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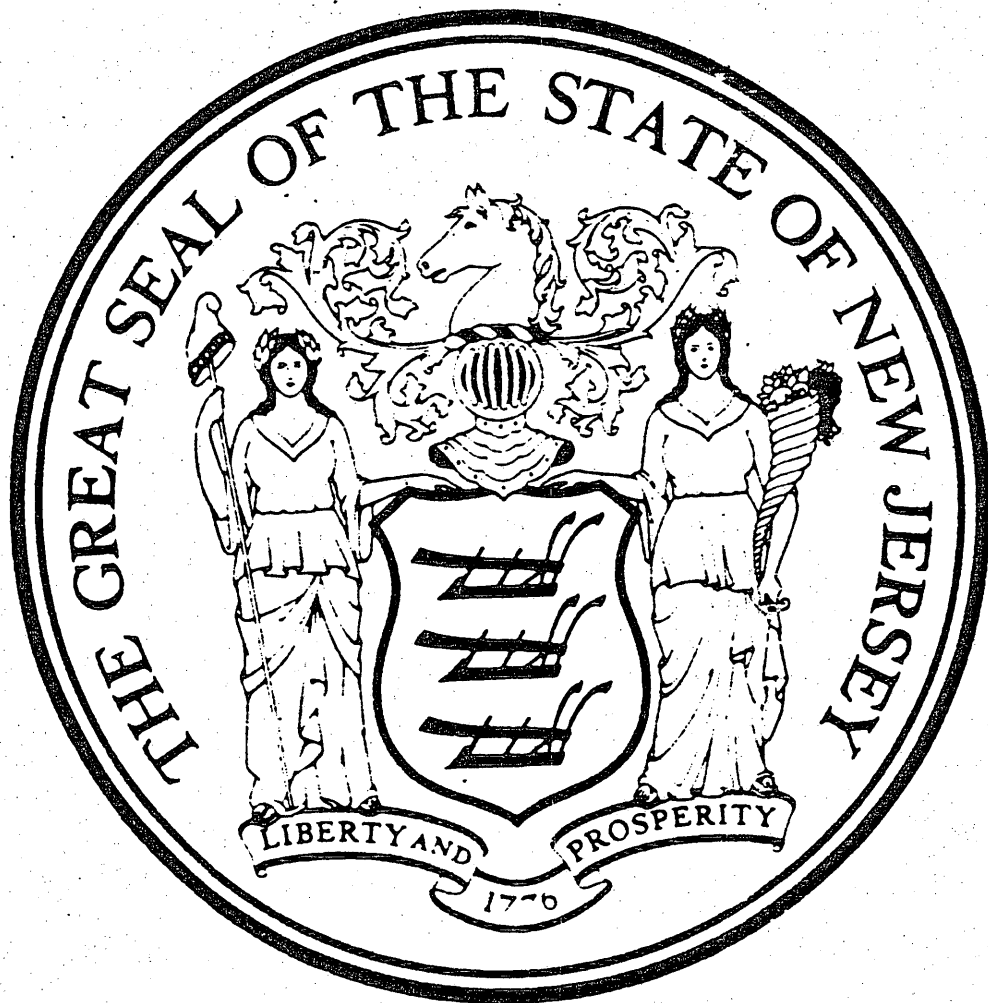
OFFICE OF ADMINISTRATIVE LAW

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ON THE OFFICE OF  
ADMINISTRATIVE LAW**

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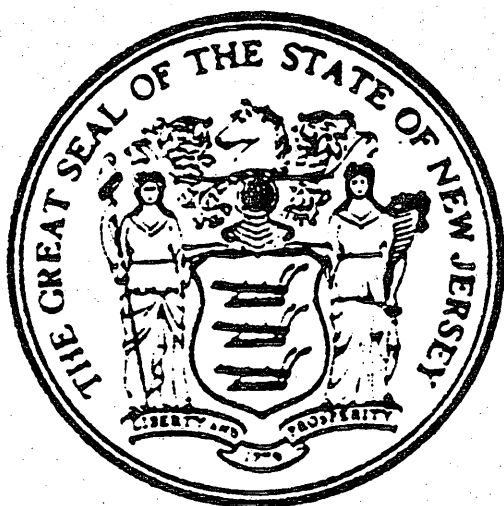
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1 THAS H. KEAN, GOVERNOR

# State of New Jersey

## ADMINISTRATIVE LAW COMMITTEE

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August 31, 1984

The Honorable Thomas H. Kean  
Governor of New Jersey  
State House  
Trenton, New Jersey 08625

Dear Governor Kean:

The Governor's Committee on the Office of Administrative Law is pleased to submit its final report in accordance with your Executive Order 38 dated April 7, 1983.

The recommendations in the accompanying document were unanimously approved by the Committee, and are the product of a comprehensive analysis of the effectiveness of New Jersey's Office of Administrative Law. It is our opinion that the recommendations are both sound and practical. They were made after hearing from attorneys with expertise in the practice of Administrative Law, State officials, and members of the public who deal with the Office of Administrative Law. The Committee members also thoroughly examined the legislative history and intent of the Office of Administrative Law.

The thoroughness of this analysis was possible only because of the consistent contribution of Committee members through 15 months of research, discussion and public hearings. As Chairman, I wish to commend the diligence of the Committee and its sense of public duty. In addition, I would like to express the Committee's appreciation for the excellent staff assistance provided throughout the development of this report.

Respectfully,

Frank X. McDermott, Chairman  
Governor's Committee on the  
Office of Administrative Law



THAS H. KEAN, GOVERNOR

# State of New Jersey

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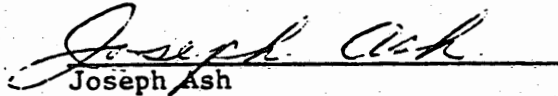
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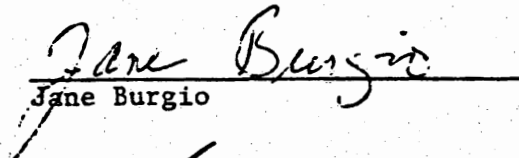
  
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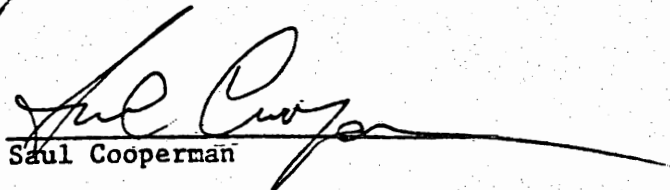
  
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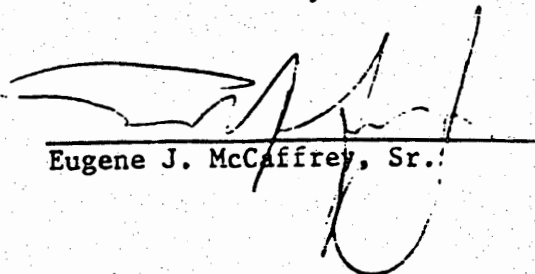
  
