

1986

An State Central Panel Hearing Officer System for Wyoming

Edgar Young

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Young, Edgar (1986) "An State Central Panel Hearing Officer System for Wyoming," *Land & Water Law Review*: Vol. 21 : Iss. 2 , pp. 497 - 526.

Available at: https://scholarship.law.uwyo.edu/land_water/vol21/iss2/12

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

University of Wyoming

College of Law

LAND AND WATER LAW REVIEW

VOLUME XXI

1986

NUMBER 2

A State Central Panel Hearing Officer System For Wyoming

*Edgar Young**

There are several problems with Wyoming's present non-system of administrative hearing officers and presiding officers, and the problems are likely to get worse. These problems are apparent to several courts, attorneys and private parties. Eight states have experience with a central panel, or state administrative hearing officer system, and each has found that it works well. The author suggests that Wyoming develop a central panel system to fit its state administrative hearing needs. A proposal to accomplish this is suggested.

PRESENT WYOMING STATUTES CONCERNING HEARING OFFICERS

Administrative hearing procedures are controlled in Wyoming by the Administrative Procedure Act (the APA),¹ agency procedural rules,² specific subject matter statutes,³ federal laws and regulations,⁴ state and federal constitutions (such as requirements for due process) and court decisions.

*Edgar Young is a private attorney in Cheyenne and a part-time staff attorney for the University of Wyoming. Although any opinions expressed are his, much of the information for this article was gathered while he was an Assistant Attorney General for the State of Wyoming.

1. WYO. STAT. §§ 16-3-101 to -115 (Supp. 1985).

2. Required by *id.* § 16-3-102 and authorized or required by specific agency statutes, such as *id.* § 33-28-105(a) for the Real Estate Commission.

3. *See, e.g., id.* § 35-9-124(a)(ii) (electrical safety).

4. *E.g.,* 20 U.S.C. §§ 1400-61 (1982); 34 C.F.R. § 300 (1985) (education of handicapped children).

The APA covers the vast majority of administrative agencies and their hearings. It contains several provisions relating to hearing officers ("presiding officers"),⁵ but nothing about a body of independent hearing officers.⁶

5. The terminology for hearing officers and administrative proceeding roles varies among states. This article will use the following terms:

- a. Administrative Law Judge (ALJ): The person who controls all procedural and evidentiary aspects of a contested case or rulemaking hearing; assumes the present Wyoming roles of presiding officer and hearing officer; and who is known in some states as an administrative trial judge, administrative hearing officer, hearing examiner, or administrative magistrate. The title also might be administrative hearing judge.
- b. Agency Advocate: The agency counsel or agency official who presents the agency's case in a contested case.
- c. Agency Counsel: The attorney assigned to the agency from the Attorney General's Office, or another attorney retained by the agency, to represent it in an administrative matter.
- d. Agency Decisionmaker: The administrative body (such as board, commission or counsel) or individual (for example, agency head) who makes the final administrative decision in a contested case or who issues agency rules.
- e. Agency Official: The agency head or other official who makes the agency's initial decision to pursue a contested case or rulemaking hearing matter and who also may serve as the Agency Advocate.
- f. Central Panel System: A state's centralized body of administrative law judges.
- g. Office of Administrative Law (OAL): An independent state agency of administrative law judges, known in some states as the office of administrative hearings, division of administrative hearings, or administrative procedures division.
- h. Hearing Officer: Under present Wyoming practice, a person hired or appointed to control the procedure and evidentiary aspects of a contested case hearing in accordance with individual agency practice under the Administrative Procedure Act; not statutorily defined, but generally an attorney.
- i. Presiding Officer: Under present Wyoming practice, the person who runs a contested case hearing. Under Section 16-3-112(a) of the Wyoming Statutes, this may be a hearing officer, or an attorney from the Attorney General's Office. Some agency rules prohibit the last option.

6. See WYO. STAT. § 16-3-107(d) (Supp. 1985) (an agency must promulgate procedural rules to provide that presiding officers will issue subpoenas upon request by a party); *Id.* § 16-3-107(k) (an agency's advocate or counsel cannot also be the presiding officer or provide ex parte advice to the presiding officer or agency decisionmaker in a contested case); *Id.* § 16-3-109 (parties must have an opportunity to file responses to a presiding officer's recommended decision in a contested case); *Id.* § 16-3-112(a) (a presiding officer can be one or more members or an employee of the agency or an employee of another agency. The employee can include an independent hearing officer hired by an agency.); *Id.* § 16-3-112(a) (a presiding officer must function impartially); *Id.* § 16-3-112(a) (a presiding officer must withdraw upon deciding that he or she is disqualified and another qualified presiding officer is available); *Id.* § 16-3-112(b) (a presiding officer may, subject to agency rules: administer oaths, issue subpoenas, make evidentiary rulings, oversee depositions, regulate hearings, hold pre-hearing conferences, handle procedural motions and matters, make recommended decisions, and take other authorized actions); *Id.* § 16-3-112(c) (the Attorney General's Office must help agencies to prepare and present contested cases when requested (nothing is mentioned about presiding)); *Id.* § 16-3-112(d) (the Attorney General's Office (impliedly) can provide someone to be presiding officer in a contested case, without charge to the agency); *Id.* § 16-3-112(e) ("When required by law" (which is undefined), an agency must adopt rules to use hearing officers); *Id.* § 16-3-112(e) (a hearing officer cannot make the final decision unless "required by law").

WYOMING LEGISLATIVE AND JUDICIAL HISTORY
ON ADMINISTRATIVE HEARING OFFICERS

In the spring of 1962, the Wyoming Law Journal published a symposium on administrative law in this state.⁷ In his introduction to the publication, Professor Harold Bloomenthal suggested that, along with adoption of an administrative procedure act, consideration be given to the creation of a separate agency to control the selection, promotion, assignment and general supervision of hearing examiners.⁸ Professor Bloomenthal pointed out that licensing agencies often have very little experience or expertise in presiding over hearings.⁹ In December of 1962, the Wyoming Bar Association Committee on Administrative Law submitted its report, recommending the adoption of an administrative procedure act. The Committee, which included Robert Chaffin, then-Judge Rodney Guthrie and present Attorney General A. G. McClintock, was chaired by Professor Bloomenthal. The Committee's report stated that the future establishment of a separate agency of qualified hearing officers insulated from direct agency control might be warranted and feasible.¹⁰

In 1965, House Bill 196, the "Wyoming Administrative Procedure Act," was introduced in the Wyoming Legislature by many sponsors, led by then-Representative and present Governor Ed Herschler, and it was enacted as House Enrolled Act 91.¹¹ Section 12 of the Administrative Procedure Act provided for "presiding officers" at hearings to control the presentation of evidence, and to give oaths, issue subpoenas, order depositions, regulate hearings, hold prehearing conferences, dispose of procedural matters, and make recommended decisions.¹² No statutory provision then or since has related to the establishment of a body of hearing officers.¹³

In 1976, a note in an opinion of the Wyoming Supreme Court recommended the establishment of a body of independent hearing officers to provide due process for administrative hearings. Justice Robert Rose stated that it was intended:

to direct the attention of the legislature to the dire need of independent hearing examiners. The growth of administrative law and the imminence of many more administrative hearings to come from recently-enacted legislation will alert all concerned with the need for hearing officers with the appropriate legal training. They should not be appointed by, paid by, or beholden to any agency. After the hearing they should be authorized to make a recommend-

7. *Administrative Law Symposium*, 16 WYO. L.J. 191 (1962). Another Wyoming administrative law symposium, if not conference, seems to be overdue.

8. *Id.* at 197, 201.

9. *Id.* at 199.

10. Wyoming Bar Ass'n, Comm. on Administrative Law, Report on a Proposed Wyoming Administrative Procedure Act Part I, at 6; Part 2, at 28-29 (unpublished report 1962).

11. Wyoming Administrative Procedure Act, ch. 108, 1965 Wyo. Sess. Laws.

12. WYO. STAT. § 9-275.30 (1965) (presently WYO. STAT. § 16-3-112 (1979)).

13. See Comment, *The Wyoming Administrative Procedure Act*, 1 LAND & WATER L. REV. 497, 508 (1966).

ed decision which the agency may adopt or modify, always retaining the right of appeal by any aggrieved person.¹⁴

In his 1978 address to the Forty-fourth Wyoming Legislature, then-Chief Justice Rodney Guthrie noted the grave and growing problem of administrative agencies whose activities affect many people, when he stated that:

In many instances a designated board must initiate a complaint, hold a hearing upon that complaint, and then judge the propriety or truth thereof, which in many cases may be the equivalent of a finding of guilt or innocence of certain charges, and which in all cases affect the right of an aggrieved person. To ask board and commission members to accuse—try—and decide such complaints or make such determinations is to ask too much of anyone, and the system tends to give an impression of impropriety to those who must submit to it.¹⁵

He went on to suggest a solution to insure proper protection of constitutional due process guarantees:

[T]here should be created a staff of competent and experienced trial or hearing examiners who would have no connection with the administrative body before whom the complaint has originated and which is faced with its disposal. The use of these offices should be made mandatory in all contested cases where there is any possibility of prejudice or adversity of interest, and they should conduct the hearing, receive all proper evidence, make a record, and prepare findings of fact and conclusions of law, along with recommendations to that administrative body.¹⁶

Rodney Guthrie had been a member of the committee which prepared the Wyoming Administrative Procedure Act. In the same legislative address, he recalled the drafter's original recognition of the necessity for a state agency of independent hearing officers.¹⁷ They had believed its legislative adoption would flow naturally from the Act's implementation.¹⁸ He thought it was time for the legislature to act on the concept.

