



**Report of the
Study Committee on Administrative Hearing Officers**

February 2014

Representative William J. Lippert, Chair *Senator Joe Benning, Vice Chair*

Representative Thomas F. "Tom" Koch *Senator Richard W. Sears*

Representative Anne H. Mook *Senator Jeanette K. White*

Prepared by:

*Office of Legislative Council
State House, 115 State Street, Montpelier, VT 05633-5301
802-828-2231*

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I. EXECUTIVE SUMMARY

Hearing officers in Vermont decide many thousands of cases every year affecting important rights held by Vermont citizens. Despite their widespread impact, though, little is known about how as a general matter hearing officers function in Vermont and whether this system of adjudicating substantial rights might benefit from any improvements. To begin answering these questions, the Administrative Hearing Officers Study Committee was established by the General Assembly in 2013 and directed “to report on the duties, powers, current practices, sources of authority, and qualifications of administrative hearing officers used in Vermont government.” The General Assembly instructed the Committee to “examine the manner and context in which administrative hearing officers are used by the State” and “consider the duties, powers, and minimum qualifications for each administrative hearing officer, including those authorized by statute, agency rule, or any other means.” After hearing testimony from a wide variety of witnesses and carefully considering the issues presented by the State of Vermont’s widespread use of administrative hearing officers, the Committee makes the following findings and recommendations:

1. There is a persuasive case that Vermont should move from a decentralized hearing officer system to a centralized one as more than 20 other states have done. Shifting to a centralized model in which all State hearing officers are located in a single administrative department is likely to increase Vermonters’ faith in the fairness and impartiality of the system and improve its efficiency. However, such a significant change in the organization of State government demands further time and study before a final recommendation can be made.
2. A State entity should be designated to receive, consider, and determine complaints about hearing officers’ conduct.
3. A Code of Conduct should be adopted for administrative hearing officers in the Executive Branch.
4. State Agencies that use hearing officers should ensure that their performance is evaluated at least annually.
5. The State should provide hearing officers with a broad and thorough program of education and training.
6. All parties in proceedings presided over by hearing officers should be provided with a copy of the rules of procedure applicable to the proceedings, including the rules for filing an appeal.

II. THE COMMITTEE

The Administrative Hearing Officers Study Committee was established by 2013 Acts and Resolves No. 61, Sec. 4 (S.1).

The Committee consisted of six members:

- (1) The Chair of the House Committee on Judiciary or designee: Representative William J. Lippert, *Chair*.
- (2) One member of the Senate Committee on Judiciary, appointed by the Committee on Committees: Senator Joe Benning, *Vice Chair*.
- (3) One member of the House Committee on Judiciary, appointed by the Speaker of the House: Representative Thomas F. “Tom” Koch.
- (4) The Chair of the Senate Committee on Judiciary or designee: Senator Dick Sears.
- (5) The Chair of the House Committee on Government Operations or designee: Representative Anne H. Mook.
- (6) The Chair of the Senate Committee on Government Operations or designee: Senator Jeanette K. White.

The Committee was staffed by: Erik FitzPatrick, Legislative Counsel, and Julie Tucker, Counsel Assistant, Office of Legislative Council.

III. THE COMMITTEE’S CHARGE

2013 Acts and Resolves No. 61, Sec. 4 (S.1) created the Administrative Hearing Officers Study Committee “to report on the duties, powers, current practices, sources of authority, and qualifications of administrative hearing officers used in Vermont government.” Act 61 provided that the Committee should “examine the manner and context in which administrative hearing officers are used by the State” and “consider the duties, powers, and minimum qualifications for each administrative hearing officer, including those authorized by statute, agency rule, or any other means.” The Committee was authorized to meet up to four times and directed to file a report of its recommendations and any proposals for legislative action with the General Assembly.

IV. MEETINGS AND WITNESSES

The Committee met four times in 2013: September 19, October 7, October 29, and December 17. The following witnesses appeared before the Committee:

Mark Oettinger, General Counsel, Agency of Education

Dixie Henry, Deputy Secretary, Agency of Human Services

Sarah London, General Counsel to the Governor

Margaret Murray, Citizen

Jane Woodruff, Hearing Officer, Department of Labor

Paul Gillies, Esq.