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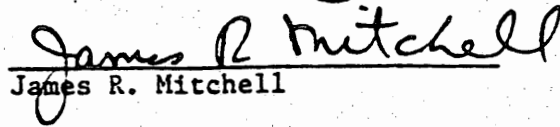
  
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#### A. Creation of Administrative Law Committee

The Governor's Committee on the Office of Administrative Law was established on April 7, 1983, pursuant to Executive Order No. 38 of Governor Thomas H. Kean. Executive Order No. 38 specifically charged the Committee with studying the following issues and reporting its findings and recommendations to the Governor:

1. Any and all ways of improving the amount of time necessary to dispose of an administrative law case, including an analysis of whether separate and distinct procedures could be instituted to accommodate different types of cases;
2. Suggested means for dealing with the existing backlog of cases;
3. The necessity or desirability of requiring that administrative law judges (ALJs) be attorneys licensed to practice law in the State of New Jersey;
4. The appropriate atmosphere which should be fostered during administrative law hearings, including the degree to which formalized courtroom proceedings, such as the wearing of judicial robes by ALJs, should be encouraged or discouraged; and
5. The appropriate role of the Office of Administrative Law (OAL) within the Executive Branch.

Since its inception in 1978, the performance of the OAL has never been evaluated in terms of the legislative mandate under which it was created. Furthermore, the nature of administrative law in New Jersey has changed

significantly during the last five years as demonstrated by an increase in the number and types of hearings coming under the jurisdiction of the OAL. Due to the importance and significance of the OAL in the framework of State government, Governor Kean felt that an evaluation of the function and performance of this office was warranted.

The life of the Administrative Law Committee was extended from April 7, 1984 to July 7, 1984 under authority of Governor Kean's Executive Order No. 64, which was signed on March 22, 1984.

B. Legislative History of the Office of Administrative Law

Before considering the conclusions and recommendations of the Committee, it is essential to examine the historical background of administrative law hearings in the State of New Jersey. Until the formation of the OAL in 1979, administrative hearings were conducted primarily by hearing officers who were employed by the various State departments or agencies. These hearing officers presided over contested matters and made a recommended report and decision to the appropriate agency head, who was authorized to adopt, reject or modify the hearing officer's recommendation in making the final decision. This system led to criticism on several fronts, as litigants and their attorneys inevitably felt that the status of hearing officers as departmental employees raised substantial due process and fairness concerns, especially in cases where the agency was also an adversary party to the hearing. To compound this issue, many of these hearing officers worked for the departments and agencies on a part-time or per diem basis while engaged in private business pursuits; as a result, the quality of hearing officer opinions was often erratic and there were long delays in the disposition of cases. Furthermore, hearing officers sometimes served the role of agency advisor in reaching an initial determination and

in hearing officer if their initial determinations were challenged; this combination of responsibilities led to obvious public perceptions of agency bias.

The system was tolerated for decades, although not without criticism, until legislative reform was seriously considered in the mid-1970s. After several abortive legislative attempts to establish a centralized office of hearing examiners for resolving contested administrative decisions, the Legislature succeeded in passing Senate Bill No. 766 (P.L. 1978, c. 67), which established the Office of Administrative Law. This bill, sponsored by Senator Charles Yates, was signed into law by Governor Brendan Byrne on July 6, 1978 and was subsequently codified in N.J.S.A. 52:14F-1 et seq. The legislative intent of S-766 was succinctly indicated in the bill statement, which read in part as follows:

The purpose of this legislation is to improve the quality of justice with respect to administrative hearings. In many agencies hearing officers serve on a part-time basis. They are either self-employed persons who are paid per diem to hold hearings or they are State employees who also perform other duties for their agency in addition to holding hearings. In both instances, a hearing officer frequently presides over cases in which his own employer is an interested party. In some agencies the backlog of cases is extensive and some administrative hearings have been cited as examples of faulty procedure.

The legislative goal embodied in this bill is to

create a central independent agency staffed by professionals with the sole function of conducting administrative hearings. This will tend to eliminate conflict of interest for hearing officers, promote due process, expedite the just conclusion of contested cases and generally improve the quality of administrative justice.

The history of S-766 and other earlier attempts to establish an Office of Administrative Law, which fortunately has been preserved in transcriptions of public hearings and legislative committee hearings, indicates a clear legislative intent to create a centralized pool of full-time independent Administrative Law Judges in order to address the cited problems of agency bias, lack of professionalism, and excessive delay in the administrative hearing process.

Although this legislation removed control over administrative hearings from the executive departments, the Legislature was careful to preserve the role of the agencies as the formulators of administrative policy. Throughout the legislative history of S-766, many State officials stressed the need for agency expertise in the administrative hearing process and asserted that it would be lost if the hearings were conducted by hearing officers who lacked specific knowledge of the specialized workings of the agency. This argument was premised on the notion that career employees who have devoted years to interpreting and implementing perhaps a single statute were more likely to arrive at appropriate decisions than were independent, nonexpert hearing officers. More importantly, the agencies felt that this expertise was integral to the formulation of consistent administrative policy by the respective agency head, who were appointed by the Governor to fulfill that policy-making function. Conversely, some persons expressed the



view that agency expertise was synonymous with agency bias, and that neither was acceptable in the administrative hearing process.

The Legislature resolved the policy-making dilemma in S-766 by transferring the hearing function for all but several enumerated types of cases to the OAL while preserving in the agency head the authority to adopt, reject or modify the findings of fact and conclusions of law made by the ALJ. In order to ensure agency expertise, the Legislature included a provision, found at N.J.S.A. 52:14F-6(a), which provides that ALJs shall be assigned to agencies in accordance with their special expertise. By requiring persons with the necessary background to work regularly with an assigned agency, it was felt that the concern over the loss of agency expertise would be allayed.

In addition to hearing contested cases, the OAL is statutorily required to perform the functions previously exercised by the Division of Administrative Procedure in the Department of State. These duties, which are enumerated in N.J.S.A. 52:14B-1 et seq., include the publishing of all State agency rules and regulations in the New Jersey Register and the New Jersey Administrative Code.

C. Committee Membership and Deliberative Process

Executive Order No. 38 specified that the Administrative Law Committee should consist of thirteen members, including the Secretary of State, the President of the Civil Service Commission, the Commissioners of Education and Human Services, the Director of the Division of Motor Vehicles, a representative of the Governor's Office, an Administrative Law Judge, and six public members. The six public members selected included four private sector attorneys, one corporate attorney, and a representative of organized labor. The Committee thus was comprised of a diverse spectrum of

individuals acutely interested in the practice and future of administrative law in New Jersey. More importantly, the Committee consisted of members who dealt with the OAL from varying perspectives and thus brought different perceptions to the discussion table. The agency heads sitting ex officio on the Committee were involved in a wide spectrum of hearings, including employee disciplinary proceedings, teacher tenure cases, welfare entitlement matters, and driver's license revocations, and represented departments which were among the heaviest users of the OAL. By virtue of the differing nature of these hearings, there were often conflicting opinions among the agency heads on the issues considered by the Committee. The presence of the agency heads was balanced by the private sector attorneys, who in general had extensive experience representing litigants under both the agency hearing system and the OAL, and thus provided an invaluable analysis of the relative merits of an independent hearing officer system. In addition, several of the private sector attorneys are active and influential in the New Jersey Bar Association. The remaining members of the Committee offered enlightening viewpoints due to their unique roles in the administrative law process. Coincidentally, the Committee included several former legislators who had participated in the passage of S-766 and were able to provide an illuminating view of the intended role of the OAL.