In his 1979 address to the Forty-fourth Legislature, then-Chief Justice John Raper echoed Chief Justice Guthrie's recommendation.¹⁹

In the 1979 Wyoming Legislature, then-Representative and now Supreme Court Justice Walter Urbigkit introduced House Bill 139, which

14. Board of Trustees, Laramie County School Dist. No. 1 v. Spiegel, 549 P.2d 1161, 1170 n.13 (Wyo. 1976).

15. 1978 WYO. HOUSE DIGEST 22-23.

16. *Id.* at 23.

17. *Id.*

18. *Id.*

19. Justice Raper stated that a body of independent hearing officers "would avoid charges of prejudice, impropriety, and an interest in the outcome. It is too much to ask an administrative body to accuse, to try the charge, and sit in judgment to decide disposition. We continue to urge corrective action in the interest of preserving the concept of due process." 1979 WYO. HOUSE DIGEST 19, 23.

would have created a Division of Administrative Hearings within the Governor's office. The Division would have included a fifty-six member Advisory Council, and hearing officers recommendations would have been mandatory in all contested cases at the state and local level.²⁰ The bill carried a \$150,000 appropriation and did not specify the number of attorneys to be employed.²¹ The bill died on general file in the Senate.²²

The 1980 legislature passed House Bill 41²³ to permit agencies to adopt rules for the use and selection of independent administrative hearing officers who could, at an agency's option, make the final administrative decision. The Governor, on advice from the Attorney General, vetoed the Act. The Governor's veto message cited the Act's enlargement of the definition of a "person" to permit an agency to obtain judicial review of another agency's decision, the unclear delegation to hearing officers of an agency's decision-making authority, the deletion of the rule of necessity, and the restriction on official notice by administrative agencies. The Governor stated that he did not oppose the principle of independent hearing officers.²⁴

One problem which the 1980 legislation could have corrected was resolved by the 1981 legislature. Federal law on handicapped children disputes²⁵ required that an impartial hearing officer make the final administrative decision. Our Administrative Procedure Act prohibited them from doing so and the loss of Wyoming's federal handicapped children funds was threatened. An interim compromise utilizing rulemaking had been worked out by the Attorney General with the State Department of Education, Federal Department of Education and the Legislative Service Office, pending changes to the APA.

The 1981 legislature enacted House Bill 45²⁶ to allow agencies to use an independent hearing officer who could make the final administrative decision when "required by law."²⁷ Whether due process, as well as specific statutory and regulatory provisions, could require that the independent hearing officer make the final administrative decision is uncertain.²⁸

Also in 1981, the legislature created an office of driver's license hearing examiners with limited jurisdiction. It provided for administrative appeal to the Wyoming Tax Commission, and authorized the Governor to appoint a chief hearing examiner and additional part-time examiners

20. H.R. 139, 45th Wyo. Legis. (1979), 1979 WYO. HOUSE DIGEST 142.

21. *Id.*

22. *Id.* at 146.

23. H.R. 41, 45th Wyo. Legis. (1980), 1980 WYO. HOUSE DIGEST 51.

24. Governor's Veto Message, Enrolled Act 39, 1980 Wyo. Legis. (on file with the Secretary of State).

25. Education of the Handicapped Act, 20 U.S.C. §§ 1400-61 (1982); 34 C.F.R. §§ 300-301 (1985).

26. Act of February 10, 1981, ch. 10, 1981 Wyo. Sess. Laws (presently WYO. STAT. § 16-3-112(e) (Supp. 1985)).

27. *Id.*

28. See *Ririe v. Board of Trustees of School District No. 1, Crook County*, 674 P.2d 214, 224 (Wyo. 1983).

throughout the state. The initial program had a \$91,200 budget.²⁹ That office is currently functioning within the Department of Revenue and Taxation.

The 1982 legislature recodified the APA into Title 16,³⁰ but made no change to the hearing officer provisions. In the same year, the Wyoming Supreme Court held that the requirements for due process were satisfied at a hearing which utilized an independent hearing officer, but at which the decision-making board members were not present. The agency decisionmakers instead relied upon the record, the parties' proposed decisions, the recommended decision of the hearing officer, and the parties' response to the recommended decision.³¹

The 1983 legislature's House Bill 200³² further clarified that an agency's attorney or advisor could not both represent the agency as a party and serve as the hearing officer or give the agency *ex parte* advice.³³ In the same session, Senator Scott's bill³⁴ to provide independent hearing officers for Insurance Department hearings died on general file in the Senate.³⁵

The 1984 legislature made no changes to the APA. The 1985 legislature made changes to two rulemaking sections,³⁶ but did not alter the presiding (hearing) officer sections. No final action relative to the APA had been taken by the 1986 legislature at the time this article was written.

PROBLEMS WITH THE PRESENT SYSTEM

The Wyoming Administrative Procedure Act allows agencies significant latitude in creating their own hearing procedures. Each state agency establishes its own hearing rules and procedures, and determines whether and to what extent it will use independent hearing officers. The only exception is the Department of Revenue and Taxation, for which the use of driver's license hearing examiners is statutorily directed.³⁷ There is a wide variation among state agency hearing rules and procedures.

Several problems with the present system are apparent. They will be discussed and compared with a central panel hearing officer system.

Contested Cases

Agencies should provide actual and apparent due process to parties in contested cases. An inherent administrative law problem of agencies,

29. Act of March 3, 1981, ch. 117, 1981 Wyo. Sess. Laws §§ 1, 2 (presently WYO. STAT. § 31-7-105 (Supp. 1985)).

30. WYO. STAT. §§ 16-3-101 to -115 (Supp. 1985).

31. Wyoming State Department of Education v. Barber, 649 P.2d 681 (Wyo. 1982).

32. Act of February 23, 1983, ch. 16, 1983 Wyo. Sess. Laws (presently WYO. STAT. § 16-3-107(k) (Supp. 1985)).

33. WYO. STAT. § 16-3-107(k) (Supp. 1985).

34. S. 239, 47th Wyo. Legis. (1983), 1983 WYO. SENATE DIGEST 274.

35. *Id.* at 275.

36. Act of February 13, 1985, ch. 57, 1985 Wyo. Sess. Laws. See WYO. STAT. §§ 16-3-103(a), -104(a) (Supp. 1985).

37. WYO. STAT. § 31-7-105 (Supp. 1985).

which both prosecute a matter and decide it, could be greatly alleviated by the use of truly independent hearing officers. Under present agency practice, there may be no hearing officer at all, the Attorney General's Office may provide the hearing officer, an agency official may be the hearing officer, or the agency may hire a private attorney to be the hearing officer. Each of these practices may present an apparent conflict of interest or an apparent denial of a fair hearing.³⁸

Actual and apparent improper *ex parte* contacts between the agency decisionmaker, the agency advocate, and the hearing officer may also cause concern that a fair hearing has not been provided to a party in a contested case. Regardless of whether the agency advocate is from the agency, the Attorney General's Office, or is someone hired by the agency, the perception of conflict, and often the actual situation, involves a close working and personal relationship between the advocate, agency officials, decisionmakers and the hearing officer. Parties in a contested case may be concerned about this arrangement and suspicious that it does not provide a fair hearing opportunity. Attacking this arrangement is difficult for the suspicious private party, however. It would be difficult to prove a violation of the APA prohibition against *ex parte* contacts,³⁹ since the evidence of any actual impropriety will likely be difficult to obtain. Parties must trust that nothing improper has occurred. A state body of independent hearing officers would avoid this problem.

Another problem with the present administrative process is that parties and their counsel appearing before agencies often are uncertain about the hearing procedures. To a lesser extent, agency counsel, officials, decisionmakers, and the hearing officer share this uncertainty. The APA allows latitude on hearing procedures and there is a great variety among agencies' procedural rules. This lack of uniformity and the awkward, confusing or outmoded content of many agency rules creates confusion about the hearing process. A state agency focusing on administrative procedure could produce consistent, clear and fair hearing procedural rules which could be either model or required procedures for agencies.

