PUBLIC HEARING

before

New Jersey. Legislature.
111
SENATE, STATE GOVERNMENT, FEDERAL AND INTERSTATE RELATIONS AND VETERANS AFFAIRS COMMITTEE,

on

SENATE, NO. 766

(Establishing an independent Office of Administrative Law "in but not of" the Department of State).

Held:
March 20, 1978
Assembly Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator Angelo J. Errichetti (Chairman)
Senator Francis X. Herbert
Senator Laurence S. Weiss
Senator Lee B. Laskin

ALSO:

James A. Carroll, Research Associate
Legislative Services Agency
Committee Aide

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I N D E X

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1-28:III
29-30:I

SENATE, No. 766

STATE OF NEW JERSEY

INTRODUCED JANUARY 30, 1978

By Senators YATES and WEISS

Referred to Committee on State Government, Federal and Interstate Relations and Veterans Affairs

AN ACT to establish an independent Office of Administrative Law in the Executive Branch of State Government, to transfer to it the functions of, and to reallocate the existing Division of Administrative Procedure, to amend and supplement P. L. 1968, c. 410, to repeal section 6 thereof and to appropriate certain sums.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) There is hereby established in the Executive Branch of the State Government the Office of Administrative Law. For the purpose of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the Office of Administrative Law is hereby allocated within the Department of State, but notwithstanding said allocation, the office shall be independent of any supervision or control by the department or by any personnel thereof. As used in this act, "office" shall mean the Office of Administrative Law.

2. (New section) All the functions, powers and duties heretofore exercised by the Division of Administrative Procedure in the Department of State pursuant to the Administrative Procedure Act, P. L. 1968, c. 410 (C. 52:14B–1 et seq.) are transferred to and vested in the Office of Administrative Law created by this amendatory and supplementary act.

3. (New section) The head of the office shall be the director, who shall be an attorney-at-law of this State. The director and the full-time administrative judges shall be appointed by the Governor with the advice and consent of the Senate.

The director shall serve for a term of 6 years. As used in this act, "director" shall mean the Director of the Office of Administrative Law.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

The director shall devote his entire time to the duties of his office and shall receive a salary as provided by law. Any vacancy occurring in the office of the director shall be filled in the same manner as the original appointment, but for the unexpired term only.

4. (New section) The Governor shall appoint the full-time administrative judges who shall serve for terms of 5 years and until the appointment and qualification of their successors. A vacancy in the office of full-time administrative judge shall be filled in the same manner as the original appointment for the unexpired term only.

5. (New section) The Director of the Office of Administrative Law shall:

a. Administer and cause the work of the office to be performed in such manner and pursuant to such program as may be required or appropriate;

b. Organize and reorganize the office, and establish such bureaus as may be required or appropriate;

c. Except as otherwise provided in subsection 1, below, appoint, pursuant to the provisions of Title 11 of the Revised Statutes, such clerical assistants and other personnel as may be required for the conduct of the office;

d. Assign and reassign personnel to employment within the office;

e. Develop uniform standards, rules of evidence, and procedures, including but not limited to standards for determining whether a summary or plenary hearing should be held to regulate the conduct of contested cases and the rendering of administrative adjudications;

f. Promulgate and enforce such rules for the prompt implementation and coordinated administration of the Administrative Procedure Act, P. L. 1968, c. 410 (C. 52:14B–1 et seq.) as may be required or appropriate;

g. Administer and supervise the procedures relating to the conduct of contested cases and the making of administrative adjudications, as defined by section 2 of P. L. 1968, c. 410 (C. 52:14B–2);

h. Advise agencies concerning their obligations under the Administrative Procedure Act, subject to the provisions of subsections b. and e. of section 4 of P. L. 1944, c. 20 (C. 52:17A–4b and 4e);

i. Assist agencies in the preparation, consideration, publication and interpretation of administrative rules required or appropriate pursuant to the Administrative Procedure Act, P. L. 1968, c. 410 (C. 52:14B–1 et seq.);

j. Employ the services of the several agencies and of the employees thereof in such manner and to such extent as may be agreed upon by the director and the chief executive officer of such agency;

k. Have access to information concerning the several agencies to assure that they properly promulgate all rules required by law;

l. Assign full-time administrative law judges at supervisory and other levels who are qualified in the field of administrative law or in subject matter relating to the hearing functions of a State agency. A full-time administrative law judge shall not hold other employment.

Administrative law judges shall receive such salaries as provided by law.

Administrative law judges shall be attorneys-at-law of this State, or any persons who are not attorneys-at-law, but who, in the judgment of the Governor or the director 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;

m. Appoint such additional administrative law judges, qualified in the field of administrative law or in subject matter relating to the hearing functions of a State agency, on a temporary or case basis as may be necessary for the proper performance of the duties of the office, pursuant to a reasonable fee schedule established in advance by the director. Temporary administrative law judges shall have the same qualifications for appointment as permanent administrative law judges.

n. Assign an administrative law judge to any agency empowered to conduct contested cases to preside over such proceedings in contested cases as are required by sections 9 and 10 of P. L. 1968, c. 410 (C. 52:14B–9 and 52:14B–10);

o. Assign an administrative law judge or other personnel to any agency to conduct or assist in administrative duties and proceedings other than those related to contested cases or administrative adjudications, including but not limited to rule-making and investigative hearings, if so requested by the head of an agency and if the director deems appropriate;

p. Assign an administrative law judge not engaged in the conduct of contested cases to perform other duties vested in or required of the office;

q. Secure, compile and maintain all reports of administrative law judges issued pursuant to this act, and such reference materials and supporting information as may be appropriate; and

r. Develop and maintain a program for the continuing training and education of administrative law judges and agencies in regard to their responsibilities under this act.

6. (New section) a. Administrative law judges shall be assigned by the director from the office to an agency to preside over contested cases in accordance with the special expertise of the administrative law judge;

b. A person who is not an employee of the office may be specially appointed and assigned by the director to an agency to preside over a specific contested case, if the director certifies in writng the reasons why the character of the case requires utilization of a different procedure for assigning administrative law judges than is established by this amendatory and supplementary act.

7. Section 5 of P. L. 1968, c. 410 (C. 52:14B-5) is amended to read as follows:

5. (a) Each agency shall file [in the office of the Secretary of State] *with the Director of the Office of Administrative Law* a certified copy of each rule adopted by it.

(b) Each rule hereafter adopted is effective upon filing with the [Secretary of State] *director*.

(c) The [Secretary of State] *director* shall: (1) accept for filing or publication any rule duly adopted and submitted by any agency pursuant to this act; (2) endorse upon the certified copy of each rule accepted for filing pursuant to this act the date and time upon which such rule was filed; and (3) maintain the certified copy of each rule so filed in a permanent register open to public inspection.

(d) The filing of a certified copy of any rule shall be deemed to establish the rebuttable presumptions that: (1) it was duly adopted; (2) it was duly submitted for prepublication and made available for public inspection at the hour and date endorsed upon it; (3) all requirements of this act and of interagency rules of the [Secretary of State] *director* relative to such rule have been complied with; (4) its text is the text of the rule as adopted. Judicial notice shall be taken of the text of each rule, duly filed.

(e) The publication of a rule in the New Jersey Administrative Code or the New Jersey Register shall be deemed to establish the rebuttable presumption that the rule was duly filed and that the text of the rule as so published is the text of the rule adopted. Judicial notice shall be taken of the text of each rule published in the New Jersey Administrative Code or the New Jersey Register.

8. Section 10 of P. L. 1968, c. 410 (C. 52:14B-10) is amended to read as follows:

10. In contested cases:

(a) The parties shall not be bound by rules of evidence whether statutory, common law, or adopted *formally* by the Rules of Court. All relevant evidence is admissible, except as otherwise provided herein. The [presiding] *administrative law judge* may in his discretion exclude any evidence if he finds that its probative value is substantially outweighted by the risk that its admission will either (i) necessitate undue consumption of time or (ii) create substantial danger of undue prejudice or confusion. The [presiding] *administrative law judge* shall give effect to the rules of privilege recognized by law. [Every party shall have the right to] *Any party in a contested case may* present his case or defense by oral and documentary evidence, [to] submit rebuttal evidence and [to] conduct such cross-examination as may be required, *in the discretion of the administrative law judge,* for a full and true disclosure of the facts.

(b) Notice may be taken of judicially noticeable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the [agency's] specialized knowledge of *the agency or administrative law judge.* Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material notice, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The [agency's] experience, technical competence, and specialized knowledge *of the agency or administrative law judge* may be utilized in the evaluation of the evidence, *provided this is disclosed of record.*

(c) [When a person not empowered to render an administrative adjudication is designated by the head of the agency as the presiding officer, his] *All hearings of a State agency required to be conducted as a contested case under this act or any other law shall be conducted by an administrative law judge assigned by the Director of the Office of Administrative Law, except as provided by this amendatory and supplementary act.* A recommended report and decision [containing] *which contains* recommended findings of fact and conclusions of law [shall be filed] *and which shall be based upon sufficient, competent, and credible evidence shall be filed, not later than 45 days after the hearing is concluded,* with the agency *in such form that it may be adopted as the decision in the case* and delivered or mailed, to the parties of record *with an indication of the date of receipt by the agency head;* and an opportunity shall be afforded each party of record to file exceptions, objections, and replies thereto, and to present argument to the

head of the agency or a majority thereof, either orally or in writing, as the agency may [order] *direct*. The head of the agency, *upon a review of the record submitted by the administrative law judge,* shall adopt, reject or modify the recommended report and decison *no later than 45 days after receipt of such recommendations. Unless the head of the agency modifies or rejects the report within such period, the decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency.* The recommended report and decision shall be a part of the record in the case. *For good cause shown, upon certification by the director and the agency head, the time limits established herein may be subject to extension.*

(d) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decison shall include findings of fact and conclusions of law, separately stated *and shall be based only upon the evidence of record at the hearing, as such evidence may be established by rules of evidence and procedure promulgated by the director.*

Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. [If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding.] *The final decision may incorporate by reference any or all of the recommendations of the administrative law judge.* Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith by registered or certified mail to each party and to his attorney of record.