In discussing the issues raised in Governor Kean's Executive Order, the Committee looked in detail at the legislative history behind the creation of the OAL, the current operations of the OAL, the viability of the OAL versus the former agency hearing system, and the administrative law systems employed by other states and by the federal government. The Committee was fortunate to hear testimony from persons with direct knowledge of and experience in each of these areas.

As might be anticipated, the diverse nature of this group resulted in the expression of strikingly divergent perspectives regarding the function and intended role of the OAL. These differences of opinion were gradually smoothed out as Committee members forthrightly evaluated the testimony of witnesses and discussed problem areas until agreements or acceptable compromise positions could be reached.

The Committee undertook its charge by conducting ten full-day meetings. Throughout the course of these sessions, which were divided between Trenton and Newark to allow greater accessibility to all concerned parties, the Committee attempted to elicit testimony from every responsible source. In addition to soliciting oral and written testimony from numerous agency heads, the Committee set aside two sessions as public hearings and complied with the statutory notice procedures applicable to all open public meetings. At these public meetings, the Committee heard testimony from persons who had appeared before the OAL, including attorneys, elected officials, representatives of State agencies, and private litigants. Also included were representatives of the Governor's industry consultants who previously studied the OAL as part of the Governor's Management Improvement Plan - whose report was made part of our record. The Committee entertained testimony from all interested parties, including private citizens, and welcomed the attendance of representatives of the media. A full listing of the members of the Committee and all persons testifying before it are included in this report.

The focus of the Committee throughout these proceedings was on the specific points raised in the Governor's Executive Order, although several additional issues essential to the Governor's general charge were examined at length.

## II. Conclusions and Recommendations

The Committee's investigation led to a conclusion that the OAL was an efficient, well-run organization which represented a significant improvement over the former hearing system in terms of quality and productivity. Although there was general agreement that the OAL's performance was more than satisfactory, it was felt by the Committee that a number of areas could be improved upon and should be scrutinized by the OAL. The major findings and recommendations of the Committee can be summarized as follows: (Not listed in order of priority)

A. The level of formality in administrative hearings is not overly excessive, but procedures should be streamlined through mandatory discussions between the OAL and the department and agency heads.

B. The wearing of judicial robes by ALJs should be discretionary based on guidelines established by the OAL in consultation with each department and agency.

C. The OAL is too inflexible in its use of hearing locations and should endeavor to utilize alternate settings, such as county, municipal and agency facilities. A plan should be formulated by the OAL for the use of such facilities in order to provide greater accessibility to litigants and witnesses in administrative hearings.

D. The procedural practices employed in administrative hearings are generally satisfactory but should be continuously studied and improved upon in order to provide the most efficient hearing system possible. Among the suggestions made by the Committee were the encouragement of greater expedition through the improved use of discovery and motion practice, prehearing



conferences, and settlement procedures, and the strict limitation of delaying vehicles such as the granting of adjournments and the filing of post-hearing submissions.

E. ALJs should be granted statutory subpoena power (absent contempt power) in order to provide them with greater control over the hearing process.

F. The OAL should continue the study of alternative methods designed to expedite the disposition of cases. This study should include experiments in the use of oral opinions and the institution of special fast-tracking procedures for certain cases requiring speedy resolution.

G. Due to the increasing number of hearing petitions being filed and the number of new laws bringing more types of cases within the OAL's jurisdiction, the Governor should have the power to appoint more ALJs as needed to meet existing workloads. The OAL should also establish and maintain a list of temporary ALJs, perhaps consisting of retired judges, who would serve on an on-call basis to help reduce temporary backlogs in cases.

H. All newly appointed ALJs should be attorneys-at-law licensed in the State of New Jersey. However, current ALJs who are not attorneys should be retained if their performance satisfies the reappointment criteria. The reappointment of ALJs should be based on the same general guidelines used for the reappointment of Superior Court Judges.

I. ALJs should be appointed on a bipartisan basis similar to the practice employed by the Judiciary and should be granted tenure after 10 years of service and subsequent reappointment to an additional term. If this is implemented there should be a procedure established for the

discipline and removal of judges, for cause, perhaps modeled after the system used for Worker's Compensation Judges.

J. The OAL should consider a Senior Judge Corps consisting of six judges who would be responsible for certain areas of expertise and would perform administrative, advisory and hearing functions within that area. Under each senior judge, there would be approximately eight ALJs who would hear cases within that realm of specialization.

K. The judicial evaluation program currently administered by the OAL is an excellent one and should be continued. However, this program should be subjected to a continuous evaluation and refinement process. One of the areas in which this program might be streamlined would be in having the proposed senior judges fulfill some of the review functions now being performed by the Director of the OAL.

L. Many attorneys and litigants appearing before the OAL are frustrated by a procedure whereby the same agency personnel sometimes participate in the initial agency determination, the OAL hearing, and the subsequent review of the ALJs recommendations. The Committee resolved this dilemma by recommending that any persons performing investigative, prosecutorial, or advocacy functions on behalf of an agency in a contested case should not be permitted to participate or advise the agency head in the final administrative decision.

M. Where an agency head modifies or reverses a particular fact-finding of an ALJ, the final decision should clearly and sufficiently identify that part of the record where the evidence is presented and provide, in detail, reasons which support the agency head's modification or reversal. Agency

heads should give deference to factual determinations which are based on the credibility of a witness.

N. ALJs should not be given absolute final decision-making authority due to the policy-making responsibility vested in the executive departments and agencies. However, consideration should be given to permitting agency heads to delegate final decision-making authority to ALJs in certain cases which do not involve policy issues or considerations.

O. The OAL should confine its processing of agency rules to a technical and stylistic review of rules submitted for publication by the various departments and agencies and should update the New Jersey Administrative Code on a more frequent regular basis.

P. A statutory change should be made to allow a designee of the agency head to hear petitions for emergent relief, instead of the agency head, provided that the final determination in such case is made by the agency head.

### III. The Administrative Hearing Process

The Committee examined a number of issues involving the OAL hearing process, including the exploration of methods for decreasing the amount of time necessary to dispose of administrative hearings, the feasibility of instituting separate procedures to accommodate different types of cases, methods of dealing with the existing backlog of cases, and a determination of the appropriate atmosphere in which administrative law hearings should be conducted. This investigation was prompted in part to review whether the OAL, which was intended by the Legislature to be a professional, centralized pool of Administrative Law Judges, had developed into a system replete with delays, overformalization and backlog of cases.