The limited availability of competent hearing officers is another problem. Retired judges may be knowledgeable, but their availability is not dependable and their numbers are very few. There are few private Wyoming attorneys with a specialized administrative law practice, background or experience, and those few attorneys generally have other time commitments. Agencies now may not be able to hire a competent independent hearing officer. Agencies have on occasion been forced to retain a hearing officer who fails to understand the less formal nature of administrative hearings and the less restrictive administrative rules of evidence, causing those administrative hearings to become unnecessarily formal and expensive. A state body of independent hearing officers would have the needed expertise and could assert control over hearings to avoid making them seem like civil trials.

38. See 1978 WYO. HOUSE DIGEST 22-23 (comments of Chief Justice Guthrie to the 44th Wyoming Legislature).

39. WYO. STAT. § 16-3-111 (Supp. 1985).

Sometimes an otherwise competent and available hearing officer is unavailable because the person has ties to the agency or to a party in the case. In a state as small as Wyoming, private attorneys who become experienced at administrative practice often are retained by associations or individuals who are regularly affected by agency decisions and rules. Thus, those potential hearing officers may have a conflict of interest which prevents them from being an impartial hearing officer. Full-time and independent hearing officers supplemented by contract hearing officers who are not assigned to preside at cases in which they have a conflict, would avoid this problem.

When competent and available officers who have no apparent conflict of interest can be found, agencies often pay fifty to seventy dollars per hour (sometimes with a special rate of one hundred to two hundred dollars per half day of actual hearing time) to obtain a hearing officer. This can add up to a significant cost for agencies which have many hearings, which have an unexpectedly long or involved hearing, or which have their first or an otherwise unanticipated (and unbudgeted) hearing. A state agency of hearing officers, even with a chargeback system, would be substantially cheaper for the agencies and would save the state money.

Some agencies use the Attorney General's Office to provide hearing officers. They may also use their agency's assigned Attorney General counsel (a different person) to present the case. Some agency statutes prohibit this.⁴⁰ But, even where not prohibited, it is an undesirable practice. Where the Attorney General's Office furnishes a hearing officer, but not the agency advocate, it still tends to appear improper to the parties and the public, who are aware that the agency is entitled to and receives counsel from the same Attorney General's Office. This may not be a legal conflict of interest, since the Attorney General's Office may be statutorily required to both serve agencies and provide hearing officers. It appears to be a conflict, though, and it is one that is easily avoided by using independent hearing officers. Where an agency official is the advocate, and there has been no Attorney General involvement in preparing or presenting the case, the appearance of an unfair hearing is diminished, but not removed. The agency also has deprived itself of legal advice in preparing the case, which may cause the case to be less vigorously and competently presented. Use of truly independent hearing officers would avoid these problems as well.

Some agencies use the agency head or a board member to sit as the hearing officer. This person is generally not an attorney and is often unfamiliar with administrative law, procedure, and evidentiary rules. Thus, the hearing officer may be either intimidated by counsel or become overaggressive (and sometimes commit legal errors) in order to maintain hearing control. This person obviously has at least one apparent conflict of interest with the agency decisionmakers, since he or she generally has a close professional and personal relationship with them. A hearing officer

40. *E.g.*, *id.* § 33-28-113(a) (Real Estate Commission).

who is a board member should not also be a decisionmaker, due to this conflict. If the board member recuses himself, however, he has deprived the state of the judgment of one of the persons appointed to decide such matters. Independent hearing officers do not have this problem.

Some agencies may hold hearings without a hearing officer. This necessarily means that the decisionmakers will involve themselves more in the presentation of the case by all parties. When they do so, there is a greater likelihood that the decisionmakers will interject their opinions into the case record and the appearance of bias is increased. It encourages more appeals of agency decisions on due process or fairness grounds. Using an independent hearing officer helps decisionmakers avoid excessive involvement in the proceedings.

Attorneys, especially those experienced in administrative hearings or civil trials, are aware that administrative decisionmakers, like juries, may allow improper considerations to affect their decision. It is only human nature to allow personal prejudices, friendships, animosities, competitive jealousies, or matters outside the record to affect a decision, but it is legally wrong. An independent hearing officer would control the hearing, and could be available to the decisionmakers in executive session to help insure that the real basis for the agency decision is on the record and derived from the evidence.

The APA requires proper, sufficient and consistent findings of fact and conclusions of law for every final decision in a contested case.⁴¹ These decisions are not easy to draft, even for experienced attorneys. Yet a poorly written decision may confuse a district court when it is considering an agency decision on appeal, and may affect the outcome. State agency hearing officers would be trained and experienced in drafting administrative decisions that are legally and practically proper, sufficient and consistent, as well as understandable.

Rulemaking Hearings

Rulemaking hearings are uncommon for most Wyoming administrative agencies, so the confusion, procedural rule deficiencies, hearing officer, and conflict of interest problems noted for contested cases are even worse for rulemaking hearings. However, since the due process concerns in the quasi-judicial function of rulemaking are less substantial than for contested cases, there is less need for hearing officers at rulemaking hearings. These hearings do occur and will continue to do so, however, and rulemaking public comment hearings are more likely to get out of control than contested case hearings. Trained hearing officers would control rulemaking, and other public hearings (such as on state plans developed by agencies after receiving public comments) and allow the agency representatives at the public hearing to concentrate on the substance of the comments.

41. *Id.* § 16-3-110.

Advantages and Disadvantages of a Central Panel System

Although conclusive documentation is not available to substantiate them, there are claimed advantages of a central panel system of hearing officers.⁴² There is a perception of increased fairness in the administrative hearing process, thus also in agencies and government in general. Further, a central panel system offers more efficient allocation of human and fiscal administrative hearing resources and agency decisions which are in proper final order form. It is also expected that a central panel system provides improved hearing officer knowledge, skills and proficiency, savings in staff, facility, equipment and library costs⁴³ and more objective and effective hiring, training, evaluation and use of hearing officers.

No change of this magnitude is without potential risks. One possible disadvantage may be a reduction of agency control over the outcome of hearings and the potential for political bias developing from the politically-appointed Chief Administrative Law Judge (ALJ), who hires the ALJs, and who can be removed only for cause (to preserve the independence of the office). There may also be a fear, often unexpressed, that truly independent hearing officers may issue recommended decisions which are objectively fair, but not wholly consistent with political and policy agendas.

MODEL LEGISLATION FOR A CENTRAL PANEL SYSTEM

Administrative adjudication involves a tradeoff between fairness and expediency. In order to insure public participation, uniformity, and fairness in administrative proceedings, the federal government and states have adopted administrative procedure acts. Those acts seek to strike a reasonable balance between the need for efficient, economical, and effective government administration and the need to provide adequate procedural protection to persons affected by agency action.⁴⁴ An administrative procedure act creates only procedural rights and imposes only procedural duties, leaving substantive matters to the agencies. The National Conference of Commissioners on Uniform State Laws has adopted model administrative procedure acts in 1946, 1961 and 1981, with some revisions later made to each. In 1965, Wyoming adopted a derivation of the 1961 Act.⁴⁵

The 1981 Model Administrative Procedure Act (MAPA)⁴⁶ was a complete revision, acknowledging the intervening tremendous growth in state administrative agencies, greatly increased and altered state governmental functions, judicial acceptance of agency discretion and implied author-

42. See Rich, *The Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons for a Proposed Federal Program*, 6 W. NEW ENG. L. REV. 643, 646-648 (1984).

43. See Harves, *The 1981 Model State Administrative Procedure Act: The Impact on Central Panel States*, 6 W. NEW ENG. L. REV. 661, 669 (1984).

44. MODEL STATE ADMINISTRATIVE PROCEDURE ACT, Prefatory Note, 14 U.L.A. 67 (Supp. 1986).

45. Wyoming Administrative Procedure Act, ch. 108, 1965 Wyo. Sess. Laws (presently WYO. STAT. §§ 16-3-101 to -115 (Supp. 1985)).

46. MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 14 U.L.A. 67 (Supp. 1986).

ity so long as it was coupled with adequate procedural safeguards (usually through an administrative procedure act), changing constitutional due process requirements, and developments in providing administrative procedure.⁴⁷ Chapter 3 of the 1981 MAPA created an Office of Administrative Hearings.⁴⁸ The 1981 MAPA provided for either a mandatory or voluntary central panel system.⁴⁹ It also added three other types of hearings in addition to contested cases, to accommodate hearings for which the formal adjudicative (contested case) process did not work well. Those types are informal,⁵⁰ conference,⁵¹ and emergency/summary⁵² hearings. A case may be converted from one type of proceeding to another.⁵³

Informal dispute resolution, or handling an adjudicative proceeding by negotiation, settlement, mediation or arbitration, is provided for in the MAPA.⁵⁴ This is something which presently occurs in Wyoming, but is not expressly authorized by the Wyoming Administrative Procedure Act.

