Off the Record— Michigan's Ex Parte Law Needs Reform

Two readers respond to a January Bar Journal *article on command influence*

Michael Lockman:

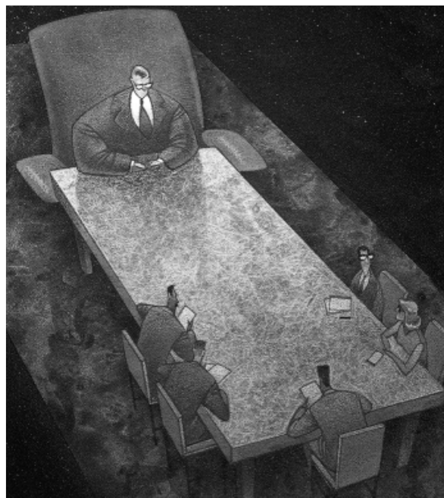
I found the article entitled "Off the Record," in which the author tilts against the windmill of administrative agency "command influence," to be both self-serving and unfounded in applicable legal principle. It is self-serving in that the article uses the terms "trial," "judge," or "administrative law judge" dozens of times in order to create the impression that the system in which the influence is being exerted is judicial in nature. Indeed, we are advised that "command influence probably erupts from time to time in all organized *judicial systems.*" (Emphasis added.) Whatever may be the law in Arkansas or Iowa, in Michigan, the system about which the author complains is manifestly not a judicial system:

> *An administrative tribunal is not a court—it is not part of the judicial branch of government.* Quinton v General Motors Corporation, *453 Mich 63, 81 (1996) Rather, administrative agencies are a part of the executive branch and while they often act in a quasi judicial capacity, they are established to perform essentially* ***executive functions.*** Judges of 74th Dist v Bay County, *385 Mich 710, 190 NW2d 219 (1971).* (Emphasis added.)

Moreover, for purposes of the exercise of so called "judicial independence" on matters of law, *administrative hearing officers* (the label used in the Administrative Procedures Act) or examiners (as they are described in the Occupational Code, one of the statutes under which the author acts as presiding officer) are by no means the equivalent of civil judges.

> *[Administrative law judges] are not judges; instead, they perform a quasi-judicial function within an agency.* Association of Administrative Law Judges v Personnel Director of the State of Michigan, *156 Mich App 388 (1986).*

The article is misdirected in its reliance on cases arising out of military tribunals and



unfounded in legal principle in its central thesis that "loopholes" in section 82 of the APA result in "no effective curb on command influence and that it is thus in need of revision." The so-called command influence permitted by section 82 is not the result of a loophole. Rather, it is the result of the proper legislative recognition of the essential nature of administrative proceedings. All legal commentators and scholars agree that an administrative agency, being a part of the executive branch and being engaged in "essentially executive functions" *Judges of Bay County,* supra, is supposed to speak with one voice with respect to the manner in which it exercises its powers on those persons brought before it. See Le Duc § 5.53, Administrative Tribunals, where he observes that the very reason courts have upheld the blended powers bestowed on administrative agencies is because final authority to decide resides in the head of the agency who is ultimately responsible for the exercise of all of the authority reposed in the agency.

Astonishingly, the article proclaims that supervisory officials within an agency "who put ex parte pressure on administrative *judges* to make what the author views as politically correct decisions are ethically corrupt" and that "ex parte contacts used to influence decisions are downright corrupt." The article does not contain any specifics about the nature of the "influence," but no corruption (downright or otherwise) results from supervisory officials within an agency that acts to influence decisions of hearing officers on questions of law involving the very statutes and rules which the agency is empowered and required to administer.

Moreover, not only is what the author describes as "command influence" on matters of law permissible, it is constitutionally required:

> *The right of all individuals, firms, corporations, and voluntary associations to* ***fair and just treatment*** *in the course of legislative and* ***executive*** *investigations and* ***hearings*** *shall not be infringed. Const 1963, art 1, § 17.* (Emphasis added.)

While not involving the author of the article, two cases that arose at the very agency which holds him captive illustrate the point. The licensing agency issued two formal complaints against two different licensed contractors. The names of the complaining witnesses and factual particulars of the alleged misconduct were different, but the complaints were otherwise identical in all respects—they used the same standardized boiler-plate style pleadings containing allegations of violations of various parts of Michigan's Occupational Code and each alleged the same rule violations.