Norm Patenaude, President, National Association of Hearing Officials, Chair, New Hampshire Workers Compensation Appeals Board

Hon. Julian Mann III, Director and Chief Administrative Law Judge, North Carolina Office of Administrative Hearings

Jim Gerl, Certified Hearing Official, West Virginia

Amy Davenport, Administrative Judge,

George Belcher, Esq., Hearing Officer, Office of Professional Regulation

Emily Bergquist, Esq., Hearing Officer, Department of Taxes

Jane Woodruff, Esq., Hearing Officer, Department of Labor

William Talbott, Deputy Secretary/CFO, Agency of Education

David Yacovone, Commissioner, Department for Children and Families

Terry Rowe, Director, Commissioner's Registry Review Unit, Department for Children and Families

Jon Groveman, General Counsel, Agency of Natural Resources

Brian Searles, Secretary, Agency of Transportation

John Dunleavy, Assistant Attorney General, Agency of Transportation

Richard Boulanger, Hearing Officer, Agency of Transportation

Robert Ide, Commissioner, Department of Motor Vehicles

John Zicconi, Executive Secretary, Transportation Board

Steven Adler, Esq., Chair, Judicial Conduct Board

Chris Winters, Esq., Director, Office of Professional Regulation, Secretary of State's Office

Erik FitzPatrick, Legislative Counsel, Office of Legislative Council

V. FINDINGS AND RECOMMENDATIONS

1. There is a persuasive case that Vermont should move from a decentralized hearing officer system to a centralized one as more than 20 other states have done. Shifting to a centralized model in which all State hearing officers are located in a single administrative department is likely to increase Vermonters' faith in the fairness and impartiality of the system and improve its efficiency. However, such a significant change in the organization of State government demands further time and study before a final recommendation can be made.

The term "hearing officer" refers to the person with the authority to make a ruling when the final decision of an Executive Branch agency is challenged. Similar to a judge, a hearing officer listens to testimony, evaluates evidence, and makes a decision in the matter. A hearing officer is also sometimes referred to in the Vermont statutes as a referee or a presiding officer, and in at least one case, an agency changed the designation by rule from referee to an administrative law judge. This lack of uniformity in terminology made it difficult for the Committee to determine with certainty how often Vermont law authorizes a person to function as a hearing officer. However, irrespective of the title, it was evident to the Committee that throughout the country, the decentralized and centralized models are the two basic approaches to hearing officer systems, and that the debate between the proponents of each system has been continuing for many years.

The traditional structure for handling administrative hearings is known as the decentralized model. In this model, each individual department or agency is responsible for administering its own process for resolving contested cases, including the use of hearing officers when authorized by law. The hearing officer typically either contracts with the agency to provide hearing officer services or works directly for the agency. Some employees perform hearing officer duties full-time, while others spend some percentage of their time on

hearing officer responsibilities and devote the rest of their time to other agency duties. Hearing officers in this system only decide cases involving the subject matter and jurisdiction of the agency for which the officer is working. The system is “decentralized” because hearing officers are dispersed throughout State government rather than consolidated in a single department.

Proponents of the decentralized system believe that it is necessitated by an administrative hearing officer’s role. A hearing officer is charged with articulating agency policy and determining whether it was followed when the agency made the decision being challenged. Since the hearing officer’s function is to ensure that agency policy is implemented, supporters of the decentralized system argue that it is fully appropriate for the hearing officer to be working for that agency. Supporters also say the highly specialized nature of many agency decisions requires a level of expertise and knowledge that can be acquired only by working exclusively for the agency.

The most common criticism of the decentralized model is that there is an unavoidable appearance of partiality because the hearing officer is either employed or contracted by the same agency whose decision is being challenged and whose interests are at stake in the proceeding. In many cases, the hearing officer may even be physically located very close to the agency manager who made the decision. The relationship between the hearing officer and the agency creates a perception that the officer’s continued employment or contract status may be dependent on whether or not the officer issues decisions that favor the agency’s position. The appearance is that the same entity that decided against the person will now decide whether its own decision was correct, and it is understandable that a person affected by this process might not believe that he or she had received a fair and impartial ruling from a neutral decision maker.