Conference hearings are conducted with less formality and greater flexibility for minor matters such as major employee grievances or a license disciplinary action which does not involve denial, suspension or revocation. Conference hearings may also be held where there is no disputed issue of material fact in, for example, utility rate proceedings, whose multiplicity of parties often are awkward under normal adjudicative procedures.⁵⁵

Emergency⁵⁶ and summary⁵⁷ hearings are the other special types. Emergency action must be followed promptly by a hearing of another type (other than a summary hearing).⁵⁸

The 1981 MAPA contains many significant differences from the Wyoming Administrative Procedure Act. Many of those changes go beyond the hearing officer scope of this article and their desirability will not be discussed. The 1981 MAPA inclusion of a central panel system is helpful to study, but it is subject to some criticism as well. For example, use of the central panel is voluntary and the central panel lacks true independence because it is placed within an existing administrative agency.⁵⁹ The American Bar Association's Judicial Administrative Division of the National Conference on Administrative Law Judges is preparing a proposed revision and expansion of section 4-301 of the 1981 MAPA to give the central panel system real independence as a separate agency and to pro-

47. *Id.* at 67-70.

48. *Id.* § 4-301, at 133.

49. *Id.* § 4-202, at 118.

50. *Id.* § 1-106, at 77.

51. *Id.* §§ 4-401 to -403, at 135-136.

52. *Id.* §§ 4-502 to -506, at 137-141.

53. *Id.* § 1-107, at 77.

54. *Id.* § 1-106, at 77.

55. *Id.* §§ 4-401 to -403, at 135-136.

56. Emergency hearings are those designed to prevent, avoid or halt an immediate and significant danger to the public health, safety, or welfare. *Id.* § 4-501, at 137.

57. Summary hearings must be expressly permitted and authorized by agency rules. They involve minor matters in which only the parties are entitled to notice and an opportunity to participate. *Id.* § 4-502, at 137-138.

58. *Id.* § 4-501(e), at 148.

59. Harves, *supra* note 43, at 661.

vide a model structure. These changes are important to achieve actual and apparent hearing officer independence.⁶⁰

Nonetheless, use of the Wyoming central panel is not mandatory for agencies in the attached proposal. This is because establishing a central panel system in Wyoming is more important, at least initially, than making its use obligatory. After a Wyoming central panel system has proven itself for a few years, the next logical step would be to make its use mandatory.

SURVEY OF EIGHT CENTRAL PANEL STATES

Eight states⁶¹ have experience with fully functioning central panels of hearing officers operating from a central agency. Missouri is expanding in that direction⁶² and North Carolina has passed legislation creating a central panel system.⁶³ Several other state legislatures⁶⁴ are studying the concept and still others⁶⁵ have expressed a recent interest in the concept.

Maine has approached the issue differently. It has created a special administrative court with limited jurisdiction within the judicial branch.⁶⁶

The presence in several states of many existing hearing officers within state agencies has been an obstacle to creating a central panel system. Fortunately, this is not a significant factor in Wyoming. Very few of our state agencies employ full-time hearing officers. Still, many Wyoming agencies may be comfortable in their present hearing officer practice and resist any change. Many state agencies were the primary opponents to creation of a central panel system in their states, since it reduces their control over hearing decisions.⁶⁷ Hopefully, it will not take a scandal or major loss of confidence in the fairness of state hearings to prompt Wyoming's serious consideration of a central panel system.

Wyoming can gain much useful background by first studying how the central panel systems in the eight states really work.⁶⁸ We need not rein-

60. Heflin, *A Question of Independence*, 19 *NEW ENG. L. REV.* 693, 694 (1984).

61. Those states are California (*CAL. GOV'T. CODE* §§ 11370.1-5 (West. Supp. 1986)), Colorado (*COLO. REV. STAT.* § 24-30-1001(1)(1982)), Florida (*FLA. STAT. ANN.* § 120.65(1) (West 1979)), Massachusetts (*MASS. ANN. LAWS*, ch. 7, § 4H (Michie/Law. Co-op Supp. 1985)), Minnesota (*MINN. STAT. ANN.* §§ 52:14F-1 to -11 (West Supp. 1986)), Tennessee (*TENN. CODE ANN.* § 4-5-321 (1985)), and Washington (*WASH. REV. CODE ANN.* § 34.12.010 (Supp. 1986)).

62. See *MO. ANN. STAT.* §§ 621.015 - .205 (Supp. 1984); *Id.* § 536.073(2) (Supp. 1986).

63. See *N.C. GEN. STAT.* §§ 150B-23, -32 (Supp. 1985).

64. These states include Maryland, Michigan, New York, Oregon, Pennsylvania and Virginia. Letter from Minnesota Chief ALJ Harves (Oct. 19, 1985) (on file in the Land and Water Law Review Office).

65. These states include Alaska, Georgia, Illinois, Indiana, Kentucky, Nebraska, North Dakota, Ohio, South Dakota, and Wyoming. *Id.*

66. *ME. REV. STAT. ANN.* tit. 5, § 10051 (Supp. 1985).

67. Harves, *supra* note 43, at 668.

68. A chart comparing several key features of the eight central panel systems is provided in Appendix A.

vent the wheel nor go through the same struggles before discovering the smoothness of rubber tires.

Creation and Independence

California's 1946 system⁶⁹ was the earliest and Washington's 1982 system⁷⁰ was the most recent of the eight states with established and functioning central panels of administrative hearing officers. The impetus for their creation came from interested parties, such as legislators, administrators, the judiciary, state bar associations and private industry. Their creation also was prompted by perceptions of unfair state agency hearing procedures, disgust with overreaching agency actions, and government scandals.

These states' central panel systems have varying degrees of independence. They may be functionally within an administrative agency⁷¹ or legislative agency,⁷² located within an agency which is statutorily prevented from exercising any supervision or control over it,⁷³ or they may be an independent and separate state agency.⁷⁴

Jurisdiction

In no state are all state agencies required to use the central panel for their hearings. However, use of the panel is mandated in six of the states under certain conditions.⁷⁵ In the two other central panel states, its use is generally optional.⁷⁶

In each of the central panel states, there are at least some agencies exempt from having to use the system. This reflects the constant tension between agencies seeking legislative exemption to manage administrative procedures their own way,⁷⁷ and the general pressure and trend to expand the system's coverage because of its advantages. Common exemptions

69. CAL. GOV'T CODE §§ 11370.1 - 1.5 (West Supp. 1986).

70. WASH. REV. CODE ANN. § 34-12.010 (Supp. 1986).

71. The central system is with the Administrative Agency in Colorado and Massachusetts and in General Services in California. COLO. REV. STAT. § 24-30-1001(1) (1982); MASS. ANN. LAWS, ch. 7, § 4H (Michie/Law. Co-op. Supp. 1985); CAL. GOV'T CODE, § 11370.2(a) (West Supp. 1986).

72. TENN. CODE ANN. § 4-5-321 (1985).

73. FLA. STAT. ANN. § 120.65(1) (1982); N.J. STAT. ANN. § 52:14F-1 (West 1986).

74. MINN. STAT. ANN. § 14.48 (West Supp. 1986); WASH. REV. CODE ANN. § 34.12.010 (Supp. 1986).

75. Central panel use for non-exempt state agencies is required by CAL. GOV'T CODE §§ 11502, 11512(a) (West Supp. 1986), MINN. STAT. ANN. § 14.50 (West Supp. 1984) and N.J. STAT. ANN. § 52:14F-5(n) (West 1986). Unless the hearing is presided over by an agency decisionmaker, central panel use is required by FLA. STAT. ANN. § 120.57(1)(A) (Supp. 1985) and WASH. REV. CODE ANN. §§ 27.10.040 (1981), 34.04.090 (1986). Unless a specific statute permits the agency head to conduct hearings, central panel use is required by COLO. REV. STAT. § 24-4-105(3) (Supp. 1985).

76. MASS. ANN. LAWS, ch. 7, § 4H (Michie/Law. Co-op. Supp. 1985); TENN. CODE ANN. §§ 4-5-102(1), (4), 4-5-301 (1985).

77. Harves, *supra* note 43, at 668.

are for unemployment compensation,⁷⁸ public employees,⁷⁹ penal systems,⁸⁰ worker's compensation,⁸¹ and tax matters.⁸² California is unique in that its system's primary jurisdiction is over specified agencies,⁸³ rather than possessing generalized jurisdiction which is subject to specified exemptions.

Rulemaking, Model Rules, and General Administrative System Oversight

In two states,⁸⁴ the legislature has specified that an ALJ should be used in rulemaking hearings. In most central panel states, this role must be implied from central panel or APA statutes.

The central panel agency typically develops model or uniform hearing procedure rules. In some states,⁸⁵ those rules must be followed when an ALJ is used.

General oversight of the state's administrative system is often a central panel office responsibility.⁸⁶ The office may gather information, conduct research, investigate problems, prepare studies, assemble reports, make legislative recommendations, participate in or sponsor workshops and educational projects, and provide help to agencies and the public.

