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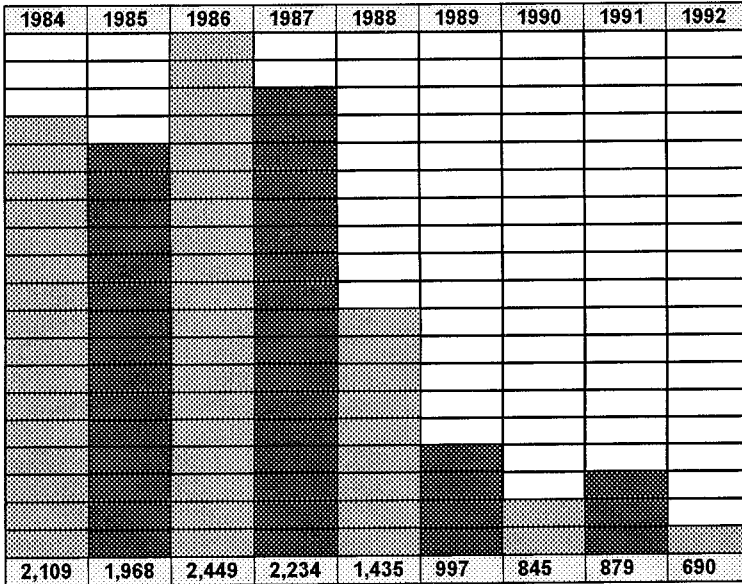
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OPENING THE FLOODGATES OF DECISION-MAKING AT THE MISSOURI ADMINISTRATIVE HEARING COMMISSION

by Daniel R. E. Jordan*

INTRODUCTION. The graph below shows the Missouri Administrative Hearing Commission's (AHC) pending cases on July 1 of nine years.



The Missouri General Assembly created the AHC in 1964. It was a flash of innovation characteristic of Missouri administrative law. The AHC is an executive-branch tribunal; its jurisdiction is entirely adjudicative. Its only regulations are procedural. The AHC's authority vests in three commissioners, one of whom acts as a hearing officer in an adversary proceeding. The AHC's decision is the decision of the agency itself, not a recommendation, and the final executive-branch action in the matter. The AHC's first area of jurisdiction was in licensing cases. The use of an independent tribunal was so popular that the General Assembly gave the AHC jurisdiction in other areas

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including Medicaid rate-making and state taxation, some of the most difficult in Missouri law.

But the AHC did not rise to meet the challenge of a growing caseload. By 1986, it had become a bottomless pit into which administrative decision-making disappeared, sometimes for years after the parties had fully briefed the issues. The General Assembly offered various solutions to fix that woeful situation, including branch offices and more commissioners.

However, the AHC's productivity increased without employing any of those costly solutions. Today the average time from the filing of the last written argument to the issuance of the decision is 15 days. Since the end of 1988, the point marked * in Graph 1, only two of the three commissioner positions have been occupied at any time. Yet the AHC has halved its inventory since that time, despite an increase in filings from 95 per month to 171 per month.

BEFORE AND AFTER.

The AHC increased its productivity by changing fundamentally its hearings procedure and its own internal management. An examination of each reveals a marked contrast between the detriments "before" and the benefits "after."

I. Management. To explain the procedural devices the AHC used, it is necessary to explain the AHC organically. Sweeping changes in the management of the AHC as an office were necessary before any procedural device could be effective. The AHC made changes in personnel, technology, and its concepts of service.

A. Personnel. The ultimate resource of the state is human beings. The right people will make the most of any given circumstances.

1. Commissioners. A commissioner must be a Missouri-licensed lawyer. Each of the commissioners wields all the AHC's power, except in making regulations, which must be unanimous. This eliminates voting on or filing dissenting opinions in decisions. To effectively manage the office, the commissioners choose one of their number to serve as presiding commissioner for a year. That office has final authority in budget, management, and personnel matters. Regulation 1 CSR 15-1.210. Section 621.035, RSMo 1986 provides that the governor appoints commissioners with the Senate's advice and consent.

Before. As with any appointment, the position could be no more than a political spoil awarded for party loyalty instead of legal ability.

After. Recent governors have made a conscious effort to appoint persons who have demonstrated merit and expertise in substantive areas of AHC jurisdiction. Such commissioners include assistant attorneys general and counsel to the Department of Revenue. Former commissioners continue to distinguish themselves as deputy attorney general, Missouri Court of Appeals judge, and in the private bar.

