



1996

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Recommended Citation

Utermohle, Jeffrey J. (1996) "The Office of Administrative Hearings: Implementing a Due Process Revolution in Maryland Administrative Justice," *University of Baltimore Law Forum*: Vol. 27 : No. 1 , Article 2.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol27/iss1/2>

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THE OFFICE OF ADMINISTRATIVE HEARINGS: IMPLEMENTING A DUE PROCESS REVOLUTION IN MARYLAND ADMINISTRATIVE JUSTICE

by Jeffrey J. Utermohle

"For many Marylanders, administrative proceedings are where government comes to life. Far more Marylanders will be involved in administrative proceedings than in litigation in court . . . Maryland's citizens must have as fair a forum as possible for resolving their differences with State government."¹

I. INTRODUCTION

Prior to the creation of the Office of Administrative Hearings ("OAH") in 1990, Marylanders contesting a governmental agency's action had their case decided by a hearing examiner employed by the same agency. Many people perceived this process as biased in the agency's favor.² In establishing the OAH, the legislature consolidated the administrative hearing functions of more than twenty state agencies under the aegis of a single, autonomous, central panel of legally trained administrative law judges ("ALJs").³

This article will describe the OAH's history and philosophy, illustrate the variety and complexity of decisions rendered by administrative law judges, and offer pointers for attorneys practicing administrative law in Maryland.

II. THE OFFICE OF ADMINISTRATIVE HEARINGS: A BRIEF HISTORY

Early one morning in 1991, the telephone rang in the Maryland OAH chambers of

Chief Judge John W. Hardwicke.⁴ On the line, Governor William Donald Schaefer⁵ vented his chagrin: "One of your judges just made a decision that could cost this state five million dollars!"⁶ Piquing the Governor's umbrage was an ALJ's ruling that required the state to pay layoff benefits to 1,766 state employees "terminated"⁷ by the Governor due to budget deficits. Although displeased with the decision, the Governor never suggested changing it, and Chief Judge Hardwicke never mentioned his conversation with the Governor to the ALJ.⁸ This anecdote illustrates one of the key advantages of Maryland's centralized system of administrative adjudication: the OAH's independence.

Chief Judge Hardwicke emphasized that both the ALJs and the OAH are absolutely independent.⁹ "We

⁴Interview with Chief Judge John W. Hardwicke of the Office of Administrative Hearings, at OAH headquarters in Lutherville, Maryland (Apr. 11, 1996)[hereinafter Hardwicke interview].

⁵Governor William Donald Schaefer's appointment of the Maryland Task Force on Administrative Hearing Officers led to the Maryland General Assembly's creation of the Office of Administrative Hearings, effective January 1, 1990. See also Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. Nat'l A. Ad. L. Judges 5, 21 (1994) [hereinafter Hardwicke].

⁶Hardwicke interview, *supra* note 4.

⁷In the hotly contested case, the Maryland Classified Employees Association argued that the Governor's calculated decision to call the firings "terminations" instead of "layoffs" did not vitiate an employee's "right to be given 90 days' notice, to displace less senior workers, and to be recalled if a new state job should become vacant." Conversely, the Maryland Attorney General's Office maintained that the law permitted the "state to fire workers without layoff protections if their jobs [were] abolished for lack of money." Balt. Sun, Oct. 4, 1991, at 4D, col. 1.

⁸Hardwicke interview, *supra* note 4.

⁹Chief Judge John Hardwicke, remarks at the MICPEL presentation on Administrative Hearings (Oct. 11, 1995)[hereinafter

¹Report of the Commission to Revise the Administrative Procedure Act, at 1 (1992).

²*Id.* at 16; see also Daily Rec., Sept. 5, 1990, at 3, col. 1.

³Eveleth, *Senate Centralizes Administrative Law Judges*, Md. B.J., July/Aug. 1990, at 19.

do not accept or brook any interference from any agency of the government, or the Governor, or any member of his staff, nor have we ever had to be defensive about any such interference; it simply has not occurred."¹⁰

In stark contrast, both the Bar and the public viewed agency influence as endemic in Maryland's "badly flawed"¹¹ regime of administrative adjudication existing prior to the OAH's creation in January, 1990. In the former system, citizens or businesses contesting an agency's action had their case decided by a hearing examiner employed by the same agency. The examiner relied upon that agency for continued employment, salary, promotions, and administrative support.¹² This arrangement spawned an administrative hearings process that many viewed as biased in favor of the state agency because the examiner's continued and future success depended upon how they scrutinized their agency's actions.¹³ Chief Judge Hardwicke analogized, "it was as though the traffic cop who arrested you was also the guy who sat and judged you in court. There was a definite perception of a conflict of interest."¹⁴