As is often the case, neither licensee appeared at the contested case hearings. No factual evidence was taken. As required by

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statute, both hearing officers wrote hearing reports containing findings of fact and conclusions of law. These reports were virtually all boiler plate with one pertinent exception: even though both hearing officers found that all facts pled in the agency complaints were to be taken as true, one found the licensee to be in violation of all the sections of the occupational code and rules that were pled, while the other, on the same facts taken as true, found that with respect to one particular rule violation, the law required the state to prove intent and that it had failed to do so. Thus, one licensee was found in violation of a rule and subjected to penalties prescribed by law while the other, on identical facts, was not!

The difference in legal conclusions between the two cases made the action of the Builders Board in assessing discipline against the contractor who was unlucky enough to have drawn the hearing officer who did not require intent to be proven an arbitrary act. In the anomalistic milieu of the Occupational Code, where each of the dozen or so licensing boards have been statutorily deprived of the authority to make their own findings of law and fact, ["The board's determination of penalty shall be made on the basis of the administrative law hearings examiner's report." MCL 339.514(1)], the only practical way to address the inconsistent positions of law is for supervisors to intervene to ensure that similarly situated persons who come into contact with the agency are treated in the same way regarding findings of law made against them for which they may be disciplined by the licensing boards. To do otherwise is to engage in arbitrary and capricious conduct violative of the constitutional duty of each administrative agency to provide fair and just treatment to all persons.

No fair-minded person would try to justify supervisory "input" directed at influencing the factual findings of a hearing officer, but executive branch agency management would be derelict in its duty if it permitted persons employed as hearing officers to be responsible ultimately to no one but the Civil Service Commission, to cloak themselves in robes of judicial independence that they have not earned the right to wear from the electorate who are the source of such independence. Until we begin to elect our administrative hearing officers, the law makes the supervisory officials at an agency, through the executive director, responsible for ensuring the proper interpretation and consistent application of the laws the agency is charged with administering. In my view, there is nothing ethically wrong with that.

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Richard B. Stapleton:

After reading Erick Williams's article, I am appalled that the editors of the *Journal,* as well as, the Administrative Law Section would provide a forum for an attorney to maliciously defame every administrative law judge who has worked for the Michigan Department of Corrections (MDOC). In fact, I personally believe that Williams's libelous accusations against MDOC hearing officers amount to a violation of Rule 8.2 of the Rules of Professional Conduct, "Judicial and Legal Officials." I am the administrator of the Office of Policy and Hearings within the Michigan Department of Corrections and am responsible for the supervision of the department's attorney officers. The premise in Williams's article is unassailable. Administrative law judges must be free from supervisory control over their decisions. However, for reasons unknown to this writer, Williams continues a personal campaign of misrepresenting the facts in two contested cases brought against the Department of Corrections, *Perry v McGinnis* and *Heit v VanOchten.*

His article intentionally misrepresents as fact to members of the Bar that MDOC attorney hearing officers have been held to a quota for the number of allowable not guilty decisions and thus lack integrity by acquiescing to that quota. Williams's defamatory intent is found in his failure to simply include the phrase that "it was alleged by the plaintiff" in *Perry* that the MDOC applied a quota against its hearing officers and took steps to enforce that quota. Instead, the allegations made in *Perry* and *Heit* are authoritatively reported by Williams as though they are beyond factual dispute. In the interest of fairness, and so as not to recklessly assault the integrity of administrative law judges, the editors should have required that Williams's article accurately report that the MDOC maintains that it has never imposed a quota system on its hearing officers or required its hearing officers to believe a guard's testimony over that of a prisoner.

Williams is correct that both the *Perry* and *Heit* cases have been settled. However, he again misrepresents the facts by stating that the MDOC agreed "to abolish the quota

system [and] abandon the informal practice of automatically taking a guard's word over a prisoner's." Williams's misrepresentations blatantly charge the MDOC with engaging in both practices and declare us guilty of doing so when that is not the case. In fact, the MDOC agreed with the plaintiffs in *Heit*—to not keep statistics on hearing officer's decisions and to require that hearing officers set forth the reasons for a credibility determination on the record for each hearing. There has never been a quota system or an informal practice of automatically believing a correction officer's word over that of a prisoner. MDOC attorney hearing officers have always been required by MCLA 791.252(i) to conduct their hearings in an impartial manner.

