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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."

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. 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").

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. On the line, Governor William Donald Schaeffer vented his chagrin: "One of your judges just made a decision that could cost this state five million dollars!" Piquing the Governor's umbrage was an ALJ's ruling that required the state to pay layoff benefits to 1,766 state employees "terminated" 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. 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. "We..."
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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."

In stark contrast, both the Bar and the public viewed agency influence as endemic in Maryland’s “badly flawed” 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. 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. 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.”

Under the prior hearing examiner system, the fundamental fairness of the agencies and their employees was suspect. In derogation of due process, agency heads would sometimes change hearing examiners’ decisions to reflect their personal policies. 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.” Conversely, the providing of fair hearings is the OAH’s raison d’etre, thereby elevating the concept that “due process is a citizen’s primordial right and a primordial duty of government.”

Critics of the former system also complained that the hearing officers (many of whom did not possess a law degree) were unethical, poorly trained and supervised, and often issued decisions that failed to withstand judicial scrutiny. 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.” 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.

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

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10See 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.
11Hardwicke at MICPEL, supra note 9.
12Eveleth, 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.
13Capitol Hill hearing testimony of Chief Judge John Hardwicke (July 26, 1995).
14Id.
16Eveleth, supra note 3, at 21.
17Hardwicke interview, supra note 4.
19Id.
20Capitol Hill hearing testimony of Chief Judge Hardwicke (July 26, 1995).
duplicated among various agencies.\textsuperscript{29} In contrast, the OAH system has scaled down to fifty-nine ALJs,\textsuperscript{30} and the OAH has implemented measures allowing the agency to handle an increased workload.\textsuperscript{31} For example, the OAH cross-trains its ALJs to conduct hearings for a wide variety of agencies,\textsuperscript{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.\textsuperscript{33} In addition, the timeliness of written decisions has dramatically improved since the agency’s inception.\textsuperscript{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 \textit{Consumer Protection Division v. Luskin’s, Inc.},\textsuperscript{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.\textsuperscript{36} Nearly 10,000 Maryland consumers partook of the offer.\textsuperscript{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.\textsuperscript{38} At the request of the Division, Luskin’s discontinued the advertisements.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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."\textsuperscript{42} After the OAH hearing, the ALJ ruled against Luskin’s.\textsuperscript{43} The ALJ issued an injunction and order of restitution,\textsuperscript{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.\textsuperscript{45} Meanwhile, the Consumer Protection Division appealed the declaratory judgment case to the Court of Special Appeals of Maryland.

\textsuperscript{29}Report of the Commission to Revise the Administrative Procedure Act, \textit{supra} note 1, at 16.
\textsuperscript{30}Office of Administrative Hearings, 1995 Annual Report at 8.
\textsuperscript{31}State Advisory Council on Administrative Hearings, 1993 Annual Report at 8.
\textsuperscript{34}Annual Report, \textit{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. \textit{Id}.
\textsuperscript{35}100 Md. App. 104, 640 A.2d 217 (1994).
\textsuperscript{36}Id. at 106, 640 A.2d at 218 (1994), aff’d, 338 Md. 188, 657 A.2d 788 (1995).
\textsuperscript{37}Daily Rec., Apr. 28, 1994, at 1, col. 2.
\textsuperscript{38}Id. at 13.
\textsuperscript{39}Luskin’s, 100 Md. App. at 107, 640 A.2d at 218 (1994).
\textsuperscript{40}Id. at 108-11, 640 A.2d at 218-20.
\textsuperscript{41}Id. at 108, 640 A.2d at 219.
\textsuperscript{42}Id. at 109-10, 640 A.2d at 219.
\textsuperscript{43}Consumer Protection Div. v. Luskin’s (OAH #92-OAG-CPD-01-844)(1993).
\textsuperscript{44}Consumer Protection Div. v. Luskin’s (CPD #92-013)(1993).
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Maryland. The court of special appeals vacated the declaratory judgment, ruling that the circuit court judge should have yielded to the pending administrative enforcement action. 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. 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." 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. Whether Luskin's will face a multi-million dollar payout to its customers hangs in the balance.

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. Located in the agency's headquarters building in Hunt Valley 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. As an additional service to members of the bar, OAH officials expect to offer public access to the system by modem. In the meantime, experienced law librarians are available to assist those wishing to utilize the OAH's computer database to locate administrative rulings. Such research can help win cases because counsel may cite prior OAH decisions to an ALJ as persuasive authority.

B. Agency Policy Enforceability Vel Non

For an agency policy to merit enforceability, it first must have been the subject of proper publication. "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." Specifically, Maryland's Administrative Procedure Act ("APA") requires enforcement of "any agency regulation, declaratory ruling, prior adjudication, or..."
other settled, preexisting policy." 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.' 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, 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. 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. The attorney, for example, should challenge whether the police officer making the traffic stop had reasonable grounds to believe the driver was intoxicated; whether the police officer requested the test after advising of the administrative sanctions resulting from a refusal; whether the licensee refused to take the test; and whether the client was afforded a reasonable opportunity to consult with counsel prior to submitting to the test.

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. The ALJ tends to admit all relevant evidence. More specifically, any evidence appearing probative but not incompetent, irrelevant, immaterial, or unduly repetitious merits admissibility. Additionally, evidence in an administrative hearing may not be excluded solely on hearsay grounds.

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. Chief Judge Hardwicke concurs: "[ALJs] are ideally suited to shed the role of passive neutrality..."
and participate more directly and aggressively in the adjudicatory process.”

In exercising their role as factfinder, adds Judge Fox, ALJs employ a “sliding scale of proactivity,” depending upon many factors. For example, to prevent unrepresented parties from suffering unfair procedural disadvantage, ALJs may help them properly frame cross-examination questions. 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.

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.”

V. CONCLUSION

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

About the Author: Jeffrey J. Utermohle practices civil litigation in the trial and appellate courts of Maryland. He is a 1987 graduate of the University of Baltimore School of Law, a former member of the University of Baltimore Law Review, and a former judicial law clerk to the Honorable Harry A. Cole of the Court of Appeals of Maryland.

75 Hardwicke, *supra* note 5, at 75.
76 Fox interview, *supra* note 74.
77 *Id.*
78 *MD. CODE ANN., STATE GOV'T § 10-222 (1995)* (provides for the right of judicial review of administrative decisions).