In response to these criticisms of the decentralized model there has been movement in recent years toward adopting an alternative hearing officer structure known as a “central panel” or “centralized” system. As the name suggests, the hearing officers in a centralized system work together in a separate State department that is completely distinct and independent from the agencies whose cases they hear. In a centralized system, the hearing officers are typically generalists just as most judges are, hearing cases from all agencies on many different subjects. In the last several decades, roughly 25 states and several large municipalities have switched from a decentralized system to a centralized one.

Despite the trend, the centralized system is not without its critics. Some say that a hearing officer unconnected to the agency is ill-equipped and in any case the wrong party to be deciding and implementing agency policy. Others point out that complex matters such as tax policy and utility regulation need to be

determined by specialized adjudicatory officers within the agency rather than generalist hearing officers who lack training and experience in the subject.

Proponents of the centralized model, though, contend that it resolves the most flawed element of the traditional system by separating hearing officers from the agencies subject to their decisions, thereby removing any appearance of bias or conflict of interest. Efficiencies are also promoted by avoiding repetition on such matters as administration, education, and training. In sum, its advocates argue that the centralized system provides a structure for contesting state administrative agency decisions that is independent, impartial, and efficient.

The Committee finds it worth noting that at one point in time the Vermont House of Representatives agreed that Vermont should change from a decentralized hearing officer system to a centralized one. In 1990, the House passed H.819, An Act Relating to Office of Administrative Law. *See* Appendix 1. H.819 created an Office of Administrative Law within the Agency of Administration and centralized most State hearing officers within that office. The hearing officers were redesignated as administrative law judges and required to be attorneys. Although it could not be determined why H.819 was not acted upon in the Senate, the Committee agrees with the policy it proposed.

After careful consideration of the competing arguments, the Committee believes there is a persuasive case that Vermont should complete the process it began when H.819 passed the House in 1990 and move from a decentralized hearing officer system to a centralized one. When a hearing officer works for the agency whose decision the officer must either support or invalidate, there is an inherent pressure to reach the agency's preferred result. Fortunately, cases of actual improper contact between an agency and its hearing officers are rare (though not unheard of; Oregon switched from a decentralized to a centralized system in part after it became apparent that its Director of Revenue was interfering with decisions of its department hearing officers). But the perception of partiality is unavoidable, and in this case it is not unreasonable. A system in which the same body charges, prosecutes, and decides a case does not appear fair, even if in most cases, such a system is handled fairly.

However, the Committee recognizes that such a significant and complex change in the structure of State government would require a major investment in time and resources to prepare, plan, and implement. Before undertaking a reorganization of this magnitude, it is crucial that a broad range of stakeholders and interested parties agree that going forward is both the correct policy and a feasible one. Composed of only six members and meeting only four times, the Committee simply did not have the time and resources to complete such a complex task. So while the Committee was convinced that a centralized

hearing officer model is the better policy, it cannot recommend that such a change be made without further examination.

Fortunately the Committee's study, including the State agency hearing officer survey describe in paragraph (2) below, indicated that there are a number of measures short of a wholesale organizational change that would substantially improve the hearing officer system in Vermont. The Committee recommends that these steps, detailed in paragraphs (3)–(7) below, be taken immediately, and that the General Assembly later consider whether more systemic changes are appropriate.

2. After conducting what appears to be the first inventory of how hearing officers are administered, used, and employed in Vermont, the Committee believes there are opportunities to make processes related to hearing officers more consistent.

Every year, nearly 200 hearing officers in Vermont make approximately 10,000 decisions affecting the rights of Vermont citizens. In many ways, that is the most important statistic the Committee can report after it surveyed Vermont agencies about their use of hearing officers, and the numbers highlight how important it is to understand what hearing officers do in Vermont and whether any areas of their jobs need additional support, oversight, or resources.

As soon as it began work, it was immediately obvious to the Committee that one of its biggest challenges was the lack of any data or information about the function of hearing officers in this State. To remedy this information deficit, the Committee undertook what appears to be the first effort to inventory how hearing officers are used throughout Vermont government. The Committee sent a detailed list of questions about hearing officer use to all State agencies and departments on September 30, 2013, and sent a shorter list of follow-up questions on November 15, 2013. *See* Appendices 2 and 3. Among other things, the survey asked about how many individuals serve as hearing officers, how many and what types of cases are heard, what rules of procedure and codes of conduct apply, whether there are any education and training requirements, and how performance is evaluated. Every agency and department surveyed ultimately provided responses, which are attached to this Report as appendices 4 and 5. The responses are lengthy, so for ease of reference, the Office of Legislative Council compiled summaries of the responses. The summaries are attached as appendices 6 and 7.