Under the prior hearing examiner system, the fundamental fairness of the agencies and their employees was suspect.¹⁵ In derogation of due process, agency heads would sometimes change hearing examiners' decisions to reflect their personal policies.¹⁶ As Hardwicke explained, "agencies are equipped for movement and action; agencies are goal-oriented; and when fairness is not the single most important goal, fairness itself may become flexible and negotiable."¹⁷ Conversely, the providing of fair

hearings is the OAH's *raison d'être*,¹⁸ thereby elevating the concept that "due process is a citizen's primordial right and a primordial duty of government."¹⁹

Critics of the former system also complained that the hearing officers (many of whom did not possess a law degree)²⁰ were unethical,²¹ poorly trained and supervised,²² and often issued decisions that failed to withstand judicial scrutiny.²³ On the other hand, today's OAH "brings professional, top quality judges to the hearings who have a greater ability to deal with attorneys, thereby creating a more professional, judicial-like atmosphere for hearings."²⁴ All ALJs hired since February 1, 1990, must possess a Juris Doctor or equivalent degree and be a member of the bar of any jurisdiction.²⁵

Not only has the OAH "revolutionized administrative decision-making in Maryland,"²⁶ it has also passed along considerable savings to Maryland's citizens.²⁷ The former system employed approximately ninety-one hearing examiners.²⁸ Critics perceived the system as inefficient because efforts were

¹⁸See OAH Mission Statement, OAH brochure (1996): The mission of the OAH is to provide flexible due process for any person affected by the action or proposed action of State agencies. Additionally, the OAH has a responsibility to provide this due process in a prompt and efficient manner. Flexible due process means that each person has a fair opportunity to be heard and the complexity of the hearing varies according to the nature of the case.

¹⁹Hardwicke at MICPEL, *supra* note 9.

²⁰Eveleth, *supra* note 3, at 19. In contrast, each current Office of Administrative Hearings administrative law judge is a law school graduate. Hardwicke interview, *supra* note 4.

²¹Capitol Hill hearing testimony of Chief Judge John Hardwicke (July 26, 1995).

²²*Id.*

²³Report of the Commission to Revise the Administrative Procedure Act, *supra* note 1, at 16.

²⁴Eveleth, *supra* note 3, at 21.

²⁵Hardwicke interview, *supra* note 4.

²⁶1995 Report of the State Advisory Council on Administrative Hearings, at 3.

²⁷*Id.*

²⁸Capitol Hill hearing testimony of Chief Judge Hardwicke (July 26, 1995).

Hardwicke at MICPEL].

¹⁰*Id.*

¹¹Balt. Sun, July 7, 1991, at 3N, col. 2.

¹²See Eveleth, *supra* note 3, at 19.

¹³Report of the Commission to Revise the Administrative Procedure Act, *supra* note 1, at 16.

¹⁴Daily Rec., *supra* note 2, at 3.

¹⁵Hardwicke, *supra* note 5, at 6.

¹⁶Hardwicke at MICPEL, *supra* note 9.

¹⁷Hardwicke, *supra* note 5, at 6.

duplicated among various agencies.²⁹ In contrast, the OAH system has scaled down to fifty-nine ALJs,³⁰ and the OAH has implemented measures allowing the agency to handle an increased workload.³¹ For example, the OAH cross-trains its ALJs to conduct hearings for a wide variety of agencies,³² thereby facilitating more efficient scheduling. Cross-training also enables Maryland's ALJs to shoulder a higher average annual caseload than ALJs in any other central panel state.³³ In addition, the timeliness of written decisions has dramatically improved since the agency's inception.³⁴ In sum, the OAH has achieved its goal of accomplishing more work with fewer judges and provides a more efficient system of administrative adjudication to the citizens of Maryland.