The Committee entertained extensive testimony on these issues from a wide spectrum of interested parties, including representatives of State agencies, private attorneys who regularly practiced before the OAL, and private citizens who had been litigants in administrative hearings. As might be expected, there was a wide diversity of opinion expressed by this group, primarily based on the type of case each witness was involved in or whether they represented a State agency or a private litigant.

The issues involving the hearing process are best broken down into two broad categories, one consisting of the formality of administrative hearings and the other dealing with the procedural practices followed by the OAL.

One of the primary criticisms of the OAL was the alleged overformalization of the hearing process. While much of this criticism dealt with essentially non-substantive issues such as the wearing of judicial robes by ALJs, including those who were not attorneys-at-law, it was felt that this insistence on formality was inextricably related to the charges that the OAL procedures were unreasonably costly and time-consuming.



One issue considered by the Committee was the wearing of judicial robes by ALJs. On this subject, there was a wide variety of viewpoints aired. Some of the agencies dealing primarily with pro se litigants, such as public welfare recipients, felt that the presence of a robed judge injected an intimidating tenor to the proceedings. Conversely, other State agencies involved in similar types of cases felt that the wearing of robes added an aspect of impartiality to the hearing which gave the litigant a greater degree of security. Agencies dealing with complex issues in which all parties were represented by counsel generally favored or did not object to wearing of robes and the use of formal courtroom settings. The Committee also heard testimony to the effect that the wearing of robes by Federal Administrative Law Judges is discretionary based on a case-by-case determination made by the ALJ. The Committee concluded that this is interrelated with the premise of providing an informal, expeditious disposition of contested cases. It was determined by the Committee that the wearing of robes should be left to the discretion of each ALJ within the confines of guidelines established by the OAL in consultation with each individual agency. This procedure would establish the best means of having the wearing of robes conform to the circumstances of each type of case heard by the OAL.

Another aspect of the formalization problem was the insistence upon the use of courtroom locations and settings by the OAL. A number of State agencies dealing with pro se litigants felt that the OAL was inflexible in its use of setting, thus precluding many litigants from pursuing their actions due to lack of transportation to the hearing facilities. This also imposed a burden on State agencies by requiring the transportation of key personnel to the hearing sites, which would often result in their absence

from work for an entire day. The Legislature addressed this problem in P.L. 1981, c. 202, which amended N.J.S.A. 52:14F-5 to require that OAL proceedings be held at suitable locations taking into consideration the convenience of the parties as well as the nature of the case. Despite this statutory provision, the Committee found that the OAL was too dogmatic in its insistence on proper courtroom settings and determined that more attention should be paid to accommodating the interests of the litigants and agency personnel required to attend the hearing. It was generally felt that the use of municipal buildings and administrative agency facilities should be utilized as often as possible. The OAL indicated that it is not welcome in such local facilities, as it creates a demand for certain support services and does not provide any reimbursement to the local entities. There was a further concern expressed by OAL representatives that the use of administrative agency and county facilities would be inappropriate, as neutral courtroom settings were necessary to ensure the integrity of the hearing process. The Committee felt that the OAL should continue and increase where practical its practice of holding hearings in local facilities for the convenience of litigants. This plan should consider the feasibility of providing for the reimbursement for the use of local buildings.

The issue of procedural formality was also discussed at great length by the Committee. In general, the Committee felt that the framework of the present system employed by the OAL should be retained, but should be improved by mandatory discussions between the OAL and each agency head. This would permit the degree of procedural formality to vary depending on the nature of each case and thus should provide a more suitable procedure for each type of hearing. While there would still be an element of discre-

L. tion left to the ALJ handling each case, the Committee strongly felt that  
OAL informality should be encouraged in proceedings to the extent possible.

the In reaching its conclusion on this broad issue, the Committee  
is considered in detail the present procedural practice of the OAL and explored  
in possible means of improving this system. Included in this discussion was an  
re extensive look at the discovery process currently used by the OAL. Although  
nd the Committee recognized that a prolonged discovery process could lead to  
at the type of protracted proceedings which the OAL was intended to avoid, it  
ld was agreed that the existing discovery procedure should remain essentially  
me intact. This conclusion was based upon the Committee's concern that any  
art limitation on the amount of discovery available to litigants would present a  
es. potential limitation of individual rights. As this was considered to be an  
of issue of extreme importance, the Committee felt that a serious effort should  
as be made by the OAL to balance the individual rights of the litigant with the  
he public concern regarding the problem of delay in OAL proceedings. However,  
nd the Committee felt that the discovery practices utilized by the OAL should  
al not be expanded to conform to those employed by the courts.

he In considering other procedural matters, the Committee felt that pre-  
al hearings conferences should be held only when necessary to clarify issues or  
by other essential matters. These conferences are now optional depending on  
he the intricacies of each case. The Committee, however, would prefer that  
be prehearing matters be resolved as often as possible by telephone conference  
d. calls and the submission of papers as opposed to in-person meetings.  
on Similarly, the Committee considered whether it would be advisable to limit  
re motion practices, which are responsible for delays and additional costs.  
e- Although it was concluded that this is not currently a problem, the  
Committee deemed it important to address this issue in order to prevent it

from becoming one. In this area, it was also felt that telephone conferences and the submission of papers was the preferred course of action. Although some State agencies have criticized the OAL for not pursuing settlement efforts, the OAL has indicated that their internal practice is to encourage settlements whenever possible. The Committee agreed with this policy and felt that settlement efforts should be promoted vigorously. Another procedural practice of the OAL considered by the Committee was the alleged liberal granting of adjournments in administrative hearings. While some agencies felt that adjournments were granted too readily, the OAL indicated that adjournments are viewed unfavorably and are not granted absent compelling circumstances. The Committee determined that the granting of adjournments should be strictly limited in an attempt to further expedite proceedings before the OAL. In the same vein, the Committee concluded that stipulations of facts in which all parties join should be strongly encouraged and that post-trial submissions, which extend the 45-day period in which a decision must be made and result in additional costs to the litigants, should be discouraged.

The Committee also considered the feasibility of granting ALJs direct subpoena power and contempt power as a means of increasing their control over the progress of administrative hearings. It was generally felt that, while the granting of subpoena power in ALJs was desirable, it would be inadvisable to bestow contempt power upon them. Currently, ALJs possess no inherent subpoena power, but can issue subpoenas which are enforceable derivatively through the authority of the agency referring the case to an ALJ. This authority varies from agency to agency and indeed some agencies do not have subpoena power. The Committee concluded that ALJs should



explicitly be given statutory subpoena power without contempt power in order to resolve this issue.