2. Legal Counsel. Three legal counsel serve at the AHC's pleasure.

Before. The AHC employed a chief counsel who supervised a varying number of contract attorneys called "clerks." The clerks were also assigned to a commissioner, one each. The clerks enjoyed no state employment benefits. Their pay was low, even for state lawyers. Their hours were irregular, and some were part-time. Turnover was high, sometimes less than six months. The AHC could not retain qualified persons in these positions.

After. The AHC eliminated the post of chief counsel and now employs three full-time legal counsel under the commissioners' direct authority.

Legal counsel advise all the commissioners. Their chief duty is to draft orders and decisions for the commissioners' review. They also hold pre-hearing conferences, draft regulations, track legislation, draft fiscal notes, and occasionally represent the AHC in court. To guard against the appearance of partiality or *ex parte* contact, counsel also field questions from attorneys, parties, news media, and other persons on the procedure and status of cases. Counsel have also assisted the AHC by publishing in professional journals articles explaining Administrative Hearing Commission procedure and important decisions affecting substantive issues at the AHC.

Legal counsel are also a large part of the AHC's institutional memory and are most important when a new commissioner takes office. The legal counsel positions are prized and the AHC has no trouble filling or retaining them. Current legal counsel come from the Department of Social Services, the Department of Revenue, and straight from law school. The longest-serving counsel has served six years.

3. Support Staff. The rest of the office performs tasks of reception, mail handling, filing, docketing, setting hearings, and other clerical functions. They are under the supervision of a staff director who serves at the commissioners' pleasure.

Before. Support staff were specialized to the point of obscurity and irreplaceability. For example, only one staff member actually typed up decisions and orders. The absence, inability, or unwillingness of a

staff member to perform as required could cripple the office. Turnover and turf wars were frequent.

After. Support staff members cross-train one another and back one another up in any member's absence. The staff director assigns tasks to staff members in consultation with the commissioners. Such assignments are flexible and change with staff turnover, now an infrequent event.

The AHC's support staff now includes hearings reporters. The use of its own reporters saves the AHC, and parties, money over the use of outside contract reporters.

The AHC also employs its own full-time computer specialist.

B. Technology. This brings us to the vehicle that enables a more effective and efficient use of the talents of personnel.

1. Computer. The AHC owns its own mini-mainframe. It is independent of, but can communicate with, other state government systems via modem. All personnel have their own computer terminal. This aids in communication and file management.

a. Case Tracking. The AHC makes every docket entry and tracks every case by computer.

b. Party Sheets. The AHC lists in the front of every file a computer-generated list of the parties' and their attorneys' or other contact persons' name, address, telephone numbers, and fax numbers. This is a tremendous convenience, especially in lengthy cases where parties and counsel change or move.

c. Statutes and Regulations. The computer contains copies of the statutes and regulations on file with the Revisor of Statutes and the Secretary of State, respectively. Instead of retyping often-used language, the commissioner or legal counsel simply searches for the desired provision and copies it into the draft.

d. Maxims. The AHC's most powerful drafting tool is Maxims. It is a selective digest of useful quotations and paraphrases from court opinions and AHC decisions.

Before. Maxims had not been updated since April 1992. It contained redundant, obsolete, and unsupported entries.

After. Counsel updated Maxims in August 1994. Counsel removed all redundant, obsolete, and unsupported entries, reducing its size by two-thirds. Counsel then updated it, and continuously reviews court opinions and AHC decisions as they issue for new entries. Each entry includes a heading, a quote or paraphrase, a pinpoint citation to a judicial opinion or statute, and if the AHC discussed the issue further in a decision of its own, a citation to that decision. It consists of two files:

the entries themselves and a table of contents by heading. Maxims now constitutes a concise and complete treatise on AHC practice.

2. Fax. Section 621.205, RSMo Supp. 1994, defines "filing" of documents at the AHC and provides that the AHC may make regulations for filing by fax. The AHC's regulations provide clarification of filing times and require a fax-filing party to attempt service on other parties by fax. Fax filing is particularly helpful to parties seeking a stay of state action at the eleventh hour. The AHC also provides sample documents to parties by fax, thus aiding their research and drafting.