(e) Except where otherwise provided by law, the administrative adjudication of the agency shall be effective on the date of delivery or on the date of mailing, of the final decision to the parties of record, whichever shall occur first, or shall be effective on any date after the date of delivery or mailing, as the agency may provide by general rule or by order in the case. The date of delivery or mailing shall be stamped on the face of the decision.

9. (New section) a. 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.

b. Nothing in this amendatory and supplementary act shall be construed to affect the conduct of any contested case initiated prior to the effective date of this act, or the making of any administrative adjudication in such contested case.

10. (New section) Unless a specific request is made by the agency, no administrative law judge shall be assigned by the director to hear contested cases with respect to:

a. The State Board of Parole, the Public Employment Relations Commission, the Division of Workers' Compensation, the Division of Tax Appeals, or to any agency not within section 2 (a) of P. L. 1968, c. 410 (C. 52:14B-2 (a));

b. Any matter where the head of the agency, a commissioner or several commissioners, are required to conduct, or determine to conduct the hearing directly and individually.

11. (New section) This act shall be subject to the provisions of the State Agency Transfer Act, P. L. 1971, c. 375 (C. 52:14D-1 et seq.).

12. (New section) Section 6 of P. L. 1968, c. 410 (C. 52:14B-6) is repealed.

13. (New section) All acts and parts of acts inconsistent with any of the provisions of this amendatory and supplementary act are, to the extent of such inconsistency, superseded and repealed.

14. (New section) To prepare for the implementation and operation of this act there is appropriated to the Division of Administrative Procedure in the Department of State the sum of $500,000.00, the obligation and expenditure of which shall be subject to the approval of the Director of the Division of Budget and Accounting.

15. (New section) If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application and to this end the provisions of this act are declared to be severable.

16. (New section) This act shall remain inoperative until 6 months following its enactment, except with respect to the making of appointments and the taking of preparatory actions, which may take effect immediately upon enactment.

STATEMENT

This bill provides for a full-time corps of trained, skilled administrative law judges to expedite the process by which State administrative agencies decide contested cases, and to inject greater impartiality into that process. It provides for a standardization of procedures used in the conduct of contested cases and the making of administrative adjudications, incorporating concepts first urged by Justice Nathan L. Jacobs, dissenting in *Mazza v. Cavicchia*, 15 N. J. 498, 536 (1954).

Presently, the Administrative Procedure Act requires that all contested cases involving State agencies be heard by a hearing officer. The existing system of part-time hearing officers has caused delay in the disposition of cases, and unnecessary expense to the State. In many instances, the Attorney General experiences difficulty defending in court the hearing officer reports, as adopted by the agency head, because they are not expertly prepared. Further, hearing officers employed by the various agencies involved in the decisions being rendered are often not impartial, an ill created in part by the fact that the agency head selected them in the first place. The concept of due process of law is also undermined by the combination of investigative, prosecutorial and hearing functions, all being administered by the same agency and sometimes by the same individual. Finally, the employment by the State of part-time hearing officers who are attorneys representing clients before other State agencies raises serious issues under the conflicts of interest law, because paid hearing officers, even those serving part-time, are State officers or employees subject to the most stringent conflicts law requirements.

Under the provisions of this bill, the director of the office will be appointed by the Governor for a 6-year term. Hearing officers, appointed by the Governor, and related employees appointed by the director shall be deemed to be employees of an independent office of administrative law, allocated to the Department of State. Provision is made for non-attorney hearing officers in cases where technical expertise is more required than legal expertise. As another means of ensuring that administrative law judges possess expertise in the technical field in which they are hearing matters, they will not be rotated among agencies, but rather will, perform duties for a single agency. In addition, the director may assign an individual who is not an employee of the office if the director certifies the reasons why the character of the case requires a different procedure for assigning the administrative law judge.

The use of full-time administrative law judges will reduce the delays which have resulted from part-time officers having to respond to the demands of their private careers.

Administrative law judges will have to forward final recommendations to department heads no later than 45 days after the hearing has been completed and the department will have to render a final decision no later than 45 days of receipt of the administrative law judge's report. Unless the agency head modifies or rejects the administrative law judge's report, that report will take effect 45 days after its receipt by the agency head, unless good cause for extension is certified by the hearing officer and the agency head.

This bill eliminates nearly all questions of conflict of interest. The time-honored concept of due process of law will be assured by the independent nature of the new hearing officer function. As under existing law, however, the head of an agency will himself exercise the ultimate options of adopting, rejecting or modifying the setting proceedings. Also as under existing law, single members of multimember bodies such as the Board of Public Utilities will be able to conduct contested cases.

An appropriation of $500,000.00 is included for administrative expenses. It is anticipated that in the implementation of this new act, a substantial portion of the operating budget will be derived from the budgets of existing departments and agencies the hearings of which will now be undertaken by the new division of administrative law.

SENATOR ANGELO ERRICHETTI (Chairman): Good afternoon, ladies and gentlemen. I would like to call this public hearing to order. I am Senator Errichetti, Chairman of the Senate State Government, Federal and Interstate Relations and Veterans Affairs Committee. My colleagues are Senators Weiss and Laskin.

The Committee is convened today to hear testimony from interested parties on Senate Bill Number 766. If there is anyone present who would like to give testimony and who has not notified the Committee, please come forward and register with our staff and you will be so heard.

The bill under consideration is S-766, sponsored by Senator Yates, which creates an Office of Administrative Law in the Department of State.

I would like to call the first witness, Attorney General John Degnan.

A T T O R N E Y G E N E R A L J O H N J. D E G N A N: Thank you, Mr. Chairman. I appreciate the opportunity to appear before you today to testify in support of Senate Bill 766. It is always nice as Attorney General to be able to support a bill that, as counsel to the Governor in the last session of this Legislature, I had something to do with drafting.

Given that caveat, I would like to wholeheartedly urge your support for the bill in the form in which it appears before you today. The statement to the bill notes that by providing for a standardization of procedures used in the conduct of contested cases, and the making of administrative adjudications, the bill incorporates concepts first urged by Justice Jacobs in a dissenting opinion, written in 1954. As you well know, I think Justice Jacobs, for a long time on the New Jersey Supreme Court, stood out in terms of handling administrative opinions - administrative agency opinions - based on his long personal background in that area.

Thus, the need for reform of our administrative procedures has long been recognized in the State. In that opinion, the Justice characterized the basic problem as the continued policy of concentrating in a single administrator wide powers of investigation, prosecuting, hearing, and determination. The recognition of this problem was one of the reasons for splitting the licensing and investigation and prosecution powers for casino regulation between two distinct agencies. That same model, I would suggest - and the Governor has publicly suggested - needs to be studied in connection with both the ABC and the Division of Motor Vehicles.

By removing hearing officers from the various departments and agencies of State Government and assigning them to a single office of Administrative Law, the hearing and determination powers are separated from other administrative processes. Thus, administrative hearings can be conducted more impartially and the concept of due process of law will be better served.

The bill also directs the Director of the Office of Administrative Law to develop uniform standards, rules of evidence, and procedures, which should further expedite the hearing of administrative proceedings.

The statement to the bill sets out, in clear terms, the goals sought to be achieved by its passage. They relate to insurance of due process. The bill itself, I think, will shorten the time involved in hearing proceedings by requiring that the hearing examiner himself file a report within 45 days and that the cabinet official charged with reviewing that decision has 45

days within which to act, or the decision has the effect of a final decision.

It also will reduce the number of conflicts which occur through the repeated use on our part of part time hearing examiners. It will allow, I suggest, the creation of a body of experts and the bill itself, as you know, provides that administrative law judges will be assigned on the basis of that expertise to the extent possible.

I think, finally, it will insure a greater impartiality in the overall administration under the bill.

One criticism of the concept of administrative law judges which has been raised at prior public hearings is that by removing the administrative judge from the regulatory agency, the judge will not develop the necessary and appropriate knowledge peculiar to that agency's area of regulation. I would suggest that the bill answers that criticism by providing that administrative law judges shall be assigned to an agency to preside over contested cases, in accordance with the special expertise of the law judge.

Trial court judges, for the most part - as you know - are not classified according to subject matter and appellate court judges, without restriction, must hear appeals from all of our administrative agencies.

As with the judiciary, the first concern with regard to the assignment of administrative judges should be to insure that cases are heard in a procedurally correct manner. If such is the case, the adversary system itself will insure the presentation of all of the substantive arguments.

The assignment of administrative law judges,in accordance with their special expertise, is an added bonus which allows more efficient processing of cases by eliminating the need to educate the trier of facts. On that basis, I repeat, speaking for myself and also for the Governor, I urge your favorable consideration of this bill and I am available at this point to answer any questions you may have about it which I am capable of answering.

SENATOR ERRICHETTI: Thank you. Senator Laskin, do you have any questions?

SENATOR LASKIN: Yes. Mr. Attorney General, do you have any idea of how many judges we are talking about?

ATTORNEY GENERAL DEGNAN: I don't, at this point, have a firm idea. I think it is difficult to say precisely because of the great number of part-time hearing examiners which are now used and the fact that they are not assigned in any kind of centralized oversight function which would allow me to tell you how many there are.

SENATOR LASKIN: Do you know how many part-time hearing examiners we have?

ATTORNEY GENERAL DEGNAN: I couldn't give you a precise number but probably hundreds is not unfair.

SENATOR LASKIN: Hundreds of them?

ATTORNEY GENERAL DEGNAN: More than 100 at least.

SENATOR LASKIN: I notice that the Election Law Enforcement Commission and the Casino Control Commission are not excluded from the jurisdiction of the bill. Was that an oversight?

ATTORNEY GENERAL DEGNAN: No, it wasn't. With respect to the Casino Control Commission, all the proceedings so far before that Commission have been held in banc or by the Chairman himself, rather than through a hearing

examiner. So, inasmuch as the bill itself provides that there is an exception when those cases are so heard, I don't believe that it is necessary to exempt the Casino Control Commission.

I would also urge that the Election Law Enforcement Commission not be exempted. I don't think that the mere fact that hearing examiners would be appointed by the Governor, with the advice and consent of the Senate, warrants an exclusion of that agency from this function any more than any other agency.

SENATOR LASKIN: Who determines whether an individual is qualified to be an administrative law judge - the Governor in his appointment power?

ATTORNEY GENERAL DEGNAN: Yes, basically. The bill itself provides that he must be either an attorney at law of the State of New Jersey or, if he is not that, have some other expertise which qualifies him.