Perhaps the most fertile area for reducing the amount of time required for OAL proceedings involves the disposition of cases through oral opinions. Currently, this practice is not generally followed because it is felt that the agencies require a full record for their review of the ALJ's recommendation. The OAL is exploring the use of oral opinions through a pilot program, which is working well thus far. Under this pilot program, ALJs may deliver their initial decision on tape and have them transcribed for the purpose of agency review. There was a general feeling by the Committee that the use of oral opinions where appropriate would be beneficial to the entire process, although there were concerns expressed that agency heads needed a written decision to review and that findings of fact and conclusions of law are important and should be preserved. The Committee determined that experiments in eliminating written decisions should be encouraged, provided that such efforts should not affect the rights of appeal for any party or result in the loss of a record for agency review. This is in conformity with a recommendation by the Governor's Management Improvement Plan that oral decisions be rendered in certain cases.

The Committee also considered the feasibility of instituting special procedures for certain cases which require expeditious determinations due to statutorily imposed deadlines or other compelling circumstances. The OAL currently gives priority to cases upon the request of the party or agency, and has demonstrated an ability to dispose of emergent matters within shortened time periods. It was felt by the Committee that certain types of cases which require speedy resolution, such as tenure appeals and budget hearings, should routinely be given priority through special procedures

designed to conclude them as quickly as possible. Accordingly, the Committee agreed that the OAL should study this matter and design "fast-tracking" procedures where applicable. Regarding other procedural issues, the Committee decided that the parties or the ALJ should have the power to bifurcate hearings when such action might moot out the need for further hearings.

It was also recommended that a statutory change should be made to allow a designee of the agency head to hear petitions for emergent relief, instead of the agency head, provided that the final determination in such case is made by the agency head.

In conclusion, the Committee felt that the OAL hearing process represented a significant improvement over the previous agency hearing system and concluded that cases were generally handled in a more professional and expeditious manner by the OAL. However, there were legitimate concerns expressed regarding the overall efficiency of the OAL operation, and the Committee felt that improvement could be made in certain areas. For example, it currently takes up to five weeks for a contested case to be assigned to an ALJ and scheduled for a hearing. The Committee felt that this period was excessive and recommended that all cases be assigned within two weeks of delivery and given a hearing date within four weeks of delivery. A possible means of facilitating this process might be appropriation of funds to the OAL for the purchase of more sophisticated data processing equipment.

The Committee also felt that the OAL should discontinue its practice of having messengers hand-deliver all initial decisions to the appropriate agency heads before release to the parties. This determination is consistent with a recommendation made by the Governor's Management Improvement Plan.

#### IV. Selection and Appointment Procedures for Administrative Law Judges

Although the selection and appointment procedures for ALJs were directly addressed in the Governor's Executive Order only insofar as they affected the status of ALJs who were not attorneys, the Committee determined that this entire topic was important to the quality and future of the OAL and devoted extensive time considering it.

The appointment and reappointment provisions for ALJs are set forth in N.J.S.A. 52:14F-4, which is part of the statute creating the OAL. This section provides that ALJs shall be appointed by the Governor, with the advice and consent of the Senate, for initial terms of one year. During this initial one year term, each ALJ is subject to a judicial evaluation program which is described in N.J.S.A. 52:14F-5(s). The first reappointment of an ALJ after completion of this initial term is made by the Governor for a term of four years and until the appointment and qualification of the ALJ's successor. Subsequent reappointments are made by the Governor, with the advice and consent of the Senate, for additional terms of five years.

Although the Committee determined that this procedure has generally worked well, it was felt that several changes were warranted in order to further professionalize the OAL and to attract highly qualified persons to serve as ALJs. In order to attain these goals, the Committee determined that the implementation of procedures similar to those utilized by the Judiciary was appropriate for the selection and appointment of ALJs.

The selection of ALJs begins with an interview by the Director of the OAL of all candidates selected by the Governor. A report on each prospective ALJ is prepared by the Director and forwarded to the Governor, who makes the selection and submits the nominations to the Senate for confirmation. Due to the relatively short terms provided to ALJs, it was

feared by the Committee that this arrangement carries with it the potential for politicizing of the OAL. For this reason, the Committee agreed that there be a bipartisan balance among ALJs consistent with the practice currently followed in the Superior Court of the State of New Jersey. In order to accomplish this goal the Committee proposed that, once a bipartisan balance has been reached in the OAL, appointees should be of the same political persuasion as the ALJs whose positions they are filling. Until such equipoise is attained, initial appointments should be made with the purpose of eliminating the current disparity in the party affiliations of ALJs.

During its discussion regarding the selection process, the Committee devoted extensive attention to the issue of non-attorneys serving as ALJs. The legislation creating the OAL has no absolute requirement that ALJs be attorneys-at-law licensed to practice in the State of New Jersey; only the Director is required to possess this status. This topic was debated throughout the legislative process of Senate Bill No. 766, but the Legislature felt that the circumstances existing at that time militated against requiring attorney status for all ALJs. When the OAL was created, there were scores of departmental and agency hearing examiners who, despite not being attorneys, possessed considerable experience and expertise in their subject areas. As this legislation contemplated the assignment of ALJs to agencies in order to ensure the continuance of this expertise, it was felt that some of these non-attorney hearing examiners were highly competent and should be eligible for consideration as ALJs. The Legislature addressed this situation by requiring that ALJs be attorneys-at-law of the State of New Jersey, with the exception of non-attorneys who, in the discretion of the Governor, are qualified in the field of administrative

law, administrative hearings and proceedings in subject matter relating to the hearing functions of a particular State agency. As a result, a significant number of the first ALJs selected were non-attorneys formerly employed as hearing examiners by various State departments and agencies.

The existence of ALJs who are not attorneys caused some concern among attorneys and litigants appearing before the OAL, and, as the reason for originally permitting non-attorneys to serve as ALJs is no longer applicable, the Committee studied this issue in considerable depth. Most of the witnesses testifying before the Committee commented on this issue, with a number of differing viewpoints being expressed. The majority position was that ALJs should be required to be attorneys, as most attorneys and litigants felt more comfortable with ALJs who were well versed in the legal and procedural aspects of administrative practice. Some witnesses even related instances where non-attorney ALJs impeded the progress of hearings through a lack of procedural knowledge. Conversely, some witnesses stated that they detected no difference in competence between attorney and non-attorney ALJs.

The Committee agreed with the majority and concluded that, in all future initial appointments, ALJs should be attorneys-at-law licensed in New Jersey. This result was predicated in part upon the diversity and complexity of cases that ALJs are required to hear. Although some types of cases, such as those involving welfare entitlements, require little legal background, others, such as utility rate cases, are extremely complex and require well-developed abilities in legal analysis and interpretation. As all ALJs, including former departmental hearing officers hired for their special expertise, hear a wide variety of cases, it was felt that all ALJs

should be attorneys. This requirement would also serve to enhance the professional perception of the OAL.

The status of non-attorney ALJs was also a significant part of the Committee's discussion of the reappointment process. It was decided that, although all new ALJs should be attorneys, the non-attorney ALJs had acquired considerable expertise during their tenure and should be reappointed if their performance merited such action. The Committee strongly believed that the reappointment process should be based solely on merit and should be utterly devoid of political considerations. In making a reappointment decision, the Governor should be guided by the judicial evaluation of the ALJ prepared by the Director of the OAL and by the same general criteria considered in the reappointment of a Superior Court Judge.