Clearly, an administrative law judge of Williams's standing should be able to distinguish between a settlement and a judgment and must not represent one for the other in a contested case. By his assertion that MDOC administrative law judges "had tried hundreds of thousands of cases, all affected by the quota system," Williams has recklessly and maliciously maligned the professional reputation of more than 50 attorneys who have been employed as hearing officers with the MDOC. He has discredited each of these people by holding them up to ridicule and contempt by fellow members of the Bar. Williams's reckless disregard for the truth is evident by his assertion that over a 20-year period, MDOC hearing officers acquiesced to pressure from their supervisors to find prisoners guilty of misconduct violations despite the weight they may personally accord the evidence presented at their hearings.

Since MDOC hearing officers are members of the Bar who have available to them a remedy through the Attorney Grievance Commission, as well as the civil service grievance system that is available to all state employees, it is ludicrous to believe that attorneys would willingly accede to a quota or supervisory influence over their decisions. To do so would be violation of the Rules of Professional Conduct. The fact is that of the "hundreds of thousands of decisions" referenced by Williams, each of which is subject to review by a state circuit court, no court has ever held that an attorney hearing officer was unfair or predisposed to find for the MDOC.

I believe that the members of the State Bar of Michigan who conduct hearings within our state's correctional facilities deserve our respect and appreciation for the difficult job they perform. They must deal with the tension and demands that come with working with a sometimes hostile and dangerous clientele while at the same time maintaining the objectivity and independence required of their position. At a minimum, I believe they deserve a formal apology from both the article's author and the Administrative Law Section for this assault on their integrity.

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Erick Williams responds:

My thesis is that administrative judges are vulnerable to command influence because they have bosses. When a party feels that a judge has made a mistake, the party should appeal, not lobby the judge's boss. Putting pressure on the judge's boss to affect the outcome of a case is corrupt. One can hardly justify that corruption by giving the judge or the procedure a diminutive name. My article never alleged that anyone in the system lacked personal integrity. In my view, the problem is not personal, but institutional.

The pressures of command influence tend to override the personal integrity of those who run the system. Luther West said it best: "If the commander concerned is honest, he will permit his court martial members to judge cases on their individual merit. If he is dishonest, or nervous, or frightened, or feels threatened in any number of ways, he may well usurp the independent judicial functions of the court-martial, and 'influence' his court members to render a verdict and sentence designed to reflect his own wishes, regardless of the merits of the individual case. The commander (or even the commander in chief) might feel it necessary to effect a particular verdict or sentence in any case to protect what he considers the vital interest of his command, or of his career (or of the nation), whether he is honest or not." Luther C. West, They Call It Justice: Command Influence and the Court-Martial System (New York, Viking, 1977).

The military has honestly confronted its institutional problem. The uniform code of military justice bans command influence and gives litigants effective remedies. That law has not destroyed the military; similar laws would not destroy Michigan administrative agencies. On the contrary, a ban on command influence and effective remedies for its breach would make administrative trials more fair and reinforce the personal integrity of those who run the system. The loopholes in MCL 24.282 swallow the ex parte rule. MCL 24.282 follows an obsolete (1961) version of the model administrative procedure act. In the 1981 revision of the model APA, the Commissioners on Uniform State Laws abandoned the impractical "law-versus-fact" distinction and the wide-open "agency member" exception. Section 4-213 of the model APA reads in part:

> *No party to an adjudicative proceeding, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer, without notice and opportunity for all parties to participate in the communication.*

Adopting the current version of the model APA would close those loopholes. The Corrections Department has taken an important step. In its settlement agreement in *Heit v VanOchten,* the department promised to collect no statistics on conviction rates, enforce no conviction quotas, and forbid staff members from lobbying judges' bosses. Those rules are a good model for the rest of the state. They should be in the administrative procedure act. The rule against lobbying a judge's boss is fundamental to fair treatment in administrative hearings. It deserves a place in the constitution. Ultimately, an effective ban is enforceable. Litigants victimized by command influence need discovery rights and access to de novo review. The practice in military courts is a good model for an effective remedy, and civilian administrative lawyers should study how command influence is addressed in the military. ✦ —*Erick Williams*