After reviewing the responses to its survey, it became apparent to the Committee that the wide range of roles hearing officers have in different State agencies permits very few generalizations to be made about the function of hearing officers in Vermont. There are 12 full-time hearing officers and 160–175 other individuals serving as part-time hearing officers either by

contract or as one portion, often a very small one, of the person's duties as a State employee. There was insufficient data to determine with confidence the FTE equivalency of the individuals serving part-time. In some cases, the commissioner of a department or its general counsel serves as a hearing officer, and at other times employees are designated to serve by the commissioner. This group of almost 200 people hears and resolves approximately 10,000 different matters each year.

Some Vermont hearing officers are required to be attorneys, while many have no particular qualification requirements. A few agencies have annual performance reviews but many have no evaluation procedures at all. Some agencies provide training but in most cases it is informal and not part of any organized program. Hearing officers who are attorneys are subject to the Rules of Professional Conduct, a few others are subject to particular agency ethics rules, but in most cases there is no generally applicable code of conduct. There are no standardized procedures for filing complaints about hearing officer performance, and in most cases it appears that if one were filed, it would be heard by another employee of the same agency that was a party to the decision.

There are, to be sure, some advantages to this decentralized system. Agencies with lower case volume are able to focus training on their specific subjects, for example, and to ensure that employees who spend only a small percentage of their jobs functioning as hearing officers do not spend a disproportionately large amount of time on related matters such as education.

But the decentralized model has an inherent lack of organizational and supervisory consistency that creates systemic disadvantages. Hearing officers make decisions affecting important rights every day but there is no way to be sure they are properly educated and trained for such a significant role. There are virtually no rules of professional conduct applicable to hearing officers, and most agencies lack any established process to hear any complaints about their conduct if they are made. Some agencies regularly evaluate the performance of their hearing officers but others do not, and it is not even clear that litigants always receive a copy of the procedural rules applicable to their cases. In at least these areas, the Committee believes, some centralization is necessary.

It was evident from the testimony provided by supervisors, commissioners, and hearing officers themselves that Vermont is very well served by a dedicated and accomplished group of people who serve as hearing officers. But as with any large system there is always room for improvement, and in this case, the survey responses helped demonstrate to the Committee that the primary area in need of improvement is the lack of broadly applicable, consistent procedural structures for hearing officers. The Committee's specific recommendations for establishing these structures are detailed below.

3. A State entity should be designated to receive, consider, and determine complaints about hearing officers' conduct.

One of the most troubling facts presented to the Committee is that when a person has a concern about a hearing officer's conduct or performance, there is nowhere the person can go to file a complaint. If a litigant has a concern about a judge in the Judicial Branch, a complaint can be made to the Judicial Conduct Board. Similarly, an allegation of misconduct by an attorney can be made with the Professional Conduct Board, just as complaints about other regulated professionals may be made to (and are investigated by) the Secretary of State's Office of Professional Regulation. But, remarkably in light of their powers and responsibilities, there is no similar entity able to receive and determine complaints about administrative hearing officers.

This concern is far more than theoretical. According to its Chair, the Judicial Conduct Board regularly receives complaints about the performance of Vermont hearing officers. The complaints vary widely but typically address matters such as professional competence, knowledge and application of the rules, dissatisfaction with the result of a case, showing lack of respect to the parties, and demonstrating bias or prejudice. Perhaps the most troubling complaints involve allegations of ex parte communications or conflicts of interest where the hearing officer denies a request for recusal. Although precise figures were unavailable, the Chair reported that the complaints are not insignificant in number and that they have occurred with enough frequency and consistency that the Board has been concerned about them for some time.