SENATOR LASKIN: But, the Governor makes that decision?

ATTORNEY GENERAL DEGNAN: That's right, with the advice and consent of the Senate.

SENATOR LASKIN: Right. That is all I have, Mr. Chairman.

SENATOR ERRICHETTI: Senator Weiss, do you have any questions?

SENATOR WEISS: No questions.

SENATOR ERRICHETTI: There are no questions from the Chair. Thank you, Mr. Attorney General.

ATTORNEY GENERAL DEGNAN: Thank you.

SENATOR ERRICHETTI: From the Department of the Public Advocate, Mr. Penn.

A R T H U R P E N N: Thank you, Mr. Chairman. I am Arthur Penn, Assistant Commissioner, Department of the Public Advocate. On behalf of the Public Advocate, I would like to thank you for the opportunity of appearing here.

The Public Advocate endorses the goal of an independent, full-time hearing officer corps. Thus, we support S-766, but we have some reservations about the manner in which the bill seeks to achieve this goal.

I believe our department has a unique perspective on the state administrative process, for we have appeared before many state agencies in our capacity as a representative of the public.

For example, we have appeared before the PUC, the Department of Environmental Protection, the Department of Health, and the Department of Insurance. Based on our knowledge and experience, we can say that this bill presents a conceptual approach which establishes much needed reforms in our administrative process.

I will very briefly, and in a general fashion, outline why we support and why we need an independent full-time hearing officer corps. The impact of administrative decisions on the public is as great, if not greater, than the impact of legislative and judicial actions. Every day, some aspect of our lives is touched by the administrative decision-maker. It is thus essential that administrative decisions be made fairly and impartially, after a thorough and comprehensive analytical review. The public interest requires nothing less.

Unfortunately, our present hearing officer system all too often fails to meet this public interest. This is because the expertise needed to resolve the complicated, sophisticated, and technical, factual issues in many of our administrative cases, cannot be found in part-time hearing officers, with little or no background in the subject area of the administrative hearing.

Moreover, part-time hearing officers lead to unnecessary delays because these officers have other responsibilities. Thus, hearing dates are frequently delayed to fit a hearing officer's schedule.

In addition, to the extent that some hearing officers are employees of the agency that will ultimately decide the case, there is not the appearance of impartiality. In matters relating to government, the appearance of impartiality is as important as the fact of impartiality.

S-766, by establishing an independent, full-time corps of administrative judges meets the problems raised by our old system of administrative hearing officers. In short, the bill serves a very important public purpose.

The major reservation we have is in the provision relating to the Governor's appointment of all full-time hearing officers. I have heard various figures bandied about as to the number of judges we will need. I assume the number will be somewhere between 150 and 200. Many of these judges will be assigned to cases that do not have a significant public impact. All cases are important to the individuals participating in those cases, but many administrative cases have no impact beyond that of the individual participating.

I think if the Governor were to appoint 150, or 200 hearing officers, many of whom would be assigned to what I would consider the lesser type of cases, we might have an unmanageable system. I think the concept of the Governor appointing hearing officers for a fixed term is fine. But, I question the need for the Governor to appoint all of the hearing officers who will be needed to implement this program.

I would think, for example, that perhaps the Governor could appoint one or two hearing officers for each department in the state and then to the extent other hearing officers are needed, perhaps they could be appointed by the director and screened by a special committee.

With those reservations, the Public Advocate wholeheartedly supports this bill. Thank you very much.

SENATOR ERRICHETTI: Senator Laskin.

SENATOR LASKIN: Yes. Since you are representing the consumer advocate, I wonder if you could reply to a comment that I would like to make about the tenure of these judges. These are not tenured judges as we know in our judicial system and they would have a five-year appointment under this bill and every five years, presumably, they would either be reappointed or new ones would be appointed. Don't you think, as the consumer advocate, that that is a serious problem of political involvement because of the non-tenure aspects of this bill?

MR. PENN: Well, I am not sure it is a serious political problem because the judges all serve for a fixed term, which I believe is five years. Presumably, at the end of that term, I would think that the good judges will be reappointed. I think so for several reasons: First of all, you have the Cabinet members, who are responsible for each of those agencies. If they are satisfied with the caliber of the legal work done by the administrative judges, I am sure that there would be support for reappointment and I think that support would be true, regardless of any political affiliation.

SENATOR LASKIN: We all assumed that would be the case when the concept of full-time prosecutors came into New Jersey, which most interested parties like. What we have seen with the five-year prosecutor appointment is,

that each time there is a change in the administration, if someone's five-year term happens to be up during the change, a new prosecutor is appointed. When we in the Legislature - those of us who were not in the Legislature at the time but were interested in taking politics out of prosecutors' offices - all assumed that the good prosecutors would be reappointed. But, unfortunately, it doesn't work that way. Every time there is a new face in the oval office, so to speak, there is a new prosecutor when the term is up. Why would you think that this bill would be implemented any differently?

MR. PENN: Well, I would say, in response to the question, that although there certainly is some merit in the observation, I think there is just as much danger, from a political point of view, in having these administrative judges on a tenure basis. And, I would also say that if our recommendations were to be accepted, you would not have every judge in this full-time corps appointed by the Governor, but only a certain number of judges, with the rest being appointed perhaps by the director and the people who run the office on a day-to-day basis.

SENATOR LASKIN: There is a provision in this bill which continues the existing state of the law to allow the department head to accept or reject the findings of the administrative law judge. That is the way it is now in effect. When a hearing officer files a report, it is merely a recommendation, and we call it that. What we have done in this bill is, we have changed the language. We don't call it a recommendation, as such, but we say in this new section, which was added, that the department head still has the same power to accept or reject. Is it your concept of administrative law judges that that continue? Even though we call them something different, in effect, it would still be the hearing officer procedure, with really relatively little power to make any binding decision. Are you in favor of that?

MR. PENN: Absolutely. I think the only person who can decide is the head of the agency. I think it probably would be illegal to have the hearing officers have any more power than is built into this bill. I think it would be a very bad precedent to have hearing officers empowered to decide these cases.

SENATOR LASKIN: Rather than calling them administrative law judges?

MR. PENN: Well, yes, administrative law judges -- whatever you call them, in a sense they are, and will be, hearing officers who will preside over the hearing and submit recommended findings of fact.

SENATOR LASKIN: Now, if that is the case - if what we are doing is just putting a robe on a hearing officer - because that is how I view this bill, to be perfectly honest with you - why the bill? How do you really think it will make any change?

MR. PENN: Well, I think the bill will make a substantial change. You are not just putting a robe on a hearing officer. What you are doing is, you are getting hearing officers who are highly qualified, competent, and have expertise in the particular area. When you look at the administrative process, the hearing officer - or hearing judge, whatever you want to call that person - has a very important role. Although it is true that the agency head decides the case, it is the hearing officer who sits through the evidence and makes recommended findings of fact and conclusions of law. Thus, that hearing officer's

report is essential in the process and a good report, after a very complicated hearing, is absolutely necessary for the decision-maker to make an informed judgment about the case.

SENATOR LASKIN: I agree with you completely. But, this bill isn't going to make that any more or less significant because a hearing officer today is a very important person in the administration of administrative justice, so to speak, and I still go back to the same problem I have with this bill; I envision hearing officers,that we now have, being made full-time with large salaries, with a robe on. They will do the same thing as they are now doing but they will be making a lot more money and their opinions are no more significant than they are now. I agree that conceptually we ought to make some changes, but I don't really see how the consumer advocate can determine that this bill makes the required changes that were recommended by a Supreme Court Justice some time ago.

MR. PENN: Well, I can only say that the present system is inadequate. By establishing a full-time independent corps of hearing officers, or hearing judges, I think we are going a long way toward reforming the present inadequacies in the system.

SENATOR LASKIN: Thank you, Mr. Chairman.

SENATOR ERRICHETTI: Mr. Weiss.

SENATOR WEISS: I have no questions.

SENATOR HERBERT: I have two questions, Mr. Penn. First of all, do you think there should be a more specific and detailed requirement in the bill, other than just the Governor's recommendation for the so-called qualified non-attorneys? Do you think there should be more specific requirements?

MR. PENN: Well, I think the fact that non-attorneys can be appointed as hearing officers is very good. I wouldn't have problems with detailing the qualifications of those non-attorneys, but I think it would be extremely difficult to do so and I wouldn't have the slightest idea of where you could begin. That is why I would endorse it in its present form. If someone could come up with some suggestions as to how you could delineate these qualifications, I don't think there would be anything wrong with that. But, I do think it is important to have non-attorneys have the opportunity to serve as hearing judges. Beyond that, in terms of qualifications,I guess the screening mechanism by the Senate in their advice and consent function would be sufficient to take care of that situation.

SENATOR HERBERT: But, the Governor must first recommend?

MR. PENN: That's correct.

SENATOR HERBERT: The second question is: Are you not disturbed by the fact that there are no proceedings for the removal, for cause, of the judges? You are disturbed by that?

MR. PENN: Yes.

SENATOR HERBERT: I am too.

MR. PENN: Yes, that is another point that I think could raise serious problems in the implementation of the bill if all of these judges are to be appointed for a fixed term. Again, I go back to the suggestion I had earlier, where only a certain number of judges would be appointed by the Governor for a fixed term, where the majority of your hearing judges would be appointed through other means and presumably subject to removal, just as any

other employee would.

But, if you have 200 full-time hearing judges, all appointed by the Governor for five year terms and there is no way to get rid of any of these judges, I think you are going to run into some very serious problems.

SENATOR HERBERT: Correct. Thank you.

SENATOR ERRICHETTI: Mr. Penn, thank you very much.

MR. PENN: Thank you.

SENATOR ERRICHETTI: New Jersey State Bar Association, Richard Aronsohn.

R I C H A R D A R O N S O H N: Good afternoon. Senator Errichetti, members of the Committee on State Government, I would like to begin, if you don't mind, with a poem which I came across just by accident when I was relaxing yesterday between National Collegiate Association basketball games. It is entitled "Spring", by Henry Timrod and it says: "Spring, with that nameless pathos in the air which dwells in all things fair; Spring,with her golden suns and silver rain, is with us once again." And, so is a newly introduced bill containing a concept for an independent corps of hearing examiners. There have been no less than about 30 bills that have run through legislative committee and either the Senate or the lower House of this State and I think it is time - if I can say so - that the bill pass.

