administrative law

The State Office of Administrative Hearings and Rules

By Peter L. Plummer

The Centralization of Michigan's Administrative Law Hearings

FAST FACTS

The concept of severing hearing functions from departments and agencies and vesting them in a single, adjudicatory entity is commonly referred to as the creation of a "central panel."

In its first 12 months, SOAHR opened over 124,000 case files. During that same period, SOAHR held over 107,000 hearings and closed over 125,000 files.

Governor Granholm's issuance of Executive Order 2005-1 has created a new national model for administrative adjudications and has significantly reshaped the Michigan hearing environment for agencies, ALEs, practitioners, and members of the public.

"An administrative agency may announce new principles through adjudicative proceedings in addition to rule-making proceedings."[1]

State departments and agencies have long established or revised public policy through two creatures of the Michigan Administrative Procedures Act (MAPA):[2] the formal rule promulgation process and the contested case hearing process. Historically, responsibility for contested case hearings and coordination of departmental rulemaking has been spread throughout state government.

"No central panel is created without a champion."[3]

Through the issuance of Executive Order 2005-1, Governor Jennifer Granholm boldly consolidated responsibility for both processes into a new centralized entity, the State Office of Administrative Hearings and Rules (SOAHR).[4] Through her leadership, Governor Granholm moved Michigan to the forefront of the national central panel movement. Indeed, with her inclusion of rule coordination responsibility as an integral facet of SOAHR's mission, Governor Granholm not only established the largest central panel in the country, she also created a new model for centralized administrative law services.

Adjudicative Proceedings Jurisdiction

Historically, the provision of contested case hearings in Michigan was the responsibility of individual departments or agencies. Before the issuance of Executive Order 2005-1, administrative contested case adjudications were handled in a wide variety of ways. The Department of Corrections had a large panel of administrative law examiners (ALEs) handling a very limited number of case types with extremely high volumes. The Department of Labor & Economic Growth (DLEG) had a panel of ALEs handling a variety of different case types of both low and high volume. The Departments of Human Services and Community Health each had panels of ALEs assigned to a variety of cases arising from those departments' respective jurisdictions. The Departments of Environmental Quality and Education, as well as the Michigan Employment Relations Commission and the Michigan Public Service Commission, had smaller panels of ALEs that specialized in the low-volume cases arising under their regulatory schemes. The Michigan Tax Tribunal had a single ALE assisting with its high-volume, small claims caseload. Still others, including the Michigan Gaming Control Board, the Department of Management and Budget's Office of Retirement Services, the Michigan Racing Commission, and the Michigan Lottery Bureau, made use of contract ALEs for their case referrals. These disparate systems came to an end with the issuance of Executive Order 2005-1.

The concept of severing hearing functions from departments and agencies and vesting them in a single, adjudicatory entity is commonly referred to as the creation of a "central panel."[5] Advocates of centralization believe that these panels fill two core functions:

(1) By merging administrative functions in a single office, the central panel creates efficiencies, maximizes both physical and personnel resources, and strengthens the ability to meet the challenges posed by increasing or decreasing caseloads.[6]

(2) By removing hearing functions from the departments and agencies and eliminating the adjudicator's status as an employee of that department or agency, the creation of central panels reduces the appearance, if not the reality, of bias and the structural dependence the adjudicator has on the regulating department or agency.[7]

The role of the central panel in assuring impartiality is paramount. John Hardwicke, former chief administrative law judge of the Maryland Office of Administrative Hearings and former executive director of the National Association of Administrative Law Judges, and Thomas Ewing, chief administrative law judge for the Oregon Office of Administrative Hearings, articulated the strengths of the central panel as an impartial arbiter in typically blunt terms:

> [I]n the old system, the judge, generally called a hearing officer, is an in-house employee of the agency. This makes the agency simultaneously the policeman, prosecutor, judge, and jury of its own action. Inevitably, such a system creates, at the very least, an appearance of bias; at worst, the reality of either direct or indirect pressure on these employees to produce decisions favorable to the agency.[8]

There are currently 27 states and three major cities using central panels.[9] The first was created in the state of California. Although authorized by the California legislature in 1945, it was not officially established until 1961. The 1970s saw central panels created in the states of Colorado, Florida, Massachusetts, Minnesota, Missouri, New Jersey, and Tennessee. The states of Alabama, Iowa, Louisiana, Maryland, North Carolina, Washington, and Wisconsin joined the

The central panel system emphasizes adjudicative skill and competence without requiring ALJs to be experts in the complexities of the particular agency's policies.

ranks of the central panel states in the 1980s. The 1990s brought the addition of Arizona, Georgia, Hawaii, North Dakota, South Carolina, Texas, and Wyoming as well as a small, limited jurisdiction panel in Michigan. SOAHR in Michigan as well as the states of Alaska, Maine, and Oregon are the most recent additions. The cities of Chicago, New York, and Washington, D.C., have created central panels as well.