3. Telephone. Less glamorous but more accessible is the telephone. The AHC uses it in two ways. When a procedure requires no evidentiary presentation, like a pre-hearing conference or oral argument, the AHC often conducts the procedure by telephone. Such calls can supplement or even replace written arguments on motions. The AHC also answers procedural questions by telephone. Finding authority for or clarification of procedures by telephone reduces both time and expense for the parties.

C. Customer Service. The AHC's conception of how it should provide the service for which the legislature created it changed fundamentally.

Before. The AHC thirsted for the perceived prestige of the judiciary, understood as superior to the executive of which the AHC is a part. The AHC endeavored to behave in a way it thought of as judicial, but superficially. The AHC treated parties and their counsel high-handedly, even rudely. It adopted a seal without statutory authority. Commissioners adopted the style "the Honorable" and "Judge," and signed themselves "Hon." They wrote elaborate and sometimes inscrutable decisions. The purpose of the chief counsel and staff director was to keep management issues from distracting the commissioners. They even considered installing an electronic gate at the receptionist's desk. In short, the AHC did not strive for true judicial quality.

After. The AHC abandoned its usurpation of judicial trappings in favor of executive-style productivity: fair and efficient. Commissioners are accessible to all staff. They are always courteous to staff parties and counsel. Decisions and orders are in plain English. The seal is now safely retired to a closet. None of this retreat from judicial symbolism has had any effect on the AHC's prestige except to increase it.

II. Procedure. The changes in the AHC's operation put to full use existing procedural devices and led to creating new and improved procedures.

A. New Regulations. Statutes require the AHC to make regulations that facilitate the processing of actions without counsel. The statutes require that certain subject matters have a set exclusively for them, so there are five chapters.

Before. Until 1992, the AHC's regulations contained inconsistent and puzzling provisions. For example, the AHC could issue a "proposed" decision. No one could remember why; the regulation required the decision to become final ten days after issuance and permitted no alteration, even at the parties' suggestion.

After. In 1992, the AHC rescinded all five chapters of its regulations and published five new chapters to replace them. Each chapter is in four parts: ground rules, pleadings, pre-hearing, and post-hearing. Though the statutes still require separate sets of regulations, those on the same subject have the same number in each chapter. The regulations are, to the extent possible, in plain English. In mid-1995, amendments to the regulations will take effect to refine them further. The amendments are the accumulation of suggestions and observations on clarification.

B. Notice of Complaint. By statute, the AHC must send a certain notice to respondent parties. However, the AHC includes further explanatory material in its notice. The notice is still only one page, but has cut dramatically the number of panicked or confused telephone calls.

C. Pro Se Publications. In 1990, pursuant to its special mandate to be amenable to *pro se* litigants, the AHC started printing pamphlets outlining AHC procedure. The AHC sends one to every *pro se* litigant.

D. Non-Attorney Letters. A simple notice of administrative appeal is sufficient to initiate most actions at the AHC. Because there is no content requirement for such initial pleadings, it is not the practice of law to file one on another person's behalf. Therefore, the AHC accepts initial pleadings from anyone on anyone else's behalf. However, advocating another person's cause is clearly the practice of law in any tribunal. To avoid the niceties of what is or is not the practice of law, the AHC's regulations provide that after the initial complaint, only a licensed attorney may do anything on another person's behalf before the AHC. When the AHC receives a pleading from a non-attorney on another person's behalf, the AHC explains all this to the non-attorney by a form letter. Further, if no lawyer appears on a corporation's behalf, the AHC reminds the corporation that it may appear only through a licensed attorney.

E. Objection Letters. The AHC's regulations provide that the AHC may dispose of any motion without oral argument. The AHC does not wait for the parties to "call up" the motion before deciding it. To ensure that all parties have the opportunity to make their arguments on the motion, the AHC sends a letter setting a deadline by which parties may respond to the motion. This keeps cases from bogging down in motion practice. A regulation setting a specific number of days to respond would not have the necessary flexibility for the type of complexity of each motion.

F. Automatic Stays. The AHC has the power to stay or suspend state action pending the AHC's decision. Experience has shown that in certain types of cases every non-state party wants a stay.

Before. Under the old regulations, few such parties knew of the stay power.