Let me say, by way of introduction, that I recognize that no bill in its entirety ever goes through - or very seldom goes through - one of the Houses of the Legislature in this State. There might have to be some changes. It is the concept that the State Bar Association is so concerned with. Let me tell you why. Just by way of background, I served as a Deputy Attorney General in the middle '60's and was counsel to the Secretary of State and, more importantly, to the State Division on Civil Rights. In the latter capacity, I was directed by then Attorney General Arthur Sills to actually get into a car with an employee of the State Division on Civil Rights and to travel all over this State to virtually 16 of the 21 counties to obtain restraining orders where there was discriminatory treatment against minorities - whether it was in housing or employment, or whatever.

I am familiar with that agency and I recognize its purpose; and I am sure that every member of the Senate and the House - at least I hope every member of the Senate and House - is fully familiar with the purpose of that agency. I really feel, having been in the agency now on behalf of people who are charged with acts of discrimination, that that agency, without meaning to single it out, only demonstrates - I mean, to ferret it out - the total inadequacy with state administrative law in its present form. You know, state administrative law is going to make the courts, within time, pale into insignificance. With urbanization and suburban living and housing concepts and employment relationship concepts, the courts are not going to be the be all and the end all in the years to come; it is going to be the state and county agencies,and I think that they ought to really be brought into the 20th Century.

Directing myself to some of the problems, I meant to - although unfortunately I did not get back from court in enough time this morning - photostat a copy of an article that I had authored in the New Jersey Law Journal quite a long time ago. It was in the beginning of 1973. Basically, it is entitled: "The Need for a Corps of Independent Hearing Examiners in State Administrative

Agencies." With your permission, Mr. Chairman, I would like to photo that and send it on to the Committee. I don't think it really answers all of the questions, but it answers some of the questions from a practitioner's point of view and it isolates some of the problems from a practitioner's point of view. I will forward that on tomorrow morning.

There are certain bugaboos that are always raised each and every year with regard to the concept itself. Let me just address myself to those. The first and foremost one, which always comes up, is administrative expertise, which is absolutely ridiculous. Taking one of the most technical agencies of all, let's take pensions. Pensions utilizes, in those statutes governing the four or five pension funds, words of art that even the courts have a lot of trouble with. If there is a word of art, whether it is accrued credits, or some fancy word or term, an administrative employee can always be put on the stand to explain, at least from that particular agency's point of view, what that term or word of art, means.

As far as the details of expertise, the rotation which is cited in this particular bill will take care of that, if rotation according to expertise is utilized by the head of the office. But, I would even suggest that the rotation is not that necessary. Anyone who is an attorney and who does his homework can understand most concepts with regard to agencies. So, to talk toward expertise doesn't get us anywhere. There is nothing-- Let me say, parenthetically, what you people are going to hear about as members of this Committee, if you haven't heard about it already, before this bill is moved to be released from Committee - and I hope it will be - is, you are going to get a lot of calls and a lot of correspondence from heads of agencies in this state who are opposed to this concept. They are opposed to the concept for a very good reason: They don't want to lose control. They want to have the particular hearing officer within their four walls, on their payroll. I don't mean to deprecate the integrity of the agency, but subject to communication, allegorically he could be having lunch from time to time with either a witness, who is on the hot seat because of a mistake made by the agency, or with the agency head, and it just does not make sense.

The problems created now are created by the hearing examiners being within the agency itself. You can't have a man who is investigating a cause of action be in a position where he has to rule on matters of evidence and matters of procedure and, again, be in a position where he has to adjudicate, at least by way of recommendation, the result. It is a combination of investigatorial, adjudicatorial and legislative to some extent because he is part of the agency and therefore he is attempting to further what he considers to be, rightly or wrongly, the agency's purpose, and that shouldn't be.

This prejudice presently created by the informality of administrative hearings — that is not the way we do it. The Public Utilities Commission has come along with this concept. At one time, approximately four years ago, they were staunchly opposed to it. They now recognize that it makes sense. But, let me tell you about a case I had before the Public Utilities Commission that you can't believe. It involved a consumer and an application by us on behalf of the user of the telephone service for discovery which is very plainly provided for in the administrative code that relates to the Public Utilities Commission.

The answer we get from the utility is, "That is not the way things are done, Aronsohn." They said,in a letter of objection to the application for discovery, "Well, he can interrogate the Telephone Company witnesses at the time of hearing." Now, if that is not archaic-- I am not saying the agency is going to go for that, but it is that tendency of familiarity in an agency like Public Utilities, between the utility and between the agency itself, that takes the adversarial nature of the proceeding out of it and it shouldn't be taken out of it.

So, it is the informality that should concern this Committee. The broad discretion vested in the hearing examiner and the parameters of that discretion are really unlimited. And I don't mean to say this bill will limit it, but the director of a particular division or of an agency of State Government is a pretty busy person. If he gets a pretty well documented hearing report, with specific findings of fact and conclusions of law, it is the unusual case where he is going to go behind that and look to see whether the findings are supported by the transcript, which may be many volumes in length.

So, I think that someone who is independent and is not on that payroll is very, very important. And there is something else that I want you to be aware of that creates tremendous problems for someone litigating and who is on the losing side. There is a presumption of regularity that attaches to the result of a state agency determination; that is,case law of the state. But it is unchallenged case law. Therefore, when a dispute is lost by whomever, he is subject to the setting in of that presumption and he has a tremendous burden. He has to show that the result is not bottomed upon adequate evidence in the record. So, you can see the importance of the initial step in the recommended findings of fact and conclusions of law.

There are other alternatives that could be posed. You could have a separate agency - a separate division within the agency itself. You could, by rotating present hearing examiners - some of which are attorneys at law of this state - between agencies, I imagine, solve some of the problems.

The only way the problem is really going to be solved is from the bill. Now, with regard to the bill itself, let me just say that this concept is nothing new. California has it. Nevada had it. It started it and implemented it in 1967. Pennsylvania has it as of 1969. It is part of the Federal system. It has been part of the Federal system since 1941. It was originally part of our Administrative Procedure Act, or at least the proposed legislation,and then that got watered down in order to get it through; they deleted it.

The bill itself, I think, is really an excellent bill. It would be something of which the Senate of this State could be proud. There is nothing too much wrong with it. I think that if judges are left to the Governor's appointment power, administrative law judges can be as well.

I am a little troubled by the wording. If I can just turn to the bill, in Section 5 on page 3 of the official copy reprint - I don't think it is an official copy reprint yet - it has words to the effect that the administrative law judge can conduct or assist in administrative duties. That troubles me a little because I think it is counter-productive. I think that is the one thing that the bill is designed to prevent - that the administrative law judge not get involved with assisting in administrative duties or getting into the policy objectives of the agency or getting into the clerical aspects of that. Maybe it needs refinement.

Maybe that is not what is meant, really. The way it is left now - "administrative duties and proceedings, other than those related to contested cases" - is rather broad.

I only leave you with the question, shouldn't non-lawyers be subject to appointment? The State Bar has no objection to non-lawyers being subject to appointment. I think, really, oftentimes someone who is over-technical, who has been to law school, can harm more than he can help. I don't think a law degree-- Let me give you an example: The State Department of Education - my firm does a lot of work before that Department. I think they do an excellent job with lay personnel. I think the hearings are conducted in a fair manner and I think everybody gets an opportunity to be heard. So, I have no problem with that. I think it is something the Committee should take a "look see" at.

I think - and I talk personally now - that it is not such a bad idea to have tenure set in after a while, so long as - as Senator Herbert so correctly pointed out - there is some means of getting rid of a tenured person in the event that he or she is not discharging their duties correctly. The problem with tenure is that sometimes people get a little bit too comfortable. But, on the other hand, you don't want someone subject to the political vicissitudes, as someone mentioned, of the oval office.

I think probably - although I am not sure about this - that as far as discharge is concerned, Senator Herbert, they would be subject to the-- There is one overall statute that relates to discharge of State employees.

So, in conclusion, I hope that this, again, doesn't turn into the annual rites of Spring. I don't mean that as a means of criticism. It is not so easy when you are on the firing line. But, I can't understand why the pitfalls that exist within the system now cannot, and should not be, negated.

Before I close, if you just take a look at the one agency -- I hate pointing towards the Division on Civil Rights. I think it is a well conducted agency. But, from a hearing standpoint, I think it could be very much improved. Let's look at the statutory matrix surrounding that agency. The Director of the Division on Civil Rights is employed by the Attorney General, at will - okay? He has no tenure or legislative appointment. He is advised on legal matters by the Attorney General himself - the man who appoints him. He is directed in the execution of policy by the Attorney General of this State. He is subject to the Attorney General's criticism as an administrator. The Attorney General appoints the hearing examiners. The hearing examiner makes recommendations but that hearing examiner himself - or herself - is paid by the agency and the hearing examiner is sitting within, albeit on a temporary basis - he is part-time - the agency's doors. It is not a question of whether there is actual bias. It is a question of the appearance. There should be a dignity that attaches to administrative hearings, just as it does, hopefully, to court proceedings. And, I respectfully request that now is the time - 1978 - to bring these agencies, so important a part of our daily life from a jurisprudential point of view, into the 20th Century. Thank you.

SENATOR ERRICHETTI: Senator Laskin, do you have any questions?

SENATOR LASKIN: I presume that you mix some of your personal remarks in with the authorized representation of the Bar Association?

MR. ARONSOHN: Well, I guess that is a very fair comment, Senator Laskin. I might say to you--

SENATOR LASKIN: I just want to know if that is true?

MR. ARONSOHN: That's true. The Board of Trustees of the State Bar Association, in the beginning of 1975, approved only the concept of an independent corps of hearing examiners, leaving the details of the implementation of a specific bill to the Senate.

SENATOR LASKIN: With regard to the tenure, just so you understand, I am only asking questions in an attempt to help me resolve this whole concept of administrative law judges. I am not an advocate of tenure anywhere other than in the judicial system. In fact, I would be very happy to see tenure eliminated from every single statutory position in the State of New Jersey. But, that is not my point.