While Michigan had some experience in collapsing small segments of contested case jurisdiction into several distinct hearings units, the issuance of Executive Order 2005-1 both formalized and significantly expanded past efforts. Under its terms, the responsibility for holding the vast majority of administrative hearings in Michigan was transferred to SOAHR.[10] With limited exceptions, Executive Order 2005-1 consolidated into SOAHR the adjudicative and support staff from nine entities: (1) Department of Community Health, (2) Department of Corrections, (3) Department of Education, (4) Department of Environmental Quality, (5) Department of Human Services, (6) DLEG's Bureau of Hearings, (7) DLEG's Public Service Commission, (8) DLEG's Michigan Tax Tribunal, and (9) DLEG's Michigan Employment Relations Commission. In addition, SOAHR assumed responsibility for a myriad of case types coming from a variety of other departments and agencies, including the Department of Agriculture; the Department of History, Arts, and Libraries; the Department of Management and Budget; the Department of Natural Resources; the Department of State Police; the Department of Transportation; and the Department of Treasury.

It is indeed easier to describe contested case jurisdiction that was not transferred to SOAHR than to attempt an exhausting listing of all case types transferred. The areas excluded, which are specified in Article IV of Executive Order 2005-1, include:

- Hearings conducted by elected state officers or direct gubernatorial appointees
- Informal conferences not subject to MAPA
- Hearings held by the Civil Service Commission under the authority granted by Section 5, Article XI of the Michigan Constitution[11]
- Hearings held by the State Administrative Board
- Hearings held by the Department of State[12]

It is also important to note that while adjudicatory jurisdiction in the remaining case types was transferred to SOAHR, the dispositional framework of cases was not impacted. Put simply, if an administrative law examiner was statutorily authorized to issue a final decision in a contested case before the executive order, the administrative law examiner retains that same authority. If, conversely, the administrative examiner was charged with issuing only a proposal for decision, Executive Order 2005-1 specifically retains in the agency final order authority.[13]

With 103 administrative law examiners, Michigan has more adjudicators than any central panel in the country.

Despite these limited jurisdictional exceptions, given the breadth of the consolidation required by Executive Order 2005-1, at its effective date of March 27, 2005, Michigan instantly became the home of the nation's largest central panel. Consider the following:[14]

- With 103 administrative law examiners, Michigan has more adjudicators than any central panel in the country.
- In its first year of operation, SOAHR opened more cases than any central panel in the nation.
- In its first year of operation, SOAHR issued more decisions and closed more cases than any other central panel.

The scope of SOAHR's adjudicative responsibility is best evidenced by the data available from its first year of operation. In its first 12 months (April 1, 2005 through March 31, 2006), SOAHR opened over 124,000 case files. During that same period, SOAHR held over 107,000 hearings and closed over 125,000 files. Again during that period, its mediation component opened over 700 cases, closed over 900 cases, and conducted over 650 mediation sessions.

Note that these case statistics include adjudication of well over 400 distinct case types covering a myriad of distinct statutory and regulatory schemes and a multitude of referring agencies and departments. Each had distinct procedures, timeframes, and substantive law. Some jurisdictions had extremely high volumes (Corrections, Unemployment Appeals, Medicaid, and Public Benefits). Others referred cases in the single digits (Natural Resources; Gaming; and History, Arts, and Libraries).

Rule Promulgation Jurisdiction

In addition to the expansive adjudicative jurisdiction granted SOAHR in Executive Order 2005-1, Governor Granholm took a second major step in consolidating administrative law functions by moving the responsibility for rule promulgation coordination into SOAHR. The executive order transferred into SOAHR all powers, duties, and functions of the previous Office of Regulatory Reform relative to MAPA's rule promulgation process.[15] In so doing, Michigan became only the second state, following Minnesota,[16] to vest pervasive control of administrative rulemaking in its central panel.