After. Under the new regulations, stays issue automatically on the filing of the complaint in those cases. When support staff sees a complaint in such a case, she informs another who prepares a stay order from a shell document for the commissioner's signature. The regulation also provides that the state may move to lift the stay.

G. Discovery. The General Assembly has provided that almost all civil discovery available in circuit (trial level) court are available at the AHC. Section 536.073.2(1), RSMo Supp. 1994. To keep its files uncluttered, the AHC forbids the filing of discovery, except when the subject of a motion to enforce, and requires instead the filing of a certificate of service. The Missouri Supreme Court recently amended its Rule 56 to provide the same. The advantages of discovery are the same as in circuit court; in particular, requests for admissions narrow the issues and provide the basis for dispositive motions.

H. Determination Without Hearing. Motions for summary judgment and judgment on the pleadings are also familiar devices to trial practitioners. The General Assembly requires the AHC to make regulations providing relief "in the nature of" those devices. Section 536.073.2(2), RSMo Supp. 1994. Parties make ready use of them.

I. Hearing Dockets. The hearings secretary manages the commissioners' hearing schedule.

Before. The AHC used to reserve two hours for every hearing, regardless of its complexity or likelihood of resolution before hearing.

After. The AHC now identifies those matters that are likely to be resolved without hearing or with a very brief hearing and sets them on a separate docket. The rest are scheduled for between two hours and

two weeks, depending on the complexity. The AHC has the authority to convene hearings anywhere in the state. It sometimes convenes one- or two- day dockets in large metropolitan areas. Local settings are convenient for many parties, but travel, lodging, and other expenses for both a commissioner and a reporter have reduced the amount the AHC is willing to travel.

J. Drafting. The culmination of the AHC's process is the drafting of its decisions. It uses the same procedure for drafting interlocutory orders.

Before. Under the clerk system, a commissioner and his clerk worked on a decision, rewriting it longhand to the commissioner's satisfaction. Then they would hand it to the decision secretary, the only support staff member out of ten who used to actually type up a decision.

After. Legal counsel review the entire record and draft a decision for a commissioner. Then the commissioner reviews the entire record and reworks the draft. When the commissioner and counsel agree on as much of the draft as any two lawyers can, they circulate it among the other counsel and commissioners. Circulation is by copy to each person with a deadline for comments. The commissioner makes any changes the comments inspire and gives it to counsel for cite-checking and proofreading. Another counsel proofreads the document again.

As this shows, both counsel and the commissioners take a hands-on approach to document preparation. They do their own word-processing and no secretary enters the process until it is time to prepare the final document.

BENEFITS FOR OTHER AGENCIES.

Not only has the AHC gotten control of its own caseload, it has found further ways to serve the citizens of Missouri. In certain cases an agency must hold a hearing itself and there is no provision for AHC jurisdiction.

Before. The Department of Natural Resources and the Missouri Consolidated Health Care Plan (the state employees' insurer) do not have their own hearings officers. Their counsel were uncomfortable with the role, and rightly so. Those agencies hired contract hearings officers to conduct the hearing. Contract hearings officers were law professors or local attorneys with administrative law experience. They charged \$100.00 per hour for their time.

After. The AHC charges \$75.00 per hour for commissioner time and \$45.00 per hour for legal counsel time. However, no money

changes hands. The agency simply returns part of its budget to general revenue.

CONCLUSIONS.

The AHC now uses hearings procedures that:

- 1) adopt useful trial court practices, like determination without hearing and discovery, and uses them freely;
- 2) constantly communicate to the parties the status of their case with simple procedural explanations, like pro se letters and objection letters;
- 3) employ support staff to produce routine orders from shell documents, like automatic stays, objection letters, and briefing schedules;
- 4) screen files to discern a probable length of time for hearings and set aside days for dockets of very brief hearings; and
- 5) employ legal counsel to the fullest, even at what some consider clerical functions.

The AHC has changed as an office in these ways:

- 1) away from ostentatious displays of authority, toward respect for all employees and parties;
- 2) away from avarice for symbols of judicial power, toward a paradigm of executive adjudication;
- 3) away from contract services toward full-time employees; and
- 4) away from passive party-driven management, toward AHC-monitored case management.

All governmental bodies operate within parameters set by the other branches of government, but many of the statutes, regulations, and procedures set forth are adaptable to tribunals of any nature. All executive tribunals should try those that opened the floodgates of decision-making at the AHC.