My problem is, what do you do about the problem you raised, the independence of these judges? Now, I recognize the lack of independence under the present system. But, if we have a five-year appointment which is really a political appointment - I don't mean that in a nasty sense; it is a political appointment and it comes up every five years - how does that help you solve the "independent" problem, because now we won't have the independence on the administrative agency head but we will have the independence on the political system, so to speak? I don't know the answer to that. I am not saying that tenure solves it, but I would be interested in hearing your comments on it.

MR. ARONSOHN: Well, if I had my "druthers" as far as the judicial system is concerned, I guess I would have to say I was in favor of tenure. I have seen the comfort that it brought to at least one judge - for whom I was law secretary, and who is, unfortunately, now deceased - when he got that tenure. He said to me words to the effect: "Well, now they can all go to hell. They can all be damned. I will take the phone calls, but it is not going to have any effect on me." Let's face it, when we talk about phone calls, these are sensitive times. People are people and these administrative law judges are going to be subject to phone calls; they are going to be subject to correspondence; and, therefore, if I had my "druthers" as far as this bill is concerned - I don't know that it would pass through the Legislature - I guess I would be in favor of tenure, after a number of terms, when he has shown that he is competent.

SENATOR LASKIN: Or some other system to keep them truly independent.

MR. ARONSOHN: I can suggest another system. I imagine, as in the Federal system, you could make them subject to the Department of Civil Service. Now, the problem is that the Department of Civil Service is, itself, going to be serviced, as I understand the bill, by the Office of Administrative Procedures. So, you get into a conflict problem once again. But - and I really don't know enough about this - I imagine certain State officers get tenure through Civil Service after a certain period of time. I know the way the Federal system handles it is to make them subject to Civil Service.

I think the important thing is to get them out of the agency. I understand the point you are making, Senator Laskin. It is an excellent point. You are never going to have purity in this. In other words, it is a question of having the "best possible." It might be that this has to be done in stages. It may be that--

SENATOR LASKIN: Unless we can come up with some other legislation which would perhaps increase penalties or establish new crimes for making these phone calls to the administrative law judges. That is something that I

don't know if we spent too much time on. But, I believe it may deter the phone calls, or whatever else occurs during these hearing procedures, or before them. Perhaps that is another thought - a very strong criminal statute, prohibiting any kind of intervention at all by anyone.

MR. ARONSOHN: I just suggest this in passing, since I have been through this leigslative process for the past four or five years. My general feeling now is - and it is not from a defeatist point of view - please try to get the concept through. I realize what can happen. Everybody from some part of the State is going to have some criticism of this bill. It is the best bill I have ever seen in the area. It is excellent. It needs very little revision, as far as I am concerned, but if it does need some minor revision, then I respectfully suggest, and hope, that those revisions can be made in an effort to get the concept through the Legislature. Too many times in the past that has been defeated by basic opposition from State agencies. That is where the pressure comes from.

SENATOR LASKIN: If we are going to continue with this whole concept of independence - and, of course, I think everyone agrees with that as a concept - is there any reason why the Bar Association does not suggest that we take the Public Employment Relations Commission exemption from this statute? Because I agree with your comments about the ridiculousness of expertise. PERC is no different than any other agency and I don't know why, if we are going to adopt this type of act, that they wouldn't be covered by it also.

MR. ARONSOHN: I think they should be subject to it. You know, what happened was - the history of this, if I can just go back a little - that at one time they were going to exempt all multi-member commissions, whether it was the Public Utilities Commission or the Public Employment Relations Commission, and then, as I said, the Public Utilities Commission realized it would be to their advantage to have a cleaner type of proceeding - I know cleaner is not the right word to use - but, a better type of proceeding with someone who came from an outside agency. Now, maybe this is the skeleton of that original thrust. I don't know. I don't really see any rational reason to keep them out. There is nothing complicated about labor relations law either; I agree with you.

SENATOR LASKIN: Thank you, Mr. Chairman.

SENATOR ERRICHETTI: Senator Weiss.

SENATOR WEISS: Mr. Aronsohn, since all of us would like to see these administrative officers, or judges, be fair and independent, and find the way they are supposed to find, I direct you to page six, Section nine - new section: "Nothing in this amendatory and supplementary act shall be construed..." --

MR. ARONSOHN: Yes.

SENATOR WEISS: Now, take the last line of that: "...to determine whether a case is contested or to adopt, reject or modify the findings of fact and conclusions of law by any administrative law judge." Does that not infringe on the independence of the administrative judge?

MR. ARONSOHN: Well, as far as -- with regard to the latter part of it, it certainly does not because you are going to get into a whole statutory problem here. Each statute that has been passed by the Legislature usually vests in the departmental or division head the right to make determinations and decisions with regard to disputes involving that agency. I don't see

how constitutionally or statutorily that could be culled out of those statutes without a major revision of all the statutes relating to all of the major agencies and divisions.

What does bother me - and I didn't even notice it before - is, it delegates to the department or division head the right to determine what is and what is not a contested case, and basically then to set the wheels in motion for the call for the rotating administrative law judge, which is very, very serious because what could happen is he could say, "I deem this not to be a contested case, but merely to be something informal that can be settled." Many agencies have informal hearings where they crystalize the issues and try to settle them. That bothers me because if it is he or she that is going to determine when the hearing officer ought to be sent out to the agency, that could be a protective device against having a hearing officer.

SENATOR WEISS: Assuming that you had a real strong-minded agency head, and he did, in fact, reject or modify the findings of a judge--?

MR. ARONSOHN: He is subject to review. If findings of fact are the crucial part of administrative jurisprudence -- That's what it is all about because you get these big records and usually the issues are not as defined as they are in a court of law. You know, we have pre-trials and they say there is a breach of contract, or whatever the issues are, and they are pretty well defined. In an administrative agency you really, because of the liberal rules of evidence, go all over the place and you need someone to refine that. So, therefore, the fact-finding process is extremely important. If he rejects those fact-findings, or alternatively modifies them, he is subject to judicial review in the Appellate Division.

SENATOR WEISS: Thank you.

MR. ARONSOHN: Thank you.

SENATOR ERRICHETTI: Senator Herbert.

SENATOR HERBERT: Mr. Chairman, it seems that we not only have judges that write poetry in Bergen County, but attorneys that can quote it. Thank you very much. I have no questions.

MR. ARONSOHN: Thank you.

SENATOR ERRICHETTI: Mr. Aronsohn, thank you.

MR. ARONSOHN: Yes, sir. Thank you, Senator Errichetti. It is nice to see you.

SENATOR ERRICHETTI: The New Jersey State Bar Association, Alan Klinger.

JULIUS WILDSTEIN: My name is Mr. Wildstein. I originally was placed on the list to speak on the bill but in view of the fact that the Attorney General has spoken and I being a hearing officer in the Civil Rights Division, I think it would be improper at this time for me to express any views whatsoever. I would, however -- Therefore, I will not address myself to the merits at all. I would, however, like to correct two statements made by Mr. Aronsohn, not on the merits of the bill but, rather, a statement of fact. One of them is that the Attorney General appoints the hearing examiners. The statute provides that the nomination of hearing examiners is made by the Attorney General, but the statute goes on to say that that person must be confirmed by the Commission, which is a Commission appointed by the Governor, and so forth. Therefore,there is a check on the appointment of hearing examiners.

The other point--

SENATOR ERRICHETTI: Mr. Wildstein.

MR. WILDSTEIN: Yes?

SENATOR ERRICHETTI: I let you go far enough.

MR. WILDSTEIN: What?

SENATOR ERRICHETTI: That's enough. Now, you are out of order.

MR. WILDSTEIN: All right, I didn't want to talk on the merits. I just wanted to correct something.

SENATOR ERRICHETTI: Mr. Klinger.

A L A N K L I N G E R: If the Committee please, my name is Alan Klinger and I am Chairman of the Administrative Law Section of the New Jersey State Bar Association. I do not have the handicap of ever having worked for the State, or been an Attorney General, or anything else. I just practice law in Hackensack, New Jersey, and have had the occasion, where clients have come to me and said, "Here I have a complaint against me from an administrative agency" and the bottom of the complaint is signed by the commissioner. Then we get a notice of hearing and the hearing is before the commissioner and we get there and the commissioner of one particular agency is presiding. We try to offer evidence and the commissioner says why the strict rules of evidence don't apply. Consequently, we are confronted with a situation where the accuser, the prosecutor, the witness, and the judge is the same person.

Now, I am not as skeptical as my colleague, Dick Aronsohn. In 1960, as Vice Chairman of what was then a special committee of the Bar, we suggested the creation of an administrative code and the adoption of an administrative procedure act. We saw then Governor Hughes and we were told it could never happen because it would be too expensive - but it has happened and we have an administrative code and we have an administrative procedure act and we have, generally, an administrative process we can be proud of. But, we do have defects, defects that can be cured by the concept of this bill.

Now, I think the concept of this bill can add to what I think is a reputation New Jersey should have for its judiciary and for its law enforcement, generally. The bill - and I agree, it is the best bill I have seen of this type - provides, among other things, for the creation of a director of administrative law, a director of the office of administrative law, who would, as it were, be an administrator of this corps of hearing officers, who could develop a corps of officials who would develop expertise in certain areas. And, I think, for example, there is expertise. When you go into the Public Utilities Commission on a rate case, for example, there is a certain manner of procedure, not because it aids one side or the other, but because it is expeditious. And, this bill makes provision for that. This bill says that a hearing officer may take judicial notice, or the administrative equivalent, official notice, but he will put it on the record.

Now, Senator Weiss and Senator Laskin particularly asked as to what is the difference if we still have the decision made by the head of the department, the cabinet officer, and the like. The difference is this: Our record, the record that is reviewed in the Appellate Division, is the record that is made before the hearing officer and unless we have a hearing where we have an opportunity to offer evidence - not necessarily legally competent

evidence but evidence that will fit a set of rules of evidence to be developed in this administrative process - we don't have anything to talk to the Appellate Division about, except arbitrary and capricious action. This is a very difficult burden, so we say give us the opportunity to make our record with a hearing officer who is independent. Give us the opportunity to deal with a set of rules of evidence, albeit not the legal rules of evidence because they are not always adaptable to administrative proceedings, but rules of evidence so that we know what they are before we go into a hearing and that do not differ from agency to agency.