Closely intertwined with the reappointment issue is the notion of tenure, which is currently not available to ALJs. Under existing law, ALJs are eligible to be reappointed to an unlimited succession of five year terms up to the mandatory retirement age of 70 but are not granted tenure protection. The Committee felt that the stability and prestige of the OAL would be enhanced by granting tenure to ALJs, as this would provide the status and security necessary to attract and retain the best possible judges. In order to achieve this objective, the Committee recommends that ALJs be granted automatic tenure upon the completion of 10 years of service and reappointment to a successive term. Under this proposal, each potentially tenured ALJ will be subject to several reviews by the Governor and the Director of the OAL after the initial appointment and more than one confirmation by the Senate after the original appointment and confirmation requirements. This system should be more than adequate to prevent the granting of tenure to undeserving candidates. Concomitant with this tenure



provision should be the formulation of a process for the discipline and removal for cause of ALJs, perhaps patterned after the methods applicable to Worker's Compensation Judges.

An integral part of the selection and reappointment process is the judicial evaluation program which is mandated by N.J.S.A. 52:14F-5(s). This program is said to be the most comprehensive of its kind in the nation, and it has drawn acclaim from all those who commented upon it. Major components of this program include the solicitation of opinions and comments from attorneys and litigants who have appeared before the OAL, the detailed evaluation of each ALJ by measures of the Director of the OAL in the areas of competence, productivity, demeanor and detailed statistical output. The Committee was favorably impressed by this system of judicial evaluation and strongly recommended that it be continuously evaluated for purposes of further refinement and improvement.

Another question that arose was whether or not there is a need for additional ALJs for the purpose of reducing existing backlogs and providing for a more expeditious disposition of cases. The Committee heard testimony to the effect that the number of ALJs has remained relatively constant since the inception of the office despite the fact that the number of cases filed has increased twofold. Due to recent legislative changes, it is anticipated that the OAL caseload will increase even further during the next year. For example, the Division of Motor Vehicles recently mailed over 70,000 notices pursuant to P.L. 1983, c. 65, which imposes insurance surcharges on drunk driving violators and motor vehicle operators who have accumulated more than six points. It is estimated that 1,000 petitions for OAL hearings will be filed in response to these billings. Similarly, the Worker and Community Right-To-Know Act (P.L. 1983, c. 315), signed into law on August 29, 1983,

will result in approximately 1,500 requests for hearings according to estimates concurred in by the Department of Environmental Protection and the Office of Legislative Services. In addition, there are scores of other recently enacted or pending legislative proposals which would result in an increased case load for the OAL.

In view of the increasing case load and the prospect of more requests for hearings in the foreseeable future, the Committee felt that the hiring of more ALJs would be warranted. Although the Committee did not determine the specific number of additional ALJs required, it felt that the available positions should be raised to a level sufficient to permit the Governor the flexibility of making further appointments based on existing needs. The Committee also felt that a corp of temporary judges should be established, perhaps drawn from retired judges, in order to deal with temporary upward fluctuations in the caseload. However, the Committee will instruct the Director of the OAL to make a report on alternative methods of disposing of cases.

The Committee supports the establishment of a Senior Judge Corps which would increase the effectiveness of the OAL. This proposal would entail the appointment of six senior judges to specified areas of responsibility in which they would exercise administrative and advisory responsibilities while still hearing cases of high visibility and significant legal impact. It was felt that the implementation of this system would promote greater efficiency by having experienced judges working and consulting with ALJs hearing cases in their areas by providing the substantive and procedural direction applicable to the types of cases being heard.

V. The Role of the Office of Administrative Law in the Executive Branch

The Office of Administrative Law, which was established as an independent agency within the Executive Branch of State Government, is expressly delegated the responsibility to hear contested administrative cases for most State agencies and to oversee the rule-making function for the Executive Branch. See N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The OAL thus performs essential governmental functions directly affecting not only the various agencies but the interests of every citizen of the State.

Under the current law, each State agency may decide which cases within its jurisdiction are contested matters subject to an administrative hearing. An ALJ will preside over the hearing of a contested case referred from an agency and within 45 days from the conclusion of the hearing issue a recommended report and decision ("initial decision") which must contain recommended findings of fact and conclusions of law. The parties are then provided the opportunity to file exceptions, objections and replies to the initial decision. The head of the agency may thereafter adopt, reject or modify the initial decision by issuing a final decision. Where an agency has not acted on the initial decision within 45 days from the receipt of the matter from the OAL, the initial decision is deemed adopted as the final agency decision. See N.J.S.A. 52:14B-10; N.J.S.A. 52:14F-7.

Much of the oral and written testimony received by the Committee focused on the issue of whether the Administrative Law Judge should be granted final decision-making authority in contested administrative cases. Many participants, including the State agencies and the Attorney General, generally opposed any change in the current process while other speakers, most notably the private sector attorneys, had various viewpoints which

would allow ALJs final decision authority in some or all areas without agency review. A key issue of debate regarding final decision-making centered on whether there should be a distinction between forum agencies, which do not participate in the administrative hearing process and merely decide cases after the record is complete, and party agencies, which may have made an initial determination which becomes the subject of a contested case or whose staff participate in an adversarial nature during the adjudicatory process. For example, the Civil Service Commission, which acts as a forum agency in its consideration of disputes between various Civil Service employers and employees, does not participate in the hearing process but provides a neutral forum in such matters. In contrast, the staff of the Board of Medical Examiners may engage in investigatory and prosecutorial roles as a party to the proceedings in physician licensing matters that are thereafter finally decided by that same agency. Some agencies such as the Department of Environmental Protection have developed mechanisms by which staff personnel who participate in the case process do not have any advisory role in the Commissioner's final decisions. Other agency heads, such as the Director of the Division on Civil Rights, must by statute make probable cause or similar types of findings before the contested case process can be initiated and later make final determinations after an OAL hearing. The role of the Attorney General in this area was also questioned, as deputy attorneys general serve by law as counsel to various State agencies in prosecutorial, advocacy, and advisory functions.

After extensive discussion, it became clear that there was no useful mechanism for distinguishing between forum and party agencies with respect to final decision authority due to the unique statutory, regulatory and operational mechanisms that have developed for the various State agencies.

The Committee determined that the fact that an agency was a forum as opposed to a party agency in a particular case was not a useful basis for restricting or eliminating an agency's final decision authority.