III. INTERRELATIONS BETWEEN OAH AND THE COURTS

A case involving an allegedly deceptive advertising campaign usefully illustrates the interrelations between a large Maryland retailer and its customers, a state administrative agency, the OAH, and Maryland's trial and appellate courts. In *Consumer Protection Division v. Luskin's, Inc.*,³⁵ the Court of Special Appeals of Maryland considered a dispute over a well-known consumer electronics retailer's controversial advertising campaign which promised free airfare for two to Hawaii for customers

who made purchases of more than \$200.³⁶ Nearly 10,000 Maryland consumers partook of the offer.³⁷ According to the Consumer Protection Division ("the Division"), the advertisements proved too good to be true. The Division charged that the ads' fine print required hotel stays at exorbitant rates, thereby negating any airfare savings and violating the state's deceptive advertising laws.³⁸ At the request of the Division, Luskin's discontinued the advertisements.³⁹ Under the Division's threat of legal action if it resumed a modified version of the ad campaign, Luskin's filed a complaint in the Circuit Court for Harford County seeking and winning a declaratory judgment that the advertising was lawful.⁴⁰ After Luskin's filed its declaratory judgment action, but before the circuit court hearing, the Consumer Protection Division initiated an administrative enforcement action against Luskin's,⁴¹ and a hearing was scheduled at the OAH. In issuing the declaratory judgment in favor of Luskin's, the circuit court judge disparaged the Division's filing of the enforcement action as "an attempt to wrest control of the litigation and to require Luskin's to go through an unnecessarily time-consuming administrative process."⁴² After the OAH hearing, the ALJ ruled against Luskin's.⁴³ The ALJ issued an injunction and order of restitution,⁴⁴ which conflicted with the circuit court's declaratory judgment. Luskin's sought judicial review of the administrative decision in the Circuit Court for Harford County.⁴⁵ Meanwhile, the Consumer Protection Division appealed the declaratory judgment case to the Court of Special Appeals of

²⁹Report of the Commission to Revise the Administrative Procedure Act, *supra* note 1, at 16.

³⁰Office of Administrative Hearings, 1995 Annual Report at 8.

³¹State Advisory Council on Administrative Hearings, 1993 Annual Report at 8.

³²Daily Rec., Sept. 5, 1990, at 3, col. 1.

³³State Advisory Council on Administrative Hearings, 1991 Annual Report, at 2, app. 2.

³⁴Annual Report, *supra* note 30 at 13. The Office of Administrative Hearings' timeliness rate for written decisions improved to 91% for the first six months of 1995, as compared to the 60% timeliness rate that existed at the OAH's inception. *Id.*

³⁵100 Md. App. 104, 640 A.2d 217 (1994).

³⁶*Id.* at 106, 640 A.2d at 218 (1994), *aff'd*, 338 Md. 188, 657 A.2d 788 (1995).

³⁷Daily Rec., Apr. 28, 1994, at 1, col. 2.

³⁸*Id.* at 13.

³⁹*Luskin's*, 100 Md. App. at 107, 640 A.2d at 218 (1994).

⁴⁰*Id.* at 108-11, 640 A.2d at 218-20.

⁴¹*Id.* at 108, 640 A.2d at 219.

⁴²*Id.* at 109-10, 640 A.2d at 219.

⁴³*Consumer Protection Div. v. Luskin's* (OAH #92-OAG-CPD-01-844)(1993).

⁴⁴*Consumer Protection Div. v. Luskin's* (CPD #92-013)(1993).

⁴⁵*Luskin's v. Consumer Protection Div.*, 338 Md. 188, 194, 657 A.2d 788, 790-91 (1995).

Maryland.⁴⁶

The court of special appeals vacated the declaratory judgment,⁴⁷ ruling that the circuit court judge should have yielded to the pending administrative enforcement action.⁴⁸ The court explained that, under the doctrine of primary jurisdiction, when a dispute “relates to subject matter falling within the special expertise of an administrative agency,” courts should defer to the expertise of the agency.⁴⁹ The court concluded that “considering the Division’s special competence in the area of defining unfair or deceptive trade practices, we hold that the circuit court should have deferred the consideration of the validity of the proposed advertisement to the Division’s expertise.”⁵⁰

However, this story’s final chapter has yet to be written. Specifically, the Circuit Court for Harford County’s judicial review of the administrative injunction and restitution order remains pending.⁵¹ Whether Luskin’s will face a multi-million dollar payout to its customers hangs in the balance.⁵²

⁴⁶*Consumer Protection Div. v. Luskin’s*, 100 Md. App. 104, 105-06, 640 A.2d 217 (1994), *aff’d*, 338 Md. 188, 657 A.2d 788 (1995).

⁴⁷*Id.* at 115, 640 A.2d at 222.

⁴⁸*Id.* at 114-15, 640 A.2d at 222. In affirming the decision of the intermediate appellate court, the Court of Appeals stated: “Proceeding with the declaratory judgment action in this case was improper and a waste of judicial resources resulting in conflicting judgments and multiple appeals.” *Luskin’s*, 338 Md. 188, 199, 657 A.2d 788, 793 (1995).