Now, Senator Laskin asked the question of the Attorney General - and I think a particularly pertinent one - as to the non-exclusion of the Casino Control Commission. We have all read in the newspapers about the action you took, as legislators, to encourage the project that is afoot in Atlantic City. I submit that the existence of an independent hearing, of an administrative judge, to whom applicants can apply in regard to actions taken by the Casino Commission, would add to the confidence of the administration of that bill. I think right now that is a particularly appropriate consideration in creating this independent hearing officer.

In regard to the appointment of administrative judges and in regard to the consideration of their qualifications, the appointing authority now, in connection with the appointment of judges, avails himself of a series of sources of information. He goes to Bar Associations. He goes to other public bodies. And similarly, for example, if there were hearing officers that were being appointed, it might well be that the various trade agencies - the New Jersey Bankers Association might be considered in regard to what hearing officers might be dealing with the banks, people who become skilled in dealing with the Banking Act. There is certainly nothing wrong with that. And, the appointive authority could avail himself - the Governor - of those sources.

I really just want to urge upon you how important we practicing lawyers think it is to have independent hearing officers, number one,for the substance and, number two, for the appearance - for our clients to say, "Here is a man who is going to hear the evidence, and make a recommendation which we will have an opportunity to review in our judicial process. Thank you.

SENATOR ERRICHETTI: Senator Laskin.

SENATOR LASKIN: I have no questions.

SENATOR ERRICHETTI: Senator Weiss.

SENATOR WEISS: No questions.

SENATOR ERRICHETTI: Senator Herbert.

SENATOR HERBERT: Yes, just one. Mr. Klinger, you said that the rules of procedure do differ from agency to agency substantially?

MR. KLINGER: Yes, sir. There are agencies which adhere more strictly to the legal rules of evidence and other agencies which don't. And, when you go from agency to agency, you really don't know what is going to be admitted in evidence or not.

For example, in a judicial proceeding, if I make an offer of proof and a judge denies me the opportunity to offer that proof, I will say, "Okay" - out of the hearing of the jury, or the judge if he be the finder of fact - "I will make an offer of proof on the record so that the Appellate Court will know what facts I have." That is practically unheard of in administrative agencies,

at least within my experience.

SENATOR HERBERT: I have no further questions.

SENATOR ERRICHETTI: Thank you, Mr. Klinger.

MR. KLINGER: Thank you.

SENATOR ERRICHETTI: Department of Civil Service, Joseph Lavery.

J O S E P H L A V E R Y: Thank you, Mr. Chairman, members of the Committee. My name is Joseph Lavery. I am Director of Hearings and Regulations for the New Jersey Civil Service Commission. I appreciate the opportunity to come before you on behalf of S. Howard Woodson, the President of the Commission, and the members of the Commission themselves.

The Civil Service Commission, and President Woodson, wholeheartedly support the concept of an independent hearing officer corps to conduct plenary hearings on behalf of state agencies.

S-766 is singularly consonant with the beneficial safeguards proposed by Justice Jacobs in Mazza v. Cavicchia, in his dissent. For essentially the same reason, Civil Service, as one of the oldest independent regulatory bodies in State Government, has long recognized the need for impartial resolution of disputes.

We are also extraordinarily sensitive to due process requirements because of the inherent sensitivity of appeals, which our Commission adjudicates - public employees versus public employers for the most part.

We support the philosophy expressed in the statement to the bill. We will send to the Committee more detailed comments, including statistics on the number of hearing officers, where they are located, etc.

But, the President and the Civil Service Commission are most anxious to avoid any adverse impact on the administrative due process provided under Title II of the Civil Service Act. Unforeseen practical drawbacks often have a way of counteracting even the most carefully contrived legislation. Their concern focuses mainly in three specific areas. The first is the need to avoid a backlog and delay in Commission decisions. The second is the need for flexibility and options in calling on hearing officers, or administrative law judges as they are named in the bill. And, last, is the ever present fiscal constraints.

We are concerned over the recent assumption of jurisdiction of affirmative action appeals under Executive Order 61 and the previous Executive Order 14. We have reason to expect that a significant number of these disputes will warrant plenary hearings and be characterized as contested cases.

We are worried by the prospect of losing that flexibility we now enjoy in assignment of hearing officers as needed. Our Commission is able to draw now from a pool of 37 per diem hearing officers. If, for any reason, one hearing officer is not available, the matter is easily remedied by rapid last minute assignment of another hearing officer.

In addition, it is obvious that the sheer number itself of hearers we employ enables us to adequately respond to our overall quantitative load. We have tried to stress the necessity that any new legislation at least match the unique and fortunate hearing officer staffing levels the Legislature afforded us in 1971, through Chapter 153 when we first obtained the hearing officer program that we now operate. Prior to that time, our hearings were as much as 18 months to 2 years behind. At the present time, it is approximately

two months from the time of hearing granted to the time of hearing held. The whole process from the time of the complaint until the time of the decison is something like five to six months and going down. We can schedule as many as 60 herings a month.

So, in a word, the Commission supports the legislation and the concept. Our only concern is that the Office of Administrative Procedure be adequately funded to absorb the load that would probably revert to that office.

I am available for any questions you may have.

SENATOR ERRICHETTI: Senator Laskin?

SENATOR LASKIN: I have no questions.

SENATOR ERRICHETTI: Senator Herbert?

SENATOR HERBERT: No questions.

SENATOR ERRICHETTI: Mr. Lavery, thank you very much.

MR. LAVERY: Thank you, sir.

SENATOR ERRICHETTI: The New Jersey Association of School Administrators, James J. Dwyer.

J A M E S J. D W Y E R: Senator Errichetti, Senators Herbert and Laskin. I have with me Philip Kirschner who is governmental relations representative for the Association.

I am speaking on behalf of the New Jersey Association of School Administrators concerning S-766 which, if enacted, would establish an Office of Administrative Law within the Department of State.

As I understand the proposed legislation, it will establish full-time administrative law judges to expedite the process by which State administrative agencies decide contested cases, inject greater impartiality in the process, standardize procedures used in the conduct of contested cases - and reference has already been made to Mazza versus Cavicchia - eliminate problems caused by the utilization of part-time hearing officers, provide for more expertly prepared hearing reports, eliminate potential conflicts where investigative, prosecutorial, and hearing functions are all administered by the same State agency and/or individual, eliminate the conflict of part-time hearing officers who are attorneys and who also represent clients before other State agencies, and reduce the delays which have resulted from part-time hearing officers who are attorneys and who must also attend to the demands of their private practice.

The New Jersey Association of School Administrators urges that the Division of Controversies and Disputes in the New Jersey State Department of Education be excluded from the provisions of S-766. This Division has had the greatest positive impact on the administration of public education in the State of any of the other components of the Department of Education. School Boards, administrators, attorneys, and education organizations rarely agree on organizational matters, but there is agreement on the importance of maintaining this division.

We could support its inclusion if it were clear that some larger public policy issue was involved, however, an analysis of Senate Bill 766 supporting arguments reveal how far this is from being the case. In listing the defects in the present administrative procedures, none of the defects listed can fairly be attributed to the work of the hearing examiners in the Division of Controversies and Disputes. On the contrary, their efforts have been consistently praised by the courts, attorneys, and public school administrators. Mr. Aronsohn, himself,

alluded to this today in earlier testimony. This Division has provided stability during the past decade of accelerated social change. It has fairly adjudicated such matters as school desegregation, student rights, teacher rights, voting irregularities, vendor complaints and a host of other minor and major matters ranging from school milk bids to transsexual teachers. During the period from 1949 through 1976, under seven different Assistant Commissioners, all of them school administrators, this Division has rendered 1,766 decisions, 99% of which have either not been appealed, or have been affirmed by the judiciary. There is no record of judicial displeasure with the quality of the record developed by the Division's hearing examiners. The inter-agency cooperation between this Division and the attorney general's office is a model of governmental cooperation.

PERC and the Teacher's Pension and Annuity Fund boards will attest to this fact-that there are no jurisdictional disputes between the Division and other agencies that may from time to time adjudicate matters relating to public schools.

Since it can be clearly demonstrated that the rationale for change suggested by the bill's summary statement does not apply to the Division, we could argue that there is clearly reason to exclude it from the bill's provision, but our concern cuts even deeper.

We argue that this proposed change will be in effect a dramatic change in school governance in New Jersey and we urge that it be considered with that in mind. This is not merely the creation of another agency to do the same job; this measure insures a qualitative difference in the manner with which that job or service will be performed. It will render the Commissioner of Education's decision on school matters subservient to the reports of theoreticians who are bringing to the adjudication their own experience and frame of reference. These administrative judges will not be employed by the department or in any real way be responsible to the Commissioner of Education. Yet, the Commissioner will be totally responsible in the public's eye for his decisions. In our judgment, this could result in a shadow government unduly influenced by a few who are insulated from the consequences of their decisions on the school system. In their zeal to be theoretically correct, they may easily fail to value the importance of the presumption of correctness principle that has guided the Division so well during these past 100 years. If local school boards, administrators, and teachers lose the discerning ear of a practitioner, the quality of hearings will be totally dependent on theory, which in education falls short of being exact.

Our concern for the emphasis on theoretical judgment, which is what an administrative judge would bring to the process, lies in the fact that it eliminates practical and clinical decisions that cannot be fully expressed in well-constructed testimony, thereby reducing the weight that insight and experience can provide in the formulation of social policy.

Hearing Examiner's reports, prepared by persons who have had experience in public schools as practitioners, have, in the past, served to ameliorate the zealous theoretician with the proclivity to centralize decision-making as far away from those involved as possible.

The Division of Controversies and Disputes in the Department of Education has a 100 year record of proving that controversies arising under the school law can be heard by school men who would naturally be concerned with the well-being of the school system, without a hint of scandal, impropriety, or lack

of excellence.

With respect to concentrating powers of investigation, prosecution, hearing, and determination in a single administrative agency, I would like to point out that in Mazza versus Cavicchia, a suit challenging the validity of an order of the Director of the Division of Alcoholic Beverage Control suspending a license to sell alcoholic beverages, the question of hearing procedures by the administrative agency was raised.

In his dissenting opinion, Justice Jacobs pointed out that "...repeated criticisms have...been voiced with respect to particular phases of the administrative process as exemplified in the Division of Alcoholic Beverage Control and in other agencies...." The most persistent criticism has been the concentrating in a single administrative agency, wide powers of investigation, prosecution, hearing and determination.