While the Committee rejected the forum/party distinction with respect to final decision-making authority, it did have serious due process and fairness concerns where agency personnel perform investigative, prosecutorial or advocacy functions and later participate in an advisory role to the agency head. The Committee endorsed the process utilized by the Department of Environmental Protection, which restricts staff in such matters, and felt that similar limitations should be instituted in the other State agencies where feasible. This is consistent with the policy established by the Attorney General, who has issued guidelines to the deputy attorneys general which provide that no attorney who serves as a prosecutor in a contested case shall be permitted to have any involvement in the advice function to the agency head on that matter. Additionally, the Committee found no reason to limit or legislatively change those areas where an agency head makes a probable cause or prima facie case determination in order for a matter to be processed as a contested case. Such a finding would not be prejudicial to a party where it merely initiates the administrative process for a hearing and is similar in some respects to a judge's determination or review for interim matters in a judicial proceeding. The Committee thus proposes the following standard:

No employee, agent, counsel or other person who has performed investigative, prosecutorial or advocacy functions in a contested case shall participate or advise the agency head in the final administrative

decision. This, however, would not preclude an agency head who must by law make a finding of probable cause or a prima facie case from issuing the final decision in a case.

Another area of discussion pertaining to final decision-making authority focused on the distinction between policy determinations and findings of fact. The Committee found that, on policy issues and conclusions, the agency head should retain complete discretion and decisional authority. With respect to strictly factual matters, the Committee recognized the important role of the ALJ as hearer of the case in deciding contested facts. Where an agency head modifies or reverses a particular fact-finding of the ALJ, the final decision should clearly and sufficiently identify that part of the record and provide reasons which support the agency head's modification or reversal. In particular, the agency head should give deference to factual determinations of the ALJ which depend on a consideration of the credibility of witnesses. On this issue, the Committee considered the following procedure to be appropriate:

The agency head shall give due consideration to the factual findings and related conclusions of the Administrative Law Judge and where such a finding or conclusion is modified or rejected, the agency head must provide in the final decision the basis for such action in clear and sufficient detail from the record.

The last consideration regarding final decision-making focused on the fact the agency heads can now in effect delegate to an ALJ final decision-making authority in a particular case through inaction after



receipt of the initial decision. In such cases, the ALJ and the parties do not know at the beginning of the process that the agency head will decline to issue a final decision. The record is thus prepared for final agency review necessitating a written initial decision, the possible filing of exceptions and cross-exceptions to the initial decision and the mandatory 45-day period before the initial decision becomes the final case decision. In the Committee's judgment, consideration should be given to permitting an agency head to determine at initial processing whether final decision-making authority will be deferred to the ALJ in a specific matter or type of case. Any such deferral should, however, be optional and limited to those cases that would entail factual determinations rather than policy issues or considerations. An agency head may also defer certain issues to the ALJ while retaining final authority on other matters. For instance, in a motor vehicle case the Director of Motor Vehicles might defer the liability question for final resolution by the ALJ but retain final authority to review penalties or sanctions.

The agency head should retain complete discretion in determining the cases or issues that would be deferred to an ALJ for final decision. This is necessary since the distinction between merely factual issues and policy matters is often difficult to clearly delineate and will vary from agency to agency. Moreover, the Committee recognized that an agency head may retain all cases for final decision. However, it was felt that where an agency head had not deferred final authority, he or she should be obligated to issue a final order to terminate the administrative process. A mechanism should also be available for a reconsideration of deferral if, during the administrative process, legitimate policy issues or concerns are presented which would require agency head final review. Such a deferral procedure

would require a legislative change. In this regard, consideration should be given to amending N.J.S.A. 52:14F-7(a), to read:

Nothing in this amendatory and supplementary act shall be construed to deprive the head of any agency of the authority pursuant to section 10 of P.L. 1968, c. 410 (C.52:14B-10) to determine whether a case is contested or to adopt, reject or modify the findings of fact and conclusions of law of any administrative law judge. However, a head of an agency may defer final decision authority to an administrative law judge on transmittal to the Administrative Law Judge in a contested case or on an issue in a case which does not involve a policy decision. The deferral may be reconsidered during the administrative process if the head of the agency or the administrative law judge determines that the matter will ultimately concern policy issues and that it should be reviewed by the head of the agency.

The Committee also reviewed the OAL's responsibility with respect to agency rule-making. At present, the OAL performs mainly ministerial functions in reviewing agency rule proposals for format and style and providing technical assistance in this area. It also prepares the New Jersey Register, the publication for public notice of rule proposals and adoptions, and coordinates the publication and dissemination of the New Jersey Administrative Code, which provides a compilation of New Jersey administrative regulations. Certain agency staff testified concerning the intrusion of the OAL into agency rule-making authority and its failure to

promptly publish certain agency rules. Moreover, long delays of over a year in updating the New Jersey Administrative Code were presented.

The Committee considered that substantive areas involving agency rule-making are clearly matters for the agency head to determine and should not be reviewable by the OAL. While the Committee recognized the OAL's oversight responsibility to ensure grammatical correctness and other technical requirements with respect to the New Jersey Register and the Administrative Code, it considered that such a role must be strictly limited and the agency head must retain discretion and overall authority in administrative rule-making.

Furthermore, the Committee strongly objected to the existing long delays in the Administrative Code updating. Such practice undermines the usefulness of the Code and creates great confusion as to the operating regulations in State Government. Immediate procedures should be implemented to change the present system and ensure an updated system that would provide Code changes on a more uniform program such as a monthly process.

In reviewing the history and operations of the OAL, it became evident that the OAL must function as an integral part of the Executive Branch. In particular, New Jersey's constitutional framework provides for a strong and viable Executive Branch of government with the power and authority exercised directly by the Governor and derivatively by agency heads accountable to the Governor. Executive policy and direction is expressed in many contexts, and agency rule-making and administrative adjudication are of prime importance. The ability of the Executive Branch to maintain and regulate these administrative processes without interference from the other branches of government is essential to its independence and ability to manage governmental services and programs. As the Supreme Court recognized,

"[a]dministrative agencies cannot be expected to cover the course of administrative regulation on one leg. They need both their rule-making and adjudicatory powers to perform their duties properly." In re Uniform Admin. Procedure Rules, 90 N.J. 85, 94 (1982).

The exercise of such Executive powers also entails responsibility which in the final analysis is reviewable by the electorate. In this manner, overall governmental policies and direction are held accountable and representative government is enhanced. Thus, the Governor and his agency heads must maintain decisional authority in areas that are essential to the proper functioning of the Executive Branch and to the development of administrative policy. These fundamental aspects of administrative law provide the foundation of our governmental structure and organization. The OAL is an essential party to this system. It coordinates and facilitates these vital processes for the State and its citizens.

VI.

