employee with permanent status in Career Service, a Below Standards appraisal must be accompanied by a plan for improvement to bring the employee up to standards.

The Division's Performance Standards for Hearing Officers are given to new Hearing Officers when they are hired, and a receipt for them is kept in the personnel file. The Performance Standards include:

- i) Pre-hearing Management of Cases:
 - a) Promptly schedules cases for hearing.
 - b) Takes timely and correct action on motions and discovery matters.
- ii) Conducting Administrative Hearings:
 - Arrives at hearings and returns from recesses on time.
 - b) Well prepared.
 - Demonstrates adequate knowledge of trial procedure, applicable legal principles, and evidentiary standards.
 - d) Maintains firm control over proceedings.
- iii) Issuance of Recommended and Final Orders:
 - a) Renders orders in a timely manner.
 - b) Good organization.
 - c) Well researched.
 - d) Shows logic and common sense.
 - e) Conclusions are legally correct.
- iv) Overall Management of Caseload:
 - a) Schedules hearings and travel in a cost-effective
 - Processes cases to conclusion in an expeditious manner.
 - Sets and enforces suspense dates on cases in abevance.
 - d) Processes average number of (non-Baker act) cases annually. (Calendar year statistical information for

hearings held, hearing hours, recommended and final orders issued, and cases closed will be used to determine average.)

Manner of Performance: V)

- Complies with Division administrative and policy directives, both written and oral.
- Exhibits tact, diplomacy, and courtesy in dealing with b) others in official matters within and outside the Division.
- Exhibits a positive attitude and is supportive of Division policies and stated goals.

Use of Evaluations. b.

Evaluations are used for improvement, and not for pay purposes. As Career Service employees, Hearing Offices are eligible for merit pay when the Legislature makes such appropriations, but historically. management allocates that money to support staff, to whom it is a more meaningful "bonus." This also maintains salary parity among Hearing Officers, which has been a long term goal of management. Only those rated as Exceeds Standards would be eligible for merit pay. which would skew salaries. The major tool used to ensure productivity is peer pressure. Management publishes average case processing statistics and gives every Hearing Officer their monthly statistics. No one wants to look like an unproductive judge. This process treats Hearing Officers more like general jurisdiction trial judges, who have no variation in salaries among themselves.

V. TERMS AND RETENTION.

No Term of Years, Removal for Cause.

After a six month probationary period a Hearing Officer becomes a Career Service employee. Employees in the Career Service have a statutorily protected property interest in their positions, and are essentially employed during good behavior. The initial period of probation can be extended once for another six months for poor performance, and if the new Hearing Officer is not suited to the job, the appointment can be terminated before the person obtains any protected property interest in employment. No hearing rights attach to such a termination under state law. Terminations of this kind have rarely been necessary. This level of job protection is unusual for professionals in state employment. Medical doctors, engineers, and attorneys are in positions classified in the Select Exempt category of state employment. They accrue leave at a higher rate, and generally have higher pay ranges than Career Service employees, but may be terminated at any time without any need to show good cause for separation from employment.

b. Permanent Hearing Officers Removable Only for "Just Cause."

A Hearing Officer who has obtained permanent status in the position has the same protections in employment that other Career Service employees enjoy. Separation requires a proceeding before the Public Employees Relations Commission to establish just cause for separation. ²⁶ The Commission has its own Hearing Officers. "Just cause" includes, but is not limited to: negligence, insubordination, willful violation of the provisions of law or agency rules, conduct unbecoming an employee, misconduct, habitual drug use, conviction of any crime involving moral turpitude. ²⁷

No such proceeding has been filed against a Hearing Officer since the Division was created.

VI. FACTORS CONTRIBUTING TO DECISIONAL INDEPENDENCE.

a. Organizational Structure of the Division.

The state APA and budgeting process deprives agency litigants of control or influence over the Hearing Officers and over the Division in personnel or financial matters. The Division is not dependent on any user agency to fund it its program, but functions as an autonomous entity.

b. Prohibition Against Ex parte Communications.

The statutory prohibition against *ex parte* communications causes agencies to treat the Division as they treat courts. They may not like the results in individual cases, but they accept them as binding, until they can change the result by amending their rules or by obtaining an amendment to controlling statutes.

c. The Legislatively Delegated Policy Role of the

Florida's APA is designed to require rule-making, it is not a matter of agency discretion. Agencies that ignore this requirement are punished by losing control of their regulatory program. The Legislature has determined that in cases where an agency attempts to rely on a

²⁶ Florida Statutes, Section 110.227 (5)(a).