The first of these two processes, investigation and prosecution, are not and never have been procedures of the Department of Education. As a matter of fact, the Department of Education, more than any other Department of State Government, has been almost exclusively an independent hearer and determiner of controversies arising under the school laws, with two separate parties contending before the Commissioner. The Commissioner conducts a thorough hearing on the appeal before him, affording both parties full due process.

The facts clearly support the Department of Education's position that this purpose of the bill does not in any way apply to it. The Department of Education is the best example in this State of an agency which is limited to the two processes of hearing and determination of appeals, and which does not have or exercise power to investigate or prosecute.

In the hundreds of cases controverted before the Commissioner in recent years, only in two rare instances did a matter arise other than through a formal petition of appeal to the Commissioner. One was a reference from an appeals judge on an integration case to have it remanded to the Commissioner and the other dealt with condemnation of an old school house building.

With respect to the practice of hiring part-time hearing officers, I would like to point out that this purpose of the bill does not apply to the Department of Education either. The Department has always had its own full-time personnel as hearing officers. Each of these hearing officers is a professional educator who has spent his entire adult lifetime in the service of public education in this State and possesses the high standard of educational expertise and understanding of, and training in, school law and administrative law required to perform this function. In only three instances since 1851, when the Commissioner was empowered to decide school controversies, has the Department utilized the services of a hearing officer who was not a full-time employee of the Department. These three instances resulted from a shortage of personnel in the Department and the necessity to assign a hearing officer to a matter requiring an extensive number of hearing days. One of those three examples, for example, was the recent - several years ago - North Brunswick versus New Brunswick regionalization breakaway - sending and receiving - that had over 80 days of hearing itself in the process.

With respect to the concern for a need to provide for more expertly prepared hearing reports, I would like - which we have heard mention of many times today - to point out that the office of the Attorney General can attest

to the standardization and uniform high quality of the Department's hearing officers' reports and the decisions rendered by the Commissioner.

The State Board of Education, the Appellate Division of Superior Court, and the New Jersey State Supreme Court have commented with approval on the quality of the fact-finding, treatment of law and final determinations contained in the hearing officers' reports and decisions of the Commissioner. More importantly, the record of decisions rendered by the State Board, Appellate Division, and Supreme Court on review of decisions rendered by the Commissioner clearly discloses the quality of the Commissioner's original determination.

The Courts of this State have, on occasion, remanded matters regarding education to the Commissioner in order to have the benefit of his educational expertise. Also, the New Jersey Supreme Court has, on several occasions, interpreted the role of the Commissioner in the State's constitutional and legislative plan to provide and administer a thorough and efficient system of free public education, looking with favor upon the utilization of the Commissioner's educational expertise. The Court has repeatedly pointed out that, in regard to educational controversies: "His" - meaning the Commissioner's - "function is admittedly to sit as a receiving body which, however, is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out."

It is the judgment of the New Jersey Association of School Administrators that the New Jersey State Department of Education needs to be excluded from the provisions of the bill in order that the Commissioner of Education not be seriously impaired in carrying out his required functions. It is the New Jersey Association of School Administrator's judgment that the existing arrangement best serves the purpose of enabling the Commissioner to perform his duties, including the proper determination of educational controversies.

The Department of Education should be excluded from the provisions of this bill because the primary purpose to eliminate the combined power of state agencies to investigate, prosecute, hear and decide does not apply in any way to this Department. Two, the Department has only utilized a part-time hearing officer in three instances out of hundreds of cases heard. Three, the Department's full-time hearing officers possess the educational expertise and knowledge of school law necessary to assist the Commissioner to best perform his duties. Four, the office of the Attorney General will attest to the uniform high quality of the Department's hearing officers' reports. Five, the State Board of Education, the Appellate Divison of Superior Court, and the New Jersey Supreme Court have commented many times with approval on the fact-finder's treatment. And, finally, the existing system, in the judgment of the Department, best serves the purpose of enabling the Commissioner to properly and most adequately perform his duties.

Currently,under the supervision of the Assistant Commissioner of Education in charge of the Division of Controversies and Disputes, there is a staff of full-time, well-qualified hearing examiners who spend approximately 70% of their time hearing cases and preparing reports of findings and fact, conclusions and recommendations for the Commissioner of Education's consideration. The Division's function continues to rest on the philosophy that school problems should be decided whenever possible by persons familiar with school matters on the combined basis of legal principles and educational expertise.

It is essential, therefore, that hearings involving school law

controversies be conducted by hearing examiners in an atmosphere and within an organization of not only administrative law principles, but also educational expertise.

The hearing examiners must keep pace with the increasing volume of applicable legal information resulting from new laws and recent decisions of the courts. The nature of the position of hearing examiner, and its accompanying responsibilities, is almost entirely problem-solving and requires the thorough, accurate and consistent application of understanding of school law and legal procedures to the already-referred to wide range of school legal problems. Thus, it is considered essential that the hearing examiner function under the jurisdiction of the Department of Education.

Consistently over the year, the Commissioner and the staff of the Division of Controversies and Disputes have been building a record in each case on which the Courts of the State, when called upon, have been able to render opinions effectively on appeals brought before them from the Commissioner's decisions.

The remaining portion of the time of the Department of Education's hearing examiners is spent in serving as a resource of information on school laws to other divisions of the Department of Education, to other Departments of State Government, to the County Superintendent's of Schools, to the personnel and boards of education of local school districts and to the public at large, hopefully, for the purpose of preventing the occurrence of controversies and disputes. This portion of the duties of the hearing examiners is closely allied with the litigation function.

Under present procedures, all appeals are litigated as expeditiously as possible. It is true, however, that in some instances completion of litigation is delayed by the complexity and time-consuming nature of many of the cases, such as those involving proposed regionalization of school districts to achieve racial integration, applications for termination of sending-receiving relationships and charges against teaching staff members under tenure, for example.

The time generally required in the resolution of matters varies, depending upon whether very prompt disposal of emergency matters, which arise frequently and unexpectedly, is required or whether full plenary hearings on the merits of controversies are necessary.

It is important to note that in addition to the hearing process, many cases arising under school laws require extensive periods of time for related technical correspondence, pre-hearing conferences, legal research, and the preparation of reports of findings of fact and arguments of law, setting forth conclusions and recommendations for the Commissioner of Education.

The fourth expressed purpose of this bill, to eliminate attacks on the due process concept caused by the combination of investigative, prosecutorial and hearing functions within the same agency is, as I have indicated, not applicable to the Department of Education. Of the hundreds of cases controverted before the Commissioner in recent years, only in several rare instances was action initiated by the Department of Education. These involved the condemnation of a schoolhouse and a matter of school integration. In these matters, both statutory law and court decisions required action by the Commissioner to effectuate public policies. I might add that the Commissioner and the State Department are not the object of these cases either.

Under the present procedure, parties to all controversies are offered complete due process in accordance with established rules of procedure adopted by the State Board of Education, and all matters are adjudicated in a fair, unbiased and understanding manner.

The responsibilities of the Commissioner to make certain that the public policy requiring a thorough and efficient system of free public schools is maintained and that the terms and policies of the school laws are faithfully effectuated, have been described in numerous decisions of the courts of this State. The entire policy of the Education Law,as interpreted by our Appellate Court, calls for submission of questions of school administration to the Commissioner in order that his expertise may be utilized. The Commissioner is the State official most cognizant of the demands on teachers and other problems involved in the effective operation of schools. For this reason, the New Jersey Supreme Court has, in many cases, required controversies involving the School Laws to be submitted in the first instance to the Commissioner.

Judicial authorities plainly evidence a legislative intent and a public policy that the Commissioner should decide all controversies involving school law or educational policy and that other possible forums - arbitrators as well as courts - should defer to the expertise of the Commissioner and to his overriding responsibility to make certain that the terms and policies of the school laws are being faithfully effectuated.

I do recognize, parenthetically, Mr. Chairman, that the bill does permit, obviously, the Commissioner of Education to have the final say in the hearing examiners' reports - the administrative judges' reports. But, from an effective point of view, it is our belief that that would not be a satisfactory substitute for the current system in the absence of the kinds of abuses and concerns that were legitimately raised earlier today by other witnesses - and I am sure are a concern of the Governor and the Attorney General. We don't contest those comments. We are just saying that in every case where there is a concern, as it is related in the bill and in prior testimony, that the Department of Education does not fit into this category. It does not have these concerns, these abuses, or these potential conflicts. It has full-time hearing officers.

Therefore, for the reasons outlined above, the New Jersey Association of School Administrators asks that the Department of Education be excluded from the provisions of this bill. Thank you very much for your attention.

SENATOR ERRICHETTI: Senator Laskin.

SENATOR LASKIN: You would agree, though, that if the Department of Education was as other state agencies, generally a party to the proceedings, that the arguments you make to exclude them would not not apply?

DR. DWYER: I think you are absolutely correct. This would be a very serious concern. But, since this isn't the case, I wanted to call your attention to it.

SENATOR LASKIN: And, of course, you pointed out that the Department of Education - and I can't think of any other similar department - is the only one that actually is a hearer. When these cases come to the Department of Education, they are not usually cases involving the state agency - that is, the Department of Education.

DR. DWYER: That's correct.

SENATOR LASKIN: They come from the towns and municipalities but, with regard to the other state agencies, these are cases generally emanating from within and so there would be a need to have an independent administrative law judge - you would agree to that?

DR. DWYER: I would say, Senator Laskin, that - and I am glad you raised this point - it is not our intent to speak against this bill today.

SENATOR LASKIN: Right.

DR. DWYER: It is that there is a peculiar situation that for over 100 years has existed and because of that peculiarity and the way it is working so well - education is, and I hate to admit this, more of an art than a science - and some of the concerns that have been laid out--

SENATOR LASKIN: Some people would disagree with that.

DR. DWYER: Well, I don't know.

SENATOR LASKIN: That it is more of an art than a science.

DR. DWYER: Well, it is not a science -- let's stop there maybe.

I would agree that it is not our intent to speak against this bill or its provisions.

SENATOR LASKIN: Thank you, Mr. Chairman.

SENATOR ERRICHETTI: Senator Herbert.