Despite its concern about the complaints, though, the Judicial Conduct Board (JCB) cannot address them. As the Vermont Supreme Court has ruled, the Code of Judicial Conduct does not apply to Executive Branch hearing officers absent a statute directing otherwise. *In re Crushed Rock*, 150 Vt. 613, 623 (1988). As a result, the JCB is forced to inform complainants that it does not have jurisdiction over matters related to hearing officers. While correct, this response is bound to be frustrating for the complainant. Even more concerning is that the complainant cannot be referred elsewhere because no other entity has jurisdiction, either.

This state of affairs cannot be permitted to continue. It should not be the case that hearing officers make decisions affecting the rights of many thousands of people every year, yet there is no independent entity where a person can file a complaint about how the hearing was handled or about how he or she was treated. The Committee recommends that, either by statute or Executive Branch rule, a specific entity be designated to receive, hear, and determine complaints about hearing officer conduct. The Committee is confident that in the vast majority of instances, hearing officers' job performance is outstanding, but the existence of a forum for complaints about the occasional instances

when improvements are needed will substantially increase Vermonters' overall satisfaction and sense of fairness in the system.

4. A Code of Conduct should be adopted for administrative hearing officers in the Executive Branch.

Just as there needs to be a forum to hear complaints about hearing officers' conduct, there also needs to be an express statement of what the rules of conduct are. Ex parte communications and conflicts of interest, for example, are far more complex concepts than they appear and involve various nuances and subtleties in their application. It would be unfair to expect hearing officers to know how to apply such principles without providing them with a written code of conduct that establishes how the rules should work.

An excellent example of a code of conduct for hearing officers is the Model Code of Judicial Conduct for State Administrative Law Judges (attached as Appendix 8). Developed by the National Association of Administrative Law Judiciary and the American Bar Association, the Model Code or some version of it has been adopted by a number of jurisdictions throughout the country to guide the conduct of hearing officers, referees, administrative law judges, and others who adjudicate claims made to state agencies. It contains provisions addressing the appearance of impropriety, impartiality, ex parte communications, conflicts of interest, and virtually any other ethical matter with which a hearing officer should be familiar.

The Model Code is an excellent starting point, and the Committee recommends that the Model Code, a version of it, or at least something similar be adopted in Vermont. The code of conduct could be adopted in the same manner as the entity to receive the complaints is established, by statute or Executive Branch rule. With a code of conduct in place, hearing officers and litigants will have a much better understanding of what is required under the relevant professional standards.

5. State agencies that use hearing officers should ensure that their performance is evaluated at least annually.

The Committee was impressed with the high degree of excellence demonstrated by Vermont hearing officers, who are asked to resolve thousands of disputes a year involving the rights and responsibilities of citizens and the State. During the course of its hearings, the Committee took testimony from a number of hearing officers, heard from management personnel who supervise hearing officers, and even held a roundtable of Vermont hearing officers from the Departments of Taxes and of Labor and the Office of Professional Regulation. It was consistently reported that the job performance of hearing officers in Vermont is outstanding.

Although their overall performance was excellent, as discussed earlier the Committee was also told of instances where hearing officers faced troubling accusations of conflicts of interest, appearance of bias, ex parte communications, and substandard decision making. Problems such as these could almost certainly be corrected if the hearing officers involved were made aware of the issues and given guidance about how to address them. An annual performance evaluation would be an excellent method for providing this feedback.

There are some Vermont agencies that regularly evaluate the performance of their hearing officers under existing practices. However, the majority of these evaluations appear to be informally conducted and do not adhere to any pre-established process. It is frequently unclear in advance precisely who is responsible for the review and how often it occurs. In order for hearing officers to benefit, the process for performance reviews should be consistent and predictable. Establishing an annual review and informing hearing officers who will conduct it would create a consistent and timely flow of constructive feedback. As a result, hearing officers would be able to correct problems when they occurred, and parties would see timely improvements to the proceedings when they were necessary.

6. The State should provide hearing officers with a broad and thorough program of education and training.

The responses to the Committee's survey indicate that in many cases hearing officers are provided with a high level of education and training. Some hearing officers are permitted to attend the National Judicial College, for example, while others attend conferences and training sponsored by organizations with specific expertise in a particular subject matter. The necessity for quality in this area is obvious: more highly trained hearing officers are provided with the tools and education to perform their jobs even better and enhance litigants' satisfaction with the results.