STATE OF NEW JERSEY  
EXECUTIVE DEPARTMENT

EXECUTIVE ORDER NO. 38

WHEREAS, the Office of Administrative Law was established in 1979 and charged with responsibility for overseeing specified functions within the Executive Branch; and

WHEREAS, the Office of Administrative Law was created with the intention that it should promote due process, expedite the just conclusion of contested cases, and generally improve the quality of administrative justice; and

WHEREAS, the size of the caseload within the jurisdiction of the Office of Administrative Law has increased dramatically since its inception; and

WHEREAS, the Office of Administrative Law adjudicates diverse issues, many of which have important consequences to members of the general public such as utility rates, professional licensing, driver's licenses and welfare benefits;

WHEREAS, legislation pertaining to the Office of Administrative Law is occasionally presented to me; and

WHEREAS, an evaluation of the performance of the Office of Administrative Law with regard to how it meets its legislative mandates has not taken place since the Office was created;

NOW, THEREFORE, I, THOMAS H. KEAN, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the laws of this State, do hereby ORDER and DIRECT that:

1. There is hereby created a committee to be known as the Governor's Committee on the Office of Administrative Law (hereinafter referred to as the "Administrative Law Committee").

2. The Administrative Law Committee shall consist of 13 members, which shall include: the Secretary of State, the Commissioners of Civil Service, Education, Human Services, the Director of the Division of Motor Vehicles, a representative of the Governor's Office, one representative or Administrative Law Judge of the Office of Administrative Law and six other members to be selected by the Governor. The Chairman and Vice Chairman shall be selected by the Governor from among the Committee membership. The members of the Administrative Law Committee shall serve without compensation.

3. The Administrative Law Committee shall study the following issues and make periodic reports to me on its findings and recommendations:

a. Any and all ways of improving the amount of time necessary to dispose of an administrative law case including, but not limited to, an analysis of whether

STATE OF NEW JERSEY  
EXECUTIVE DEPARTMENT

separate and distinct procedures can be instituted to accommodate different types of cases.

b. Suggested means for dealing with the existing backlog of cases.

c. The necessity or desirability of instituting a requirement that administrative law judges be attorneys licensed to practice law in the State of New Jersey.

d. The appropriate atmosphere which should be fostered during administrative law hearings, (i.e., the degree to which formalized courtroom procedures, such as the wearing of robes, should be encouraged or discouraged).

e. The appropriate role of the Office of Administrative Law within the Executive Branch.

4. The Administrative Law Committee is authorized to call upon any department, office, division or agency of the State to supply such data, program reports and any other information, personnel or assistance as it deems necessary to discharge its responsibilities under this order. Each department, office, division or agency of the State is authorized to the extent not inconsistent with law, to cooperate with the Administrative Law Committee to furnish it with such information, personnel and assistance as necessary to accomplish the purposes of this order.

5. This order shall take effect immediately and shall expire one year after its effective date.

GIVEN, under my hand and seal this  
7th day of April  
in the Year of Our Lord, one  
thousand nine hundred and eighty  
three of the Independence of  
the United States, the two  
hundred and seventh.

/s/ Thomas H. Kean  
GOVERNOR

(seal)

Attest:

/s/ W. Cary Edwards  
Chief Counsel



STATE OF NEW JERSEY  
EXECUTIVE DEPARTMENT

EXECUTIVE ORDER NO. 64

WHEREAS, Executive Order No. 38 created a Governor's Committee on the Office of Administrative Law; and

WHEREAS, the purpose of the Governor's Committee on the Office of Administrative Law is to undertake a comprehensive evaluation of the performance of the Office of Administrative Law with regard to how it meets its legislative mandates; and

WHEREAS, the proper adjudication by the Office of Administrative Law of many diverse issues of important consequence to members of the general public is of vital importance to the promotion of due process, the just conclusion of contested cases, and the general improvement in the quality of administrative justice in the State; and

WHEREAS, it is imperative that the Committee be given adequate time to thoroughly and completely perform its designated responsibilities;

NOW, THEREFORE, I, THOMAS H. KEAN, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the statutes of this State, do hereby Order and Direct:

1. Section 5 of Executive Order No. 38 is hereby amended as follows:

"5. The Committee shall submit a report of its findings to the Governor on or before July 7, 1984, accompanying the report with any recommendations it deems appropriate. The Committee may make interim reports concerning its study as it shall determine."

GIVEN, under my hand and seal  
this 22nd day of March  
in the Year of Our Lord  
one thousand nine hundred  
and eighty four and of the  
Independence of the United  
States, the two hundred  
and eighth.

/s/ Thomas H. Kean

GOVERNOR

[seal]

Attest:

/s/ W. Cary Edwards

Chief Counsel

VII.

LIST OF STATE WITNESSES

The Honorable Michael Cole  
First Assistant Attorney General

The Honorable Mary Ann T. Burgess  
Assistant Attorney General

The Honorable Audrey Harris  
Director  
Division of Public Welfare  
Department of Human Services

The Honorable John F. Vassallo, Jr.  
Director  
Division of Alcoholic Beverage Control

The Honorable Joseph H. Rodriguez  
Commissioner  
Department of Public Advocate

Bart Bennett, Esq.  
Assistant Director of Regulatory Affairs  
Department of Environmental Protection

The Honorable Scott Weiner  
Executive Director  
New Jersey Election Law Enforcement Commission

Mr. Eric Perkins  
Special Assistant to the Chancellor  
Department of Higher Education

The Honorable Terrance Moore  
Executive Director  
New Jersey Pinelands Commission

The Honorable Thomas M. Russo  
Director  
Division of Medical Assistance and Health Service  
Department of Human Services

The Honorable Harold G. Handel  
Executive Director  
Division of New Jersey Racing Commission

The Honorable Pamela S. Poff  
Director  
Division on Civil Rights  
Department of Law & Public Safety

The Honorable Dominick Mazzogetti  
Deputy Commissioner  
Department of Banking

The Honorable Walter M. Read  
Chairman  
New Jersey Casino Control Commission

The Honorable Barbara Curran  
President  
State Board of Public Utilities

LIST OF PUBLIC WITNESSES

William S. Greenberg, Esq.  
Private Practice

Steven I. Kern, Esq.  
Private Practice

Vincent A. Maressa, Esq.  
Executive Director and Legal Counsel  
Medical Society of New Jersey

Vincent J. Dotoli, Esq.  
Private Practice

Richard F. Aronsohn, Esq.  
Private Practice

Dr. John P. Delaney  
Superintendent Woodbridge State School

Sheldon H. Pincus, Esq.  
Private Practice

Richard S. Semel, Esq.  
Legal Services

Joel Shain, Esq.  
Chairman of the New Jersey State Bar  
Administrative Law Section

George Frazza, Esq.  
General Counsel of Johnson & Johnson  
Member of Governor's Management Improvement Plan

James Scott Hill, Esq.  
Counsel to Shanley & Fisher Member of  
Governor's Management Improvement Plan

Atif S. Aktar  
Private Citizen

Anthony Castaldo  
Private Citizen

Richard McManus, Esq.  
Private Practice

Nahum Litt  
Chief Judge of the U.S. Department of Labor

Samuel J. Halpern, Esq.  
Private Practice

WRITTEN TESTIMONY  
PROVIDED BY

The Honorable John P. Renna  
Commissioner  
Department of Community Affairs

The Honorable Robert S. Kline  
Deputy Director  
New Jersey Division of Motor Vehicles

The Honorable William J. Joseph  
Director  
Division of Pension  
Department of the Treasury