²⁷ Florida Statutes, Section 110.227 (1).

policy that has not been formally promulgated as a rule, unless the agency proves that a specific statutory exception to required rulemaking applies, the Hearing Officer, not the agency, develops the policy to be applied in the adjudication. The policy the Hearing Officer applies is based on the evidence adduced in that case, for in the course of the hearing, each non-agency party may propose an alternative policy, and Hearing Officer's choice of which policy is most consistent with legislative intent becomes a protected finding of fact which controls the outcome in that case.²⁹ Agencies retain complete policy control, however, by engaging in rule-making.30

This aspect of Florida's APA makes very clear to agencies the legitimacy of outside review of their actions. This has a significant carryover effect. Even in cases involving traditional fact-finding rather than policy development, agencies expect to be called upon to demonstrate that their actions are rational and consistent with the authority delegated to them in the text of applicable statutes.

Internal Collegial Pre-publication Review of Orders.

A general attitude of respect for the decisions rendered by the corps of central panel judges in the appellate courts and legislative and (both substantive committees committees) is invaluable. A high quality work product enhances the deference accorded to orders on judicial review. Internal collegial review within the central panel catches potential errors that agencies would seize on as arguments for exemptions from the requirement to use the central panel, and return to a system of controlling their own hearing Remember. Florida's internal officers. Administrative Hearings has no constitutional authority, and poor work product can fuel agency moves for changes to the state APA.

DIVISION OF USERS VIEW THE VII. HOW AGENCY ADMINISTRATIVE HEARINGS.

Primary Agency Concern is Ability to Meet Hearing a. Demand.

The Division has generally been able to provide timely hearings to The number of hours of hearing scheduled and hours actually heard is shown in the following chart for fiscal years 1987 through 1993-93.

²⁹ Florida Statutes, Sections 120.535; 120.57 (1) (b) (10),(15).

³⁰ See generally, S. Maher, "Florida Administrative Procedure Act Amendments," 20 Fla. St. U. L. Rev. 367, 390 ff. (1992).

FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS Summary of Hearing Hours Scheduled and Held 1987-88 through 1993-94

	1987-88*	1988-89*	1989-90*	1990-91	1991-92	1992-93	1993-94
Hearing Hours Scheduled by Agencies	25,069	23,883	28,022	29,419	31,056	26,006	25,445
Percent Increase/ (Decrease)		(4.73%)	17.33%	4.99%	5.56%	(16.26%)	(2.16%)
Actual Hearing Hours Held:							
Regular	5,777	5,818	6,506	6,292	6,504	4,951	5,106
Baker Act**	341	369	478	567	571	523	439
TOTAL	6,118	6,187	6,984	6,859	7,075	5,474	5,545
Percent Increase/ (Decrease)		1.13%	12.88%	(1.79%)	3.15%	(22.63%)	(1.30%)
Number Actual Hearings Held:							
Regular	1,293	1,316	1,448	1,326	1,291	1,104	1,061
Baker Act**	2,165	2,619	3,737	3,781	4,109	3,537	3,313
TOTAL	3,458	3,935	5,185	5,107	5,400	4,641	4,374
Percent Increase/ (Decrease)		13.79%	31.77%	(1.50%)	5.74%	(14.06%)	(5.75%)

*NOTE: In FY 1987-88, 1988-89, 1989-90, hours scheduled were reported as follows:

1987-88:	12/1/87 - 11/30/88
1988-89	12/1/88 - 11/30/89
1989-90	12/1/89 - 11/30/90

^{**}Baker Act cases are brief hearings conducted to determine whether persons involuntarily committed to state or private mental health facilities shall be retained for another six month period. Statistics on these high volume cases are kept separately for some management purposes. Source: Florida Division of Administrative Hearing, Revised 8/02/1994

b. Tendency to See Decisions as Work of the Division, as an Institution, Rather than as Products of Individual Hearing Officers.

Agency managers tend to view the decisions of the Division's Hearing Officers as work of the Division as an institution, and not as the work of individuals. They fail often to realize the individual choices made by one Hearing Officer may not be the same that another would make on similar evidence in another case, because different credibility choices could be made. This can lead to requests to do such things as "sensitivity training" for Hearing Officers. This is really only an attempt

to lobby the fact-finders, outside the context of a specific adjudication, to support or accept the agency point of view. Sometimes the agency managers must be told bluntly that every Hearing Officer gets all the training required to decide every case — its called the trial.

Initial Agency Resentment of "Usurpation" of or C. Intrusion into its Policy Role, Followed by Later Understanding of How the Work of the Division Can be Useful.