Finality of ALJ Decisions

In most states, ALJ decisions are only recommendations to the agency that makes the final administrative decision. In some states, specified ALJ decisions are final, such as for hospital medical service provider rates appeals,⁸⁷ capital construction contract change order appeals,⁸⁸ professional revenue license tax appeals,⁸⁹ social services cases,⁹⁰ special education

78. FLA. STAT. ANN. § 120.57(1)(a) (Supp. 1985). Information on the exemption for Colorado, Massachusetts, New Jersey and Tennessee given orally to author at central panel state directors meeting in Denver, Oct. 15-16, 1984 [hereinafter Meeting].

79. FLA. STAT. ANN. § 120.57(1)(a)(7) (West Supp. 1985); MINN. STAT. ANN. § 14.03(2) (West Supp. 1986); N.J. STAT. ANN. § 52:14F-8 (West 1986); WASH. REV. CODE ANN. § 34.12.020(4) (Supp. 1986). Information on Colorado's exemption given orally to author. Meeting, *supra* note 78.

80. MASS. ANN. LAWS, ch. 30A, § 1A (Michie/Law. Co-op 1983); MINN. STAT. ANN. § 14.03(2) (West Supp. 1986); N.J. STAT. ANN. § 52:14F-8 (West 1986); TENN. CODE ANN. § 4-5-106(b) (1985).

81. FLA. STAT. ANN. § 120.52(1)(c) (Supp. 1985); N.J. STAT. ANN. § 52:14F-8 (West 1986). Information on Massachusetts' exemption given orally to author. Meeting, *supra* note 78.

82. N.J. STAT. ANN. § 52:14F-8 (West Supp. 1986); WASH. REV. CODE ANN. § 34.12.020(4) (Supp. 1986). Information on Massachusetts' exemption given orally to author. Meeting, *supra* note 78.

83. These agencies include local school districts and most state licensing bodies. CAL. GOV'T CODE § 11501 (West Supp. 1986); CAL. EDUC. CODE § 4494 (West Supp. 1983).

84. MINN. STAT. ANN. § 14.50 (West Supp. 1986); N.J. STAT. ANN. § 52:14F-5 (West 1986).

85. MASS. ANN. LAWS, ch. 30A, §§ 1A, 9 (Michie/Law. Co-op. 1983); MINN. STAT. ANN. § 14.51 (West Supp. 1985); WASH. REV. CODE ANN. §§ 34.04.022 (1986), 34.12.080 (1986).

86. CAL. GOV'T CODE § 11370.5 (West 1986); N.J. STAT. ANN. § 52:14F-5 (West 1986). See TENN. CODE ANN. § 4-5-321 (1985). Information on Minnesota's and Washington's offices carrying out this oversight function given orally to author. Meeting, *supra* note 78.

87. Massachusetts. Meeting, *supra* note 78.

88. *Id.*

89. *Id.*

90. Colorado. Meeting, *supra* note 78.

cases,⁹¹ mental release cases,⁹² human rights discrimination,⁹³ state employee discipline,⁹⁵ and OSHA fines.⁹⁶ A trend is to have the ALJ's recommended decision become the final administrative decision unless the agency⁹⁷ acts promptly⁹⁸ to change it. In Florida,⁹⁹ the ALJ decision can be changed by an agency only if it can cite supporting authority.

Director's Appointment and Removal

The central panel agency director is generally the Chief ALJ. He is typically¹⁰⁰ appointed by the Governor, with the advice and consent of the legislative body. In Tennessee,¹⁰¹ the appointment is by the legislatively-elected Secretary of State. In other states the appointment is through the Governor's Office¹⁰² by majority vote of an administrative commission,¹⁰³ or through the state personnel system.¹⁰⁴

The term of the Director may be for a specified length¹⁰⁵ or the person may serve at the appointing authority's pleasure.¹⁰⁶ The Director can be removed only for cause in three states.¹⁰⁷

Funding

The central panel office may be funded wholly through a legislative general fund appropriation, with any ending balance reverting to the state's general fund.¹⁰⁸ User agency fees¹⁰⁹ or licensing and filing fees¹¹⁰

91. CAL. GOV'T CODE § 11370.5 (West 1986). Decisions are final under controlling federal law in The Education of the Handicapped Act rules at 34 C.F.R. § 300.509 (1985) in all states except New Mexico.

92. Florida. Meeting, *supra* note 78.

93. Minnesota. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. A private party in Tennessee may also act to have the agency issue its own decision. Meeting, *supra* note 78.

98. CAL. GOV'T CODE § 11517(d) (West Supp. 1986) (100 days to act); COLO. REV. STAT. § 24-4-105(14) (1985) (30 days); TENN. CODE ANN. §§ 4-5-314(b), -315(b) (1985) (10 days).

99. FLA. STAT. ANN. § 120.57(1)(b)(9) (West Supp. 1985).

100. CAL. GOV'T CODE § 11370.2(b) (West Supp. 1986); MINN. STAT. ANN. § 14.48 (West Supp. 1985); N.J. STAT. ANN. § 52:14F-3 (West 1986); WASH. REV. CODE ANN. § 34.12.010 (1986).

101. See TENN. CODE ANN. § 4-5-321(4) (1986).

102. MASS. ANN. LAWS, ch. 7, § 4H (Michie/Law. Co-op. Supp. 1985).

103. FLA. STAT. ANN. § 120.65(1) (West 1982). The Commission consists of the Governor, Attorney General, Secretary of State, Secretary of Education, Lieutenant Governor, Secretary of Agriculture, and Insurance Commissioner.

104. Colorado. Meeting, *supra* note 78.

105. MINN. STAT. ANN. § 14.48 (West Supp. 1986); N.J. STAT. ANN. § 52:14F-3 (West 1986); WASH. REV. CODE ANN. § 34.12.010 (1986).

106. Florida. Meeting, *supra* note 78.

107. MINN. STAT. ANN. § 14.48 (West Supp. 1986); WASH. REV. CODE ANN. § 34.12.010 (1986); Colorado, under state personnel rules which apply to the Director. Meeting, *supra* note 78.

108. Massachusetts, New Jersey and Tennessee. Meeting, *supra* note 78.

109. Colorado. *Id.*

110. Florida. *Id.*

may supplement the general fund appropriation. In California, the office is supported through a non-reverting revolving fund of user fees and from contracts for ALJ services with local government agencies.¹¹¹

The Minnesota central panel office contains two divisions. Its large worker's compensation section is funded by a reverting direct appropriation; the rest of the office is funded by a non-reverting revolving fund supplemented by user fees.¹¹² In only one state¹¹³ is the office wholly supported by user agency fees, which are deposited in a non-reverting revolving fund.

Several states collect user agency fees in a charge-back system. The hourly rates range from thirty to one hundred dollars.¹¹⁴ The hourly rate may cover only the ALJ's time, or it may include complete overhead and ALJ costs.

ALJ Titles

One of the surprising central panel disputes has been over their title. Judges have sometimes resisted the word "judge" in the ALJ name, despite the federal Administrative Law Judge title precedent.¹¹⁵ Nonetheless, the hearing officers in most central panel states now are called Administrative Law Judges.¹¹⁶ Other titles used by central panel states include Hearing Officer¹¹⁷ and Administrative Magistrate.¹¹⁸

ALJ Qualifications and Hiring

In all but one state,¹¹⁹ ALJs must have several years of experience as attorneys. ALJs may not be covered by state personnel or civil service

111. CAL. GOV'T CODE § 11370.4, 27727 (West Supp. 1986).

112. MINN. STAT. ANN. §§ 14.53, .54 (West Supp. 1986) (user fees). Other information given orally to author. Meeting, *supra* note 78.

113. WASH. REV. CODE ANN. § 34.12.130 (1986).

114. California (\$80 per hour), Colorado (\$30 basic rate, \$43 full service rate), Minnesota (\$166), New Jersey (\$95), Washington (\$30). 1984 information given orally to author. Meeting, *supra* note 78.

115. 5 U.S.C. § 3105 (1982).

116. CAL. GOV'T CODE §§ 11370.3, 11500(d) (West Supp. 1986); MINN. STAT. ANN. § 14.48 (West Supp. 1986); N.J. STAT. ANN. § 52:14F-4 (West Supp. 1986); WASH. REV. CODE ANN. § 34-12.020(2) (1986). Their statutory title in Tennessee is Administrative Judge. TENN. CODE ANN. § 4-5-102(1) (1984). In Florida, the statute refers to Hearing Officer (FLA. STAT. ANN. § 120.65(2) (West 1982)); however, they are generally called ALJs. Meeting, *supra* note 78.

117. COLO. REV. STAT. § 24-30-1003(1) (1985). California's Office also includes non-attorney hearing officers for special education cases in local school districts. CAL. GOV'T CODE § 11370.3 (West Supp. 1986).