⁴⁹*Id.* at 113, 640 A.2d at 221.

⁵⁰*Id.* at 114-15, 640 A.2d at 222.

⁵¹Telephone interview with Assistant Attorney General John H. Nethercut of the Consumer Protection Division (Dec. 9, 1996). In conducting its judicial review, the Circuit Court must apply the substantial evidence test. See *Anderson v. Department of Public Safety*, 330 Md. 187, 212-13, 623 A.2d 198, 210 (1993) (explaining that “Substantial evidence” as the test for reviewing factual findings of administrative agencies, has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”). The scope of review “is limited ‘to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.’” *Id.* at 213, 623 A.2d at 210.

⁵²Daily Rec., *supra* note 37.

IV. PRACTICE POINTERS

A. How to Win Cases and Influence ALJs

OAH officials encourage practitioners to exploit the OAH’s well-equipped library’s unique resources in order to better prepare for administrative hearings.⁵³ Located in the agency’s headquarters building in Hunt Valley⁵⁴ and open to the public during regular business hours, the library boasts a computerized, keyword-searchable database featuring approximately 10,000 full-text OAH administrative law decisions.⁵⁵ As an additional service to members of the bar, OAH officials expect to offer public access to the system by modem.⁵⁶ In the meantime, experienced law librarians are available to assist those wishing to utilize the OAH’s computer database to locate administrative rulings.⁵⁷ Such research can help win cases because counsel may cite prior OAH decisions to an ALJ as persuasive authority.⁵⁸

B. Agency Policy Enforceability Vel Non

For an agency policy to merit enforceability, it first must have been the subject of proper publication.⁵⁹ “There cannot be ‘secret’ policies, nor can agency policy be introduced at the hearing which was not actually promulgated and available to the affected citizen prior to the citizen’s relevant conduct.”⁶⁰ Specifically, Maryland’s Administrative Procedure Act (“APA”) requires enforcement of “any agency regulation, declaratory ruling, prior adjudication, or

⁵³Hardwicke at MICPEL, *supra* note 9.

⁵⁴On Dec. 1, 1996, the OAH moved its headquarters to 11101 Gilroy Road in Hunt Valley. Hardwicke interview, *supra* note 4.

⁵⁵Annual Report, *supra* note 30 at 12. The OAH library also features a full range of statutes, regulations, case law, legal treatises, and encyclopedias.

⁵⁶Hardwicke interview, *supra* note 4.

⁵⁷*Id.*

⁵⁸Hardwicke at MICPEL, *supra* note 9.

⁵⁹See Hardwicke, *supra* note 5, at 50.

⁶⁰*Id.*

other settled, preexisting policy.”⁶¹ The APA’s legislative history instructs that “the word ‘policy’ . . . does not mean an ad hoc directive, but rather is intended to bear its ordinary meaning as a ‘settled or definite course or method previously adopted and followed by government.’”⁶²

In order to protect a client’s rights, vigilant counsel must recognize and seize upon inadequate publication of agency policy as a basis for challenging an administrative action.

C. Representing the Client Who Has Refused to Submit to a Breathalyzer Test

When a suspected drunk driver has received a license suspension after refusing to take a breathalyzer test, an ALJ, pursuant to statute,⁶³ has no discretion to issue a restrictive license, even for the limited purposes of traveling to and from employment or alcohol education classes. According to OAH officials, many attorneys fail to recognize this basic concept.⁶⁴ Rather than pleading for a provisional license, the astute lawyer should focus upon relevant facts that could exculpate a client who refused to take a breathalyzer test.⁶⁵ The attorney, for example, should challenge whether the police officer making the traffic stop had reasonable grounds to believe the driver was intoxicated;⁶⁶ whether the police officer requested the test *after* advising of the administrative sanctions resulting

from a refusal;⁶⁷ whether the licensee refused to take the test;⁶⁸ and whether the client was afforded a reasonable opportunity to consult with counsel prior to submitting to the test.⁶⁹

D. Relaxed Rules of Evidence

Practitioners should bear in mind that the rules of evidence are far more relaxed in administrative hearings than in judicial proceedings.⁷⁰ The ALJ tends to admit all relevant evidence.⁷¹ More specifically, any evidence appearing probative but not incompetent, irrelevant, immaterial, or unduly repetitious merits admissibility.⁷² Additionally, evidence in an administrative hearing may not be excluded solely on hearsay grounds.⁷³

E. Understanding the Role of an Administrative Law Judge

According to Executive ALJ Suzanne S. Fox, as compared to district or circuit court judges, ALJs shoulder much more inquisitorial responsibility to discover the truth of what happened in the underlying dispute.⁷⁴ Chief Judge Hardwicke concurs: “[ALJs] are ideally suited to shed the role of passive neutrality

⁶¹MD. CODE ANN., STATE GOV’T § 10-214(b); *see also* Hardwicke, *supra* note 5, at 56 (Stating that in the course of arguing policy matters, counsel may present prior rulings, both those of the OAH and of the agency, as well as manuals, brochures, and other documentary proof of pre-existing practice and established policy).