No administrative agency welcomes the independent review, and rejection, of any of its work. Agencies learn that the review provided by an independent central panel is not an unalloyed evil. Through the cases heard and orders entered by the central panel, the Legislature gets a neutral analysis of agency action, both in individual instances and in the full range of litigated cases. Agency decisions entered after litigation before a fact finder perceived as neutral helps well managed agencies dealing with controversial programs. It also hurts poorly managed agencies prone to arbitrary or ill-considered action by exposing their folly in detail. These case records can be effectively used by agencies to disprove complaints from regulated groups about arbitrary or high-handed agency action. For example, if a legislative committee receives a coordinated series of complaints that the environmental protection agency is acting irrationally in its wetland permitting program, but the record of enforcement proceedings heard by independent adjudicators from the state central panel shows only that the agency took action to stop midnight dredging of wetlands by an owner or group of owners who were trying to evade the permitting process, the agency has a convincing defense before its oversight committee.

Agencies also find they get better analysis of facts and policy involved in their cases than they get in the state's constitutional courts, which have no requirement to enter detailed findings of fact and conclusions of law, as Hearing Officers must under Florida's APA. Recommended and final orders must include particularized rulings on proposed findings of fact. 31 This has been rather strictly enforced by the appellate courts. Kinast v. Dep't. of Professional Regulation, 458 So. 2d 1342 (Fla App. 1984), and agencies and private parties like it more than a brief order from a court merely "finding in favor of petitioner and against respondent," bereft of any careful analysis of their positions.

³¹ Florida Statutes, Section 120.59 (2).

Eventually agencies develop confidence in the integrity of the hearing process, and learn that it is not just a forum to embarrass them, but to let them explain to a neutral why they have done what they have done. Agency heads also don't bother trying to conduct their own hearings anymore, and willingly send them to the central panel. Some Florida agencies offer regulated parties the option to send a case to the Division for adjudication even when it involves no disputed fact issues, only a point of law, as a means of showing confidence in the soundness of its interpretation of a statute, rule, or judicial decision. This is especially true in tax cases, where the controlling facts are rarely in dispute. The Division usually declines these cases as beyond its jurisdiction.

Decisions of central panels, if they are well indexed for use by practitioners before an agency, also provides a data base for members of the press, the "fourth branch" of government, who may be assigned to research how various state programs are being administered. This is especially true for programs which generate a large volume of litigation. For example, after a decision in a notorious malpractice case, a newspaper may want to research whether the state Board of Medical Quality Assurance brings any/many discipline cases against licensees for incompetence, after they have had "x" number of successful malpractice actions brought against them, and if so how many such licensees have been disciplined in the past two years? Reading the decisions of the central panel provides a kind of program audit done by independent fact-finders that can be useful to those in and outside of government. Well managed agencies learn to maximize the public relations advantage this kind of information provides to them.

VIII. MANAGEMENT LESSONS FROM THE STATE ADMINISTRATIVE JUDICIARY.

a. Excessive Delay: Any Central Panel's Achilles' Heel.

Any central panel system can be undone by an inefficient management information system which doesn't closely track cases, and allows cases to age excessively. The main advantage of a specialized administrative hearing system to the legislature is the ability to get cases decided promptly and with a level of detail in the decision appropriate to what is at risk in the controversy. This can't be done if management doesn't know where the old cases are, why they are aging, and how to re-allocate resources to get old cases out.

b. Once the Corps is Independent, New Judges Should Obtain Permanent Status Only After Some On-The-Job Trial Period of Brief Duration.

In the current federal system, the process to choose ALJs is At its end, new ALJs get immediate tenure. appropriately insulates judges from improper pressure from the employing agency to decide cases in a way that pleases the current agency administration. Once an ALJ corps is independent, that reason loses force. The type of person who is an appropriate candidate for judicial office values decisional independence, and will not be attracted to a position with a high degree of intrusive management control. The type of lawyers who have the level of litigation experience to qualify for ALJ positions need rather limited supervision in order to get their work out. On the other hand, there is no right to be a judge. If the hiring authority comes to understand that it has made a serious error in hiring within a brief period, such as six months, because the new judge just can't write intelligibly, control a hearing, or efficiently administer a docket and get cases out in a timely manner, it is in the interest of the entire corps of judges to take early action and find a new candidate for the position. The probationary period should be brief, for the kind of defects warranting replacement should be obvious quickly. This has rarely been necessary in Florida's central panel. If the chief judge or a council is to be responsible for the functioning of the independent corps of federal administrative law judges, there should be a way to handle the problem before the new judge obtains a property right in the position. It should remain very difficult to take action against a judge who has obtained permanent status.

c. Maintenance of Decisional Quality.

Many state central panels have a type of collegial review of decisions before they are released for publication. The intensity of review may vary according to the high volume or routine nature of certain types of cases. This tradition of internal review is common at the appellate level, where the courts often sit in panels. Judges of the court have the opportunity to review decisions, whether or not they are on a panel, before they are published. The federal system should consider what types of collegial internal pre-publication review is appropriate for different types of cases, in order to maintain high decisional quality in its corps of ALJs when it establishes an independent central panel of ALJs for the federal government.