As in most decentralized systems, though, there are no uniform requirements for education and training that apply regardless of which agency a hearing officer serves. This is perhaps an understandable result of a system in which some individuals serve as full-time hearing officers while others spend only 10 percent of their time in that function. Nevertheless, it is also understandable that that distinction makes no difference to the person whose rights are being decided. That person deserves a highly trained hearing officer just as much as the hearing officer deserves quality training, and the State should ensure that such training is provided.

In order to provide litigants with the highest quality decision makers in disputes with government agencies, the Committee recommends that the State ensure that hearing officers receive a broad and thorough program of education

and training. The program should include consistent training so that all hearing officers attain the same minimum level of proficiency on particularly important subjects such as ex parte communications, bias, and conflict of interest. Hearing officers deserve the best education and training their employers can offer, just as the litigants who appear before them do, and it is the State's responsibility to provide it.

7. All parties in proceedings presided over by hearing officers should be provided with a copy of the rules of procedure applicable to the proceedings, including the rules for filing an appeal.

It should go without saying that a basic element of fairness and due process is that a person should know the rules of a proceeding before having his or her rights determined by it. Nevertheless, it is frequently the case that parties to administrative proceedings in Vermont are not aware of the applicable rules of procedure at the outset. One of the primary reasons for this is that the vast majority of parties in these matters are not represented by attorneys or by anyone else with sufficient knowledge about and experience with the process to advocate for the party's interests. Not knowing how the process works places the person at a severe disadvantage and runs the risk of permitting the person to make uninformed decisions that adversely affect his or her own rights without realizing that other options may have been available.

It is true that in some cases the rules applicable to Vermont administrative proceedings are available to participants through an on-line database. In addition, there are instances in which the rules are provided directly to the parties, or at least made available to them. But there is no systemic approach to the issue, and very rarely is there any certainty that a party who had access to the rules actually received a copy of them.

The need to know the procedural rules is especially acute with respect to a party's appeal rights. A party does generally have the right to appeal a hearing officer's decision to a court, whether the governing statute explicitly provides for an appeal or not. *See* Vermont Rules of Civil Procedure 74, 75 (establishing process for appeal of decision rendered by government agency). However, it is a longstanding legal principle that such an appeal can only be taken after the party has exhausted all potential administrative remedies. Known as the doctrine of "administrative exhaustion," this rule can serve as a difficult hurdle for parties because many State agencies have several layers of internal review that must be completed before an appeal can be brought to a court. It is not uncommon for this lengthy process to cause a person to drop the matter altogether, a result that prompted one witness to observe that on account of the exhaustion doctrine "the State wins by losing slowly." If the process is pursued, though, a person who does not know how to navigate it may find his or her attempt to appeal a hearing officer's decision sent from a

court back to the agency in order to exhaust administrative remedies that the person did not know existed.

Under these circumstances it is obviously crucial that a party to an administrative proceeding be given a copy of the rules of procedure that apply to the proceedings, and that the rules should prominently describe any appeal rights the party has. Consistent and uniform application of this requirement would increase the fundamental fairness of the proceedings and permit parties to exercise fully the rights they already have.

VI. CONCLUSION

A centralized system may well be the fairest and most efficient model for Vermont to adopt for purposes of the thousands of matters hearing officers decide each year that affect the rights of Vermonters. The centralized system largely frees administrative hearing officers from the unavoidable perception of partiality that citizens feel when their cases are decided by an employee of the same agency whose decision is being challenged. A centralized model also offers opportunities to maximize efficiency by bringing the education, training, supervision, and evaluation of hearing officers together under one roof. However, whether to institute such a wholesale change in the structure of State government is not a decision the Committee can make with only a handful of meetings in a short time. If the General Assembly wishes further to consider shifting to a centralized hearing officer system, then it should establish a longer-running committee or task force to make a final recommendation on the issue. Whether or not this occurs, Vermont's current decentralized hearing officer system could be substantially improved by establishing a hearing officer code of conduct and disciplinary system, designating a State entity to receive and determine complaints about hearing officer conduct, requiring annual evaluations of hearing officer performance, and establishing a system for hearing officer education and training. With these enhancements, Vermonters' trust and faith in a system that makes thousands of decisions impacting their rights each year could be significantly increased.