MAPA prescribes a rigid promulgation protocol for departments and agencies that have been vested with statutory rulemaking authority. As a result of the executive order, SOAHR has

been assigned a number of specific functions within that protocol. These include:

- Review of all requests for rulemaking filed by departments and agencies seeking permission to promulgate
- Preliminary review of all draft rule language prior to public hearing
- Legal review of proposed administrative rules to ensure that they are constitutional, have proper statutory authority, and do not conflict with state statute or other administrative rules
- Economic review of proposed administrative rules to ensure that the regulatory objective is achieved in the most cost-effective manner allowed by law
- Filing of proposed administrative rules with the Office of the Great Seal

In addition to these specific statutory functions, SOAHR is charged with the following programmatic responsibilities:

- Coordination and streamlining of the administrative rulemaking process to reduce time in the promulgation of administrative rules and to increase citizen access
- Maintenance of the Internet-based Michigan Administrative Code and Michigan Register
- Coordination of the elimination of obsolete, duplicative, or superseded rules to ensure that the Michigan Administrative Code contains only current and enforceable administrative rules
- Training of agency staff on the drafting, processing, and cyclical review of administrative rules

In its first full year of operation, SOAHR coordinated the promulgation of 169 rule sets—including two sets of emergency rules. Thirteen separate departments had rule promulgation activity with SOAHR during this period—demonstrating the far reach of SOAHR's rulemaking responsibilities.

To make use of available expertise, SOAHR has created linkages between its two major responsibilities: contested case hearings and administrative rule review. Through the executive order, over 100 ALEs were transferred into SOAHR—each having expertise and experience in particular areas of the law. SOAHR has been able to make use of that expertise by having experienced ALEs review complex proposed rulemakings. Given their unique backgrounds, the ALEs were able to provide a thorough review of the proposed rules from both a policy and an enforcement perspective. This is an ALE role that SOAHR will significantly expand in the coming years.

Impact of Centralization

Neither the impact nor importance of the shift to a centralized adjudication model in Michigan can be overemphasized. By making use of the efficiencies inherent in the larger corps of ALEs and support staff, SOAHR will be better positioned to meet the challenges posed by widely varying caseloads in particular areas. By merging physical locations and database systems, SOAHR will be able to make better, more prudent uses of limited state resources. By involving ALEs in proposed rule analysis, SOAHR will have quicker, more detailed response to agency proposals. By consolidating diverse practices in the plethora of case types, SOAHR will be able to provide parties and their attorneys more predictability and logic in hearing procedures. Finally, by completing a thorough review of all areas brought into it, SOAHR will be able to identify the best practices of varying practice areas and replicate them throughout SOAHR.

In addition to these easily identified benefits, the creation of SOAHR will also produce several, less quantifiable impacts. Initially, the removal of the ALEs from the agencies will foster both the perception and the reality of impartiality from agency influence. Litigants will no longer have to go to the office of the agency bringing adverse action and will no longer have to appear before an employee of that agency. The ALEs' removal from the agency could also eliminate the integral, though sometimes indirect, role an ALE can play in the formulation of agency policy. Commentators disagree on whether the elimination of that role is a positive or negative result of centralization.

Professor Charles H. Koch, Jr. analyzed the implication of adjudicative centralization in an article that distinguished between "traditional hierarchical adjudicative structures" and central panels.[17] Professor Koch argues that "the panel structure replaces a specialized, program-sensitive judicial community with an isolated, generalist administrative judiciary."[18] In general, Koch concludes that the benefit of the agency independence gained through this generalist administrative judiciary is in some ways offset by the decrease in the agency's ability to formulate and develop public policy through the contested case process. He theorizes that centralization can have a debilitating effect on an agency's ability to make policy decisions because the agency has, in effect, lost control of the adjudicator. Indeed, Koch notes that "the central office system forces agencies to make most policy moves by rules."[19] In addition, by removing the adjudicator from the administering agency, centralization may even encourage judges to engage in what Koch describes as "independent policymaking" or policymaking outside the agency.[20]

Other commentators have expressed views contrary to Professor Koch's regarding the move away from policy development through administrative adjudications. Professor Johnny Burris, for example,

identified a number of concerns over an agency's use of the contested case process to establish policy in lieu of formal rulemaking.[21] Burris points out first that policymaking in the contested case venue can limit full participation in policy development.[22] He also argues that use of policymaking through order fails to provide the same citizen access as a properly promulgated rule.[23] This in turn, Burris concludes, undermines a reviewing court's ability to ensure that the agency has acted rationally towards similarly impacted parties.[24] Finally, Burris argues that, as a result of all these factors, policy development through order can result in a waste of the limited resources of the reviewing court.[25]

A second commentator argues that the two systems, the traditional model verses the centralized model, may simply rely on differing adjudicatory skill sets. Professor Greer points out that "[t]he central panel system also emphasizes adjudicative skill and competence without requiring ALJs to be experts in the complexities of the particular agency's policies. The intended function of the ALJ during administrative adjudication is not to specialize in agency policy but to moderate with impartiality."[26] As a result, a central panel ALE requires skills more focused on the adjudicative process itself rather than specific training in the intricacies of unpromulgated agencies policies.[27] As the central panel ALE may not be steeped in the history of the policies and procedures of a particular agency, that expertise will have to come from elsewhere. The same author asserts that this challenge could be easily faced. "Accordingly, the communication of relevant agency policies to the ALJ and the use of expert witnesses during the hearings are suggested as remedies for the absence of specialization requirements."[28]