118. MASS. ANN. LAWS, ch. 7, § 4H (Michie/Law. Co-op. Supp. 1985).

119. CAL. GOV'T CODE § 11502 (West Supp. 1986); COLO. REV. STAT. § 24-30-1003(2) (1985); FLA. STAT. ANN. § 120.65(2) (1982); MASS. ANN. LAWS, ch. 7, § 4H (Michie/Law. Co-op. Supp. 1985); MINN. STAT. ANN. § 14.50 (West Supp. 1986); N.J. STAT. ANN. § 52:14F-5(1) (West 1986); TENN. CODE ANN. §§ 4-5-102(1), -321(2) (1985). Washington law does not require the use of attorneys as ALJs, although most are in fact experienced attorneys. Meeting, *supra* note 78. See WASH. REV. CODE ANN. § 34.12.030(1) (1986).

rules.¹²⁰ In all but one of the central panel states,¹²¹ the ALJs are hired by the Director. Uniquely, each of New Jersey's forty-five ALJs is appointed by the Governor, with the advice and consent of the senate.¹²²

Number of ALJs and Contract Options

Given their variance in population and jurisdiction, it is not surprising that the number of ALJs varies among the states, from ten to sixty-two.¹²³ In all but Tennessee, the Director may contract with private attorneys or retired judges, as independent contractors, to handle peak ALJ demands.

Centralized Case Assignment, Scheduling and Docket Control.

In all states, the Director assigns cases to an ALJ. In all states except Colorado, there is at least some master calendar or centralized scheduling, docket or continuance control to best utilize office and ALJ resources and to accommodate the parties in an efficient manner.

ALJ Subject Matter Expertise

ALJs are primarily procedural gate-keepers. Agencies commonly perceive that a good hearing officer must have expertise in their particular subject matter and operation. Experience in the central panel states, though, tends to support a conclusion that good ALJs, like judges, are generalists. Thus the trend has been for specialists, especially those prior agency hearing officers grandfathered in as ALJs, to become more generalists. This seems to enhance the continued interest of ALJs and the quality of their decisions. Of course, the Director considers individual ALJ strengths in assigning cases.

A WYOMING CENTRAL PANEL SYSTEM PROPOSAL

A select task force composed of interested leaders from the executive branch,¹²⁴ legislative branch, judicial branch, bar, private parties likely

120. FLA. STAT. ANN. § 120.65(1) (1982); MASS. ANN. LAWS, ch. 7, § 4H (Michie/Law. Co-op. Supp. 1985). California and New Jersey. Meeting, *supra* note 78. ALJs are subject to state personnel or civil service rules under COLO. REV. STAT. § 24-30-1001(2) (1976); MINN. STAT. ANN. § 14.48 (West Supp. 1986); WASH. REV. CODE ANN. § 34.12.030(5) (1986); and in Tennessee. Meeting, *supra* note 78.

121. CAL. GOV'T CODE § 11502 (West Supp. 1986); COLO. REV. STAT. § 24-30-1003(1) (1976); FLA. STAT. ANN. § 120.65(2) (West 1982); MASS. ANN. LAWS, ch. 7, § 4H (Michie/Law. Co-op. Supp. 1985); MINN. STAT. ANN. § 14.48 (West Supp. 1986); TENN. CODE ANN. § 4-5-321(2) (1985); WASH. REV. CODE ANN. § 34.12.030(1) (1986). New Jersey is the exception.

122. N.J. STAT. ANN. § 52:14F-4 (West 1986).

123. Based upon information given orally to author at meeting of state central panel directors in Denver on Oct. 15-16, 1984, the numbers then were 10 (Massachusetts), 11 (Tennessee), 15 (Colorado), 24 (Florida), 30 (California), 33 (Minnesota), 45 (New Jersey), and 62 (Washington).

124. For example, members could be selected from the Governor's Office, Attorney General's Office, an administrator and a lay board member from both a large and a small agency, an experienced private attorney hearing officer, and two private attorneys who practice frequently before state agencies.

to appear before agencies,¹²⁵ a public representative, and an administrative law professor could be formed to study this concept and make recommendations. Alternatively, an interim legislative committee could study the issue.

A system used in one of the other central panel states could be studied and modified for Wyoming's needs, or a new proposal could be analyzed and adopted. To that end, and to illustrate one way a central panel could be implemented in Wyoming, the author has prepared the attached proposal.¹²⁶

This proposal is the result of the research summarized in this article, conversations with the directors of all eight central panel state offices, conversations with interested persons in the Attorney General's Office, Legislative Senate Office, and University of Wyoming College of Law, personal experiences at locating, using and serving as a contract hearing officer, and litigating hearing officer issues in Wyoming. It is an effort to propose a sound and realistic central panel system to fit this state's present and foreseeable needs.

Significant parts of the proposal are derived from section 4-301 of the 1981 Model Administrative Procedure Act,¹²⁷ reactions to that uniform model act by the National Conference of Administrative Law Judges and Minnesota's Chief ALJ Duane Harves,¹²⁸ and the implementing legislation in the eight central panel states.¹²⁹

Under the proposed Act, the central panel is an independent state agency. Its director is appointed by the Governor, with the advice and consent of the senate, for a five year term and may be removed only for cause. This protects the agency's independence.

The Director has great flexibility to tailor the agency's operation to fit needs that change from year to year, even from month to month. This flexibility includes hiring temporary ALJs as independent contractors to handle peak demands. The Director would also gather information, promulgate the agency's rules, and study and recommend ways to improve the state's administrative system.

ALJs would be experienced attorneys, trained to preside over hearings and issue timely and properly written recommended decisions. If an agency failed to act promptly (within sixty days), the ALJ's recommended decision would become the agency's decision. This keeps pressure on agencies to prevent cases from dragging on to decision.

The typical licensing contested case hearing would be substantially similar in form to the present practice of many agencies. When an agen-

125. For example, representatives could be chosen from large and small private industry, a regulated business administrator, and two state licensed individuals or their representative groups.

126. The proposal is provided in Appendix B.

127. MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 14 U.L.A. 67, 133 (Supp. 1986).

128. Harves, *supra* note 43.

129. See *supra* note 61.

cy decides to use the office, the Director would assign the case to an ALJ, who would function much like a present presiding officer, but who would use the office's model rules. The office could centrally docket and schedule hearings if desired.

The agency's costs to use an ALJ would depend upon the office's appropriation and fee structure; they could range from nothing, to a nominal fee, to covering the ALJ's and actual hearing expenses, to an hourly or per-day rate partially subsidized by the office's appropriation for its overhead.

No agency would be required to use an ALJ, although presumably its expertise and low cost would encourage increasingly widespread use. Statutorily mandating its use for all (or most) state agencies should follow naturally in a few years. Governmental entities other than state agencies could be served if the office had an available ALJ and the Director chose to do so. Those users could be charged at a different rate than state agencies.

The Act provides for summary proceedings for minor matters, emergency proceedings for the rare case requiring immediate action to protect the public, conference and informal proceedings to encourage informal dispute resolution and handle large multiple party cases, and the typical APA contested case proceeding. The Office would promulgate rules to control when each type of proceeding could be used, what procedures would be followed, and how a case could change from one type to another. Those changes respond to the fact that present contested case proceedings may discourage informal dispute resolution, become unwieldy, over-formal and expensive, and may also be awkward for emergency, very small, or very large cases.

No state agencies have been exempted from the proposal. Although exemptions for such proceedings as worker's and unemployment compensation have been common in central panel states, particularly in their early years, most of those states have generally expanded their ALJ jurisdiction.

This proposal should satisfy the concerns that Governor Herschler had when he vetoed a prior central panel bill,¹³⁰ since it does not expand the category of parties eligible to appeal an agency decision, does not affect the rule of necessity, does not restrict official notice, and does not permit an ALJ to make the final decision except when the agency so chooses or unless required by law.

CONCLUSION

Wyoming can improve its administrative adjudication system by legislatively creating a central agency of independent hearing officers. The successful experience of eight states with various forms of the central panel concept can be built upon in establishing a Wyoming system. The

130. See *supra* text accompanying note 24.

concept proposed in Appendix B presents a fiscally sound and flexible method for increasing the perceived and actual fairness provided private parties appearing before governmental agencies.

APPENDIX A: THE EIGHT CENTRAL PANEL STATES

State	Year began	Independent Agency?	Jurisdiction*	Latest #case filings /year	Latest annual budget	How funded**	# Full-time ALJs	ALJ 1984 salary range	Dir's Appt. ***	Dir's 1984 Salary
Cal.	1945	No	M/f	4,600	\$4M	ER/UFW*+	30+	\$45-57K	Gov.	\$52K
Mass.	1974	No	X/b,c,d,f,g,h	1,450	\$375K	GF†-	10+	\$22-27K	Admin.	\$43.5K
Tenn.	1974	No	X/c,d,f,g	2,500	\$600K	GF	11	\$30-42K	Sec.	\$46K
Fla.	1974	Yes	D/b,c,e	5,000	\$2.1M	GF†-	24+	\$32-48K	Cab.	\$52K
Colo.	1976	No	X/c,e,g	12,000	\$750K	GF/UFGF	15+	\$36-47K	Civ. Serv.	\$47K
Minn.	1976	Yes	M/c,d,e,f	6,000	\$2.6M	ER/UFW/GF	33+	\$35-46.5K	Gov.	\$55K
N.J.	1979	Yes	M/b,c,d,e,f	10,000	\$8M	GF/UFGF	45+	\$47-67K	Gov.	\$67K
Wash.	1982	Yes	D/e,f,h	36,000	\$3.75M	ER/UFW	62+	\$28-42.6K	Gov.	\$53K

Codes:

*: Jurisdiction:

M=Mandatory ALJ use

X=ALJ use mandatory in some instances and discretionary in other instances

D=ALJ use is discretionary with agency

ALJ jurisdiction (major exemptions only):

a=All agency hearings covered

b=Workers compensation hearings exempt

c=Unemployment compensation hearings exempt

d=Corrections dept., prison, parole and pardon hearings exempt

e=Public employee, civil service and state personnel hearings exempt

f=Tax hearings or appeals exempt

g=Regulated utility hearings exempt

h=Environmental hearings exempt

**: Funding mechanism:

GF=General Fund (annual/biennial appropriation whose ending balance reverts)

ER=Earmarked revolving fund (appropriated, but no reversion)

UFW=Wholly user-agency-supported by chargeback fees going to central panel office

UFP=Partially user-agency-supported by chargeback fees going to central panel office

UFGF=User-agency chargeback fees go the General Fund

†=Filing fee charged for at least some cases (-=goes to general fund; +=goes to office)

+: Fulltime ALJs may be supplemented with contract or part-time ALJs

***: Who appoints Director:

Gov=Governor

Cab=Executive branch cabinet (Governor & other top elected officials)

Sec=Secretary of States (appointed by Legislature)

Civ Serv=Hired through state civil service/personnel system process

Admin=State general administration agency head

APPENDIX B: PROPOSED WYOMING OFFICE OF ADMINISTRATIVE LAW ACT

SECTION 1. CREATION, TITLE AND DEFINITIONS

(a) There is created the Office of Administrative Law within the executive branch as an independent and separate state agency.

(b) Definitions: Except as modified in this Act, definitions from the Wyoming Administrative Procedure Act apply to this Act. For this Act, the following special definitions shall apply:

(1) "Administrative Law Judge" or "ALJ" means a person appointed by the Director on a fulltime or temporary basis to conduct or preside over administrative proceedings as provided for in this Act;

(2) "Administrative proceeding" means a conference proceeding, contested case proceeding, emergency proceeding, informal proceeding, rulemaking proceeding, or summary proceeding;

(3) "APA" means the Wyoming Administrative Procedure Act (W.S. 16-3-101 through 16-3-115);

(4) "Conference proceeding" means an administrative proceeding in which one or more of the following exists: no disputed issue of material fact, a monetary amount of not more than \$1,000, or a disciplinary action against a licensee or employee which does not involve suspension, revocation or discharge;

(5) "Director" means the head of the Office of Administrative Law, who is also the Chief ALJ;

(6) "Emergency proceeding" means an administrative proceeding involving an immediate and significant danger to the public health, safety or welfare and requiring immediate agency action;

(7) "Hearing" means an administrative proceeding conducted or presided over by an ALJ;

(8) "Informal proceeding" means an informal dispute resolution administrative proceeding conducted with less formality than any other form of administrative proceeding, and includes mediation, arbitration, and settlement conferences conducted or presided over by an ALJ;

(9) "Initial decision" means the recommended decision rendered by an ALJ;

(10) "Natural person" means an individual;

(11) "Office" means the Office of Administrative Law;

(12) "Revenue-generating agency" means an agency receiving funds generated through licenses or filing fees, federal grants, or any other source which is not a general fund appropriation;

(13) "Rulemaking proceeding" means an administrative proceeding or hearing required for promulgating rules under the APA;

(14) "Summary proceeding" means an administrative proceeding in which law or the protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties and in which one or more of the following exists: a monetary amount of not more than \$100; an action which may be reviewed de novo; a default proceeding in which the person received actual notice of the proposed action; a disciplinary action against a licensee or employee; an employee grievance which does not involve suspension, revocation, or discharge; a matter that solely involves an inspection, examination or test; or any matter clearly having only an unsubstantial potential impact upon the affected parties;

(15) "Temporary Administrative Law Judge" or "Temporary ALJ" means a temporary, part-time, independent contractor or other ALJ who is not a fulltime ALJ employed by the Office;

(16) "User" means any state agency or other governmental entity who uses an ALJ or other service of the Office, including by contract;

(17) "Decisionmaker" means the individual or body of an agency or other user who issues the final decision;

(18) "Head" means the individual who is the chief operating officer of an agency or other user;

SECTION 2. OFFICE JURISDICTION

(a) The Office shall be responsible for the fair and impartial conduct of hearings under this Act;

(b) The Director may grant any user request for the Office to provide an ALJ to conduct or preside over an administrative proceeding or for other Office services under this Act;

(c) With the consent of the parties and in accordance with promulgated Office rules, the Director may designate or convert any administrative proceeding into another type, excluding emergency or summary proceedings, as necessary to carry out this Act. The Director may designate or convert an administrative proceeding into an emergency or summary proceeding only upon the request of at least one party and after the receipt of notice by all parties. Emergency and summary proceedings shall be followed within five (5) days after the issuance of a final decision by the initiation (by the agency or another party) of a non-emergency or non-summary type proceeding to review the matter de novo.

(d) An ALJ must render and serve on all parties an initial decision within thirty (30) days of the record closing after a hearing. An initial decision is a recommended decision to the user, unless required by law or the user lets it become the final decision by inaction. The initial decision will

become the final decision for state agency hearings if the agency does not give notice within twenty (20) days after its receipt of the initial decision from the Office, of its intent to issue its own decision, and actual issuance of its own final decision within sixty (60) days.

**SECTION 3. DIRECTOR, APPOINTMENT, QUALIFICATIONS, DUTIES,
AUTHORITY AND SALARY**

(a) The Director shall be appointed by the Governor, with the advice and consent of the Senate, for a five (5) year term, and may be removed only for good cause. If the position is vacant, the senior ALJ shall serve as acting Director until the Governor appoints a replacement, who shall serve for the remainder of the unexpired term. The Director shall meet all requirements to be an ALJ and shall be experienced in administrative law.

(b) The Director shall:

(1) Serve as the Chief ALJ and devote at least some of this time to conducting or presiding over hearings;

(2) Be a fulltime employee in the position;

(3) Organize, staff, equip, maintain and operate the Office to efficiently and effectively carry out this Act;

(4) Appoint, train and maintain ALJs sufficient to carry out this Act;

(5) Assign ALJs to conduct or preside over hearings;

(6) Promulgate rules and regulations necessary to carry out this Act;

(7) Study, experiment with, establish and implement acceptable methods to make an appropriate record of all hearings;

(8) Advise state agencies of their obligations and options under this act and the APA;

(9) Prepare and maintain needed and appropriate information, analyses and reports on the operation of the Office;

(10) Investigate, collect and analyze information, and prepare reports on the implementation of this Act, the operation of the APA and the state's administrative law system. The Director shall submit annual reports of this nature, which include recommendations for any needed changes, to the Governor and Legislature; and

(11) Perform all other duties necessary to carry out this Act.

(c) The Director may:

(1) Delegate any duty, except ALJ appointment, and any other action authorized in this Act to supervisory ALJs in the Office;

(2) Reject any request for ALJ or other Office services;

(3) Appoint temporary ALJs, as independent contractors, as needed to avoid conflict of interest, handle peak hearing loads, and other purposes under this Act;

(4) Contract with any user to provide ALJ or other Office services under this Act;

(5) Establish, if by rule, administrative proceedings types which include conference, emergency, informal, and/or summary proceedings as hearings under this Act, to be held in lieu of contested case or rulemaking proceedings. For each type, the establishing rules must decide its nature, prerequisites, procedures, and how and when it may be designated or converted into from another type;

(6) Monitor and review hearings for compliance with this Act and the APA;

(7) Establish, staff, equip, manage and operate branch office locations within the state, if their creation will provide better service to parties, improve the efficiency and effectiveness of the Office and make better use of office personnel and resources;

(8) Establish Office sections and ALJ specializations to improve the efficiency and effectiveness of the Office;

(9) Create up to three (3) ALJ position classifications under the state personnel system and up to two (2) supervisory ALJ classifications to implement this Act and to improve the efficiency, effectiveness and morale of the Office;

(10) Reassign any hearing matter to a different ALJ at any time, when necessary to avoid an actual or perceived conflict of interest;

(11) Centralize hearing scheduling, docketing, prehearing conferences, hearings and continuances;

(12) Evaluate and discipline ALJs and Office staff under the state personnel system;

(13) Establish centralized hearing reporting and/or recording systems, the use of which may be required or made optional for users, and charge users for the system use at hearings;

(14) Prepare and circulate among state agencies and users model hearing rules, hearing guides, rulemaking guides, and other materials to help implementation of this Act and the APA;

(15) Sponsor, support or participate in educational and preventive law programs on this Act, and APA, and the state's administrative law system and related topics, to include courses, workshops, seminars, publications, audio and visual materials for agencies, users and the public, and for the attendance, purchase or rental of which a fee may be charged and collected by the Office;

(16) Sue or be sued as a state agency; and

(17) Grant exceptions to hearing deadlines in this Act and Office rules when necessary in the interests of justice.

(d) The Director shall not have the authority to change an ALJ decision.

(e) The Director shall be a state official and employee whose salary shall be ninety percent (90%) of the amount statutorily set for a district court judge.

SECTION 4. ALJS: APPOINTMENTS, QUALIFICATIONS, DUTIES, AUTHORITY AND SALARY

(a) Each ALJ, whether fulltime or temporary, shall be appointed by the Director under the state personnel system, of which each ALJ shall be a part. The qualifications for appointment shall be set by the Director, and shall include at least residence within the State, admission in good standing to practice law for at least the three (3) years preceding the appointment, and experience in administrative hearings, civil or criminal trials, or as a judge.

(b) Each ALJ shall:

(1) Conduct or preside over hearings and perform other professional duties as assigned by the Director under this Act;

(2) Maintain control over all hearings over which he presides, including through the use of orders granting motions to strike testimony or parties, excluding witnesses or parties, granting summary judgment in whole or part, directing a verdict, or dismissal. Each ALJ may exercise throughout the state the same civil contempt powers as possessed by a county court judge in this state.

(3) Insure that all hearings over which he presides are conducted in a fair and speedy manner consistent with this Act, the APA, and the rules of the Office;

(4) Recuse himself from conducting or presiding over any hearing in which he has a conflict of interest or in which he cannot base his initial decision upon the evidence presented on the record; and

(5) Issue an initial decision for all hearings over which he has presided within thirty (30) days after the record is closed, including his ruling upon all motions made in the hearing, and serve copies upon the parties.

(d) Each ALJ's salary shall be set by the Director under the state personnel system, but no fulltime ALJ shall receive a salary less than sixty percent (60%) nor more than ninety percent (90%) of the amount statutorily set for a district court judge.

SECTION 5. OFFICE FUNDING AND FEES

(a) The Office shall be primarily funded through general fund appropriations.

(b) The State Treasurer shall establish an Office account within the earmarked revenue fund. Disbursements from the fund shall not exceed the monies credited to it. Disbursements shall be made upon the Director's request for any purpose authorized by or incident to this Act. At the end of each biennium, seventy-five percent (75%) of all monies remaining in the account shall be transferred to the general fund.

(c) The Director, if established by rule, may impose reasonable filing and other hearing-related fees on users. All fees shall be paid promptly to the Office, which shall deposit them promptly with the State Treasurer, who shall credit them to the Office account.

(d) The Director, if by rule, may require users to reimburse the Office for all or part of the actual costs incurred for hearing-related expenses, including ALJ travel costs, reporters or recorders, hearing room rental, equipment or supplies, or long distance telephone charges; however, this subsection does not authorize reimbursement for Office overhead, ALJ or staff salaries by state agency users. All payments shall be paid promptly to the Office, which shall deposit them promptly with the State Treasurer, who shall credit them to the Office account.

(e) The Director may impose reasonable charges to reimburse the Office for actual costs incurred for educational and preventive law programs of the Office. All payments shall be paid promptly to the Office, which shall deposit them promptly with the State Treasurer, who shall credit them to the Office account;

(f) The Director, if by rule, may require all revenue-generating state agencies and all other users, including other state agencies, to pay reasonable hourly rates for ALJ and other Office services. Different hourly rates may be charged for different categories of users and for different services, including presiding over different types of administrative proceedings. The hourly rate for ALJ services which is charged state agencies cannot exceed \$40.00. Hourly rates for ALJ services which are charged users other than state agencies cannot exceed \$80.00. The Office shall bill users monthly. All payments shall be made promptly to the Office, which shall deposit them promptly to the State Treasurer, who shall credit them to the Office account.

SECTION 6. HEARING PROCEDURES

(a) All requests for hearing and other Office services shall be made to the Director, who may provide them at his discretion. Services provided by the Office to any user except state agencies must be documented by a written agreement signed by the Director.

(b) The Director shall assign all hearing requests to an ALJ, and designate the applicable type of administrative proceeding. If by rule, the

Director, instead of the assigned ALJ, may schedule any or all hearing-related matters.

(c) The Director shall maintain docket records, provide notices to the parties, maintain the record, and take other actions necessary for hearings to be conducted fairly, efficiently, and promptly under this Act.

(d) All hearings shall be conducted under rules governing form, procedure and evidence which are promulgated by the Office and which shall take precedence over agency procedural rules for the hearing.

(e) Once the record in a hearing matter is closed, the Director shall insure that the initial decision is rendered and served within no more than thirty (30) days, that any party responses are received within a maximum of the next thirty (30) days, and that the complete record (containing the initial decision and any responses) is sent to the decisionmaker within a maximum of ninety (90) days after the record closing.

(f) The Director may grant any decisionmaker's request for the assigned, or any other, ALJ to be present and to advise them during their final decision deliberations.

(g) The Director, in his capacity as Chief ALJ, shall enter and serve upon all parties, any order declaring an initial decision to be the final decision as provided for by this Act;

(h) The Office shall maintain user service request documents, docket sheets, initial decisions, final decision orders and final decisions for a period of five (5) years. The Director may maintain other hearing-related documents.

SECTION 7. USER COOPERATION

All parties subject to the APA and all other users, shall give the Director ready access to their records and full information and reasonable assistance for any matter related to hearings, administrative proceedings, this Act, the APA and the study and operation of the state's administrative law system.

SECTION 8. TRANSITION INTO OFFICE OPERATION

(a) The Director shall be appointed within two (2) months of the enactment of this Act. He shall locate, staff, equip, and supply the Office within two (2) months after his appointment, except that the Director may take up to four (4) months to appoint and initially train ALJs and to promulgate the rules required by this Act to begin the Office's offering of services to users. The Office shall begin assigning hearings to ALJs within six (6) months after enactment of this Act.

(b) Except for employees of any agency exempted from this Act, all fulltime state employees who have exclusively or principally conducted or presided over hearings will cease that function by the last day of the fiscal year following enactment of this Act. These persons may be appointed by the Director as ALJs and if so, their service will be deemed

to have been continuous and they will retain all previously held rights as state employees under the state personnel and retirement systems. Any of these persons not appointed by the Director as ALJs will be given a preference for other employment positions for which they are eligible and shall not be demoted or terminated except as provided for under applicable law and rules.

SECTION 9. CHANGES TO OTHER STATUTES

(a) APA changes:

W.S. 16-3-102(c): Add Office as another, optional, source of rulemaking help to agencies.

W.S. 13-3-104(d): Add Office as another, optional, source of rulemaking help to agencies.

W.S. 16-3-107(c): Add ALJ authority to that of agencies under this subsection.

W.S. 16-3-107(d): Add ALJ authority to that of agencies under this subsection.

W.S. 16-3-107(e): Add ALJ authority to that of agencies under this subsection.

W.S. 16-3-107(g): Add ALJ authority to that of agencies under this subsection, plus reference to ALJ's civil contempt authority and the Office's rules, which can include the extent to which the W.R.Civ.P. and W.R.E. apply.

W.S. 16-3-107(h): Add ALJ authority to compel discovery.

W.S. 16-3-107(k): Add reference to Office rules in addition to agency rules.

W.S. 16-3-107(o)(v): Add "or ALJ" after "Officer" and before "presiding at the hearing."

W.S. 16-3-107(p): Add "and ALJs" in front of "shall give effect to the rules of privilege. . ."

W.S. 16-3-108(d): Add "or ALJ" in front of "decision of material fact notices,. . ."

W.S. 16-3-109: Add "or initial" after "In the event a recommended" and before "decision is rendered. . ."

W.S. 16-3-111: Add "ALJs" after "authorized by law," and before "members of the agency. . ."

W.S. 16-3-112(a): Add "an ALJ," after "in all contested cases" and before "the statutory agency."

W.S. 16-3-112(b): Add "(x) If an ALJ, take any other action authorized by the Wyoming Office of Administrative Law Act."

W.S. 16-3-112(c): Revise to delete any implied authority for the Attorney General's Office to provide a presiding officer.

W.S. 16-3-112(d): Revise to delete any implied authority for the Attorney General's Office to provide a presiding officer.

W.S. 16-3-112(e): Revise to include: "When required by law an agency shall adopt rules and regulations providing for the use and the selection of an administrative hearing officer. If an ALJ is used, the rules of the Office of Administrative Law shall be used and take precedence over any agency procedural rules for any hearing or procedure handled by the ALJ. . . ."