⁶²Drafter’s Note to MD. CODE ANN., STATE GOV’T § 10-214(b).

⁶³MD. CODE ANN., TRANSP. § 16-205.1(n)(3)(Supp. 1995) (“If the licensee refused to take a test, the Administration may not modify a suspension under this section or issue a restrictive license.”).

⁶⁴Hardwicke interview, *supra* note 4.

⁶⁵*See generally* W. Patton & L. Stamm, 1996 *Maryland DWI Manual*.

⁶⁶MD. CODE ANN., TRANSP. § 16-205.1(f)(7)(i)(1)(1995 Supp.).

⁶⁷*Id.* § 16-205.1(f)(7)(i)(3).

⁶⁸*Id.* § 16-205.1(f)(7)(i)(4).

⁶⁹*Sites v. State*, 300 Md. 702, 717-18, 418 A.2d 192, 200 (1984) (recognizing a limited due process right of a suspected drunk driver to, upon request, consult with counsel before submitting to a chemical sobriety test, “as long as such attempted communication will not substantially interfere with the timely and efficacious administration of the testing process”).

⁷⁰Hardwicke, *supra* note 5, at 75.

⁷¹*Id.*

⁷²*Powell v. Maryland Aviation Admin.*, 336 Md. 210, 220, 647 A.2d 437, 442 (1994).

⁷³MD. CODE ANN., STATE GOV’T § 10-213(c)(1995); *see generally* “Hearsay in State Administrative Hearings: The Maryland Experience and Suggestions for Change,” 21 U. Balt. L. Rev. 1 (1991).

⁷⁴Interview with Executive Administrative Law Judge Suzanne S. Fox, at OAH headquarters in Lutherville, Maryland (Apr. 11, 1996).

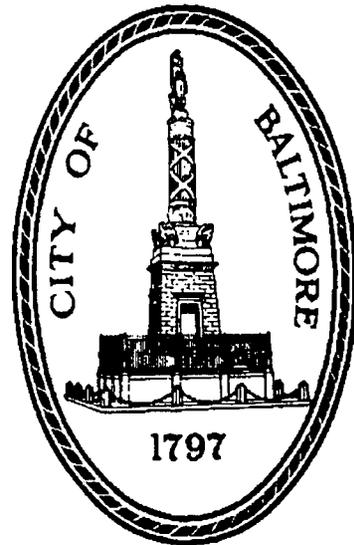
and participate more directly and aggressively in the adjudicatory process.”⁷⁵ In exercising their role as factfinder, adds Judge Fox, ALJs employ a “sliding scale of proactivity,” depending upon many factors.⁷⁶ For example, to prevent unrepresented parties from suffering unfair procedural disadvantage, ALJs may help them properly frame cross-examination questions.⁷⁷ In addition, ALJs may assume an active role in examining witnesses, *sua sponte* entering documents into evidence, and otherwise assuring that a full and complete record exists for judicial review.⁷⁸

Attorneys may harbor uncertainty as to the degree of formal deference to accord an ALJ. On this subject, Chief Judge Hardwicke advises: “Trappings of judicial authority may be automatically accorded [ALJs] by lawyer practitioners and the public but genuflection should not be demanded.”⁷⁹

V. CONCLUSION

With its broad jurisdictional mandate and professional approach, the OAH has revolutionized administrative adjudication in Maryland and achieved stature as a national model⁸⁰ of independence, fairness, and efficiency. The citizens of Maryland deserve no less when resolving disputes within state governmental agencies.

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⁷⁵Hardwicke, *supra* note 5, at 75.

⁷⁶Fox interview, *supra* note 74.

⁷⁷*Id.*

⁷⁸MD. CODE ANN., STATE GOV'T § 10-222 (1995) (provides for the right of judicial review of administrative decisions).

⁷⁹Hardwicke, *supra* note 5, at 73-74.

⁸⁰Office of Administrative Hearings 1995 Annual Report, at 2.