The provisions of Executive Order 2005-1 address both Koch's desire for case type expertise and the need for the more generalized adjudicative skill referenced by Greer. In general terms, the executive order adopts the classic centralization model by vesting in SOAHR the right to designate and select administrative law examiners.[29] To ensure the benefit of the traditional hierarchical structure, the executive order requires the "assignment of personnel to perform administrative hearing functions with expertise in the appropriate subject areas and the law."[30] Further, Governor Granholm specifically required agency input into ALE selection into two areas of SOAHR's jurisdiction historically deemed to require specific expertise: cases referred by the Michigan Employment Relations Commission[31] and cases referred by the Michigan Public Service Commission.[32]

Conclusion

Governor Granholm's issuance of Executive Order 2005-1 has created a new national model for administrative adjudications and has significantly reshaped the Michigan hearing environment for agencies, ALEs, practitioners, and members of the public. This model will both encourage internal efficiencies within SOAHR and consolidate diverse practices used by predecessor hearing entities. The model will also promote, provide, and ensure the impartiality of the adjudicators from the agencies responsible for administering programs and bringing the action that may be the basis of the appeal. Finally, by melding administrative rule promulgation coordination with administrative adjudications, the Governor has fostered a more thorough and integrated mechanism for consistent, exhaustive, and timely administrative rule review. ◆

Peter L. Plummer was appointed by Governor Granholm as the first executive director of the State Office of Administrative Hearings and Rules in April 2005. Before his appointment, Mr. Plummer worked as a public defender in Detroit, served nearly 20 years as the chief assistant prosecuting attorney in Marquette County, and served as an assistant attorney general from 1997 to 2005. Mr. Plummer obtained his Juris Doctorate at Wayne State University Law School.

Footnotes

1. *Detroit Auto Inter-Ins Exch v Comm'r of Ins,* 119 Mich App 113, 117; 326 NW2d 444, 446 (1982).
2. 1969 PA 306, MCL 24.201 *et seq.*
3. Hardwicke & Ewing, *The central panel: A response to critics,* 24 J Nat'l Ass'n Admin L Judges 231, 231 (2004).
4. Executive Order No 2005-1.
5. See, e.g., Flanagan, *Redefining the role of the state administrative law judge: Central panels and their impact on state ALJ authority and standards of agency review,* 54 Admin L R 1355, 1356 (2002).
6. See, e.g., Ewing, *Oregon's hearing officer panel,* 23 J Nat'l Ass'n Admin L Judges 57 (2003) (detailing the increased efficiency that would result if Oregon adopted a central panel); Kauper, *Protecting the independence of administrative law judges: A model administrative law judges statute,* 18 U Mich JL Reform 537, 543 (1985) (applauding the benefits of the central panel paradigm).
7. See Redish & Marshall, *Adjudicatory independence and the values of procedural due process,* 95 Yale LJ 455, 477 (1986).
8. Hardwicke & Ewing, *supra* at 232 n 3.
9. The Nat'l Assoc of Admin Law Judges, *Central panel states,* available at <http://www.naalj.org/panel.html> (accessed October 10, 2006).
10. Executive Order No 2005-1, Article III.
11. Executive Order No 2005-26.
12. Although exempt from EO 2005-1, by interagency agreement, SOAHR hears some Department of State cases as requested.
13. Executive Order 2005-1, Article IV. A.
14. State of Louisiana, "2005 Comparison of States with Centralized Administrative Law Hearing Panels" (internal Louisiana administrative hearings office document).
15. Executive Order No 2005-1, Article V.
16. Minn Stat No 14.001 *et seq.*
17. Koch, Jr., *Policymaking by the administrative judiciary,* 56 Ala L R 693, 732 (2005).
18. Koch, *supra* at 734 n 12.
19. *Id.*
20. *Id.* at 735.
21. Burris, *The failure of the Florida judicial review process to provide effective incentives for agency rulemaking,* 18 Fla St U L R 661, 690–697 (1991).
22. *Id.* at 690.
23. *Id.* at 691.
24. *Id.* at 693.
25. *Id.* at 697.
26. Greer, *Expanding the judicial power of the administrative law judge to establish efficiency and fairness in administrative adjudication,* 27 U Rich L R 103, 123 (1992).
27. I note that ALEs are required to enforce certain unpromulgated agency policies where MAPA provides for a promulgation exception. See MCL 24.207.
28. Greer, *supra* at 123 n 26.
29. Executive Order No 2005-1, Article III, A 2.
30. *Id.* at Article II, D.
31. *Id.* at Article II, H.
32. *Id.* at, Article II, G.