SENATOR HERBERT: Dr. Dwyer, in the new section of the bill-- Do you have a copy of the bill?

DR. DWYER: Yes.

SENATOR HERBERT: On page 4, section 6 -- "Administrative law judges shall be assigned by the director from the office to an agency to preside over contested cases in accordance with the special expertise of the administrative law judge." That seems to me to meet your objections. If the administrative law judge is an expert in law - school law - he would be assigned to cases involving school personnel.

DR. DWYER: You see, we have a couple of issues here, Senator. One is that there is a grandfather possibility here, or of bringing on non-lawyers to this.

SENATOR HERBERT: Correct.

DR. DWYER: And if there could be a guarantee, for example, that the types of hearing officers that would be assigned would also bring not just understanding of law, which we feel is important, but also an understanding of the educational forum itself -- but, there can't be any guarantee like this. You know it and I know it.

SENATOR HERBERT: That is why we are here. We are trying to trim and possibly amend the bill.

DR. DWYER: Yes, I understand that and I also understand that you can't have language that covers every kind of possible concern.

SENATOR HERBERT: Yes.

DR. DWYER: What we are saying is, right now it works in the Department of Education. It has worked for over 100 and something years.

I am sitting here, by the way, not as an employee of the Department of Education; I am a Superintendent of a public school district in Northern New Jersey. I have been involved in controversies and disputes on both sides. We have won some cases and we have lost some cases, but it is really an effective

way to operate and we feel there is so much happening in the educational arena over the last ten years - and it is continuing to this day - that we don't really want to complicate your problems or the Governor's problems or the Department of State's problems any more than they have to be. And, we feel that, even in terms of some of the other agencies that have been exempted from this bill, a stronger argument can be made for the Department of Education -- even prior to some of those.

I guess to put it in colloquial speech, why tamper with a good thing? It is working here and almost everyone who has been involved here, who spoke in favor of the bill - even including Mr. Aronsohn who made an exception that no one prompted him to make - used the Department of Education as an exception to the kinds of concerns that he was raising. That is our point.

SENATOR HERBERT: Even in those cases that you lost, although you weren't happy with the decision, were you satisfied that the case was heard properly?

DR. DWYER: Yes. The type of scope and flexibility of limits of introduction of evidence or position is amazing and the patience and the real expertise on the part of the hearing officers is amazing to anyone who hasn't been involved and who was involved for the first time.

I have never heard anyone complain that their side - and many times, by the way, they permit a third party to come in on these cases; that is not unusual - can't get their day in court, so to speak, or that they can't get their positions across. It is only after, when they are finding fact, that they do assess this type of testimony. So, no one ever gets the opinion when dealing with the Department of Education that they have been frozen out or that there haven't been effective procedures followed. Over the years - and this isn't just recently I am talking about - this has been the case.

SENATOR HERBERT: What about the contention by supporters of the bill that it would shorten the time of decision?

DR. DWYER: I don't think that is going to--

SENATOR HERBERT: You can't have an average time, but--

DR. DWYER: I don't think that is a very effective clause, if you want my comment, in the bill, even if you take the Department out, and the reason is because it only talks about after the hearings are concluded in 45 days. There is no kind of limit, or schedule, that could be anticipated. You know, the hearings could theoretically-- I mentioned the North Brunswick/ New Brunswick case that went on for 80 hearing days and they were not 80 consecutive days, so you can imagine how long that type of situation can last. Now, I am not saying that should have been shortened or not shortened, but the 45 day thing,I think, is a misleading kind of factor because it only indicates in the bill, as I read the bill, that it is only from the point that the hearing is ended that the administrative judge's report should be submitted to the commissioner of the particular agency. And then, of course, the next step would be the 45 additional days for the commissioner to make a ruling.

SENATOR HERBERT: Do you know if, for a fact, there are any part-time hearing officers in the Division of Education?

DR. DWYER: They are all full-time hearing officers.

MR. KIRSCHNER: There are 8 positions for full-time hearing officers, 6 of which are staffed at the moment.

SENATOR HERBERT: I didn't think so. Okay, thank you very much.

SENATOR ERRICHETTI: Thank you very much, Dr. Dwyer.

DR. DWYER: Thank you.

SENATOR ERRICHETTI: The Department of Treasury, Thomas Bush.

T H O M A S B U S H: I am pleased to be here on behalf of the Treasurer of New Jersey, Clifford Goldman, and to read the statement in support of this bill on his behalf.

The Treasurer had intended to be here personally, but a schedule conflict has prevented that.

The establishment of an Office of Administrative Law, staffed with full-time administrative judges, will achieve greater governmental efficiency and fairness. As government has grown more complex, the role of administrative hearing officers has expanded. Yet, much of this important work is conducted on a part-time basis by persons hired through widely varying selection systems. Moreover, compensation rates vary substantially between departments.

While steps are already being taken to bring greater uniformity to hearing officer reimbursement rates, the most effective reform requires the creation of a centralized office of full-time administrative judges. Reliance on full-time administrative judges will enable the State to budget hearing officer time more efficiently. The State itself will be able to avoid delays resulting from hearing officer schedules which accommodate the needs of part-time officers. Also, the creation of this new office will eliminate the kind of large-scale contracting discretion which this Administration has avoided wherever possible.

In the long run, it is expected that the establishment of a centralized system, with full-time officers, will be more efficient, provide higher quality decisions and better serve the public.

That concludes the Treasurer's statement. To the extent possible, I am available to answer questions and also Mr. Patrick Kennedy, of the Department of Treasury also, is here as well.

SENATOR ERRICHETTI: Senator Laskin.

SENATOR LASKIN: No questions.

SENATOR ERRICHETTI: Senator Herbert.

SENATOR HERBERT: No questions.

SENATOR ERRICHETTI: Senator Martin.

SENATOR MARTIN: No questions.

SENATOR ERRICHETTI: No questions? Thank you, Mr. Bush.

MR. BUSH: Thank you.

SENATOR ERRICHETTI: The New Jersey Association of School Attorneys, James L. Wilson.

J A M E S L. W I L S O N: Mr. Chairman, members of the Committee, my name is James Wilson. I am the representative of the New Jersey Association of School Attorneys. I am the current president of that organization.

I asked for this opportunity to speak on this bill because the organization I represent feels that the bill contains a grave risk of serious harm to our educational system. Title 18A constitutes a plan compiled by our Legislatures over the years to carry out the educational mandate of our Constitution. Basically, it is a good plan - susceptible, I am sure, to improvement, but still good enough that in seeking improvement, we should not risk the present level of performance.

These are particularly critical times. The Legislature recently enacted Chapter 212 of the Laws of 1975, which, with the regulations that followed, contain new directives, rights and procedures. Many of these are yet to be tested. Legal problems will arise as Boards of Education and the staffs they employ attempt to carry out these directives. To avoid catastrophe, there must be a forum for rapid and reliable resolution of these questions. This forum must be educationally oriented, but have as well an understanding of the legal standards to be applied. The Division of Controversies and Disputes is so organized.

SENATOR LASKIN: Mr. Chairman? Pardon me, Mr. Wilson, I don't want to appear discourteous but may I just go a little bit out of order at this time and ask a question that may be very pertinent at this time?

SENATOR ERRICHETTI: Yes.

SENATOR LASKIN: Mr. Wilson, I presume - and I think that the members of the Committee may presume - that you are going to echo the sentiments of the last speaker: That you join in his position - and, of course, I know the School Board Attorney's position personally - in eliminating the Department of Education, Controversy Section, from the bill. Is that basically your position?

MR. WILSON: Yes, Senator, that is correct. I think I may have one or two minor points where, rather than differ from him, I think they are an amplification of his testimony - things that occurred to me, as opposed to things that occurred to him. If you would like me, in the interest of time --

SENATOR LASKIN: Right.

MR. WILSON: Certainly. I have a couple of exhibits here that perhaps illustrate things better. First of all, in 1953/'54 - I picked this as the year in which I commenced the practice of law - twelve decisions by the Commissioner, together with two Appellate decisions, and all of the amendments to school law in an 83 page pamphlet. 1975, the last bound copies of our school law decisions - 1,167 pages and one of the things that I would urge on the Committee and on the Legislature as a whole is, before you play around with a system that is working, examine a few of the matters that came before the Division of Controversies and Disputes. You will find them to have a great deal of technical content and policy which is a very important element of the qualification of the hearing examiner.

I don't question for a moment that the appointments to this Board will be competent appointments for the most part, but they need a great deal.

Let me add something from my own experience: The hearing examiners are the representatives of the Commissioner. They are not in an adversary position themselves. They are hearing, usually, adversary cases and they are living on a day-to-day basis with what is going on in education. I have them take intermissions during a hearing to go check on something that they did not consider themselves to be up-to-date on.

Now, New Jersey is somewhat unique in that we report -- First of all, not every state, you understand, has a Commissioner with appellate powers. New Jersey is somewhat unique in that there are a handful of them but it is not the rule among the states of the United States. So, what comes out of the Commissioner's office is watched by the rest of the United States as an example -- what is going on in the firing line. You get detailed, quick

decisions here that never find their way into the Appellate Courts. Therefore, there are answers on the smaller questions, the ones that don't have a lot of money behind them - very helpful and has, over a long period of time, brought New Jersey to prominence in the field of education.

These are of sufficient importance that our organization finances an index, which is not -- I think this is the first one that has an index of its own in it. It has a subject index so that we can find our way through the decisons of the Commissioner.

Last year, when Chapter 212 was enacted, our organization also financed a study, which was reported, on the implications of Chapter 212 for new subject matter for controversies, with which we could expect to be confronted, trying not to get caught short. I think this might very well be of interest to you. If you are not satisfied that this is something that should be excluded, that there is a special expertise involved in this, you might very well want to check on this. It is available through my organization or through the School Boards Association. I think that you would find this well worth inspection.

I mentioned the nationwide importance of New Jersey's decisions. The National Organization on Legal Problems of Education reports regularly on educational decisions throughout the country. So, our decisions come to their attention, throughout the United States.

Let me stop at that point and say if there are any questions that you have, I would be delighted to respond to them.

SENATOR ERRICHETTI: Are there any questions? (no response)

Thank you for coming, Mr. Wilson. (see page 1X for Mr. Wilson's full statement)

NJEA, Walter O'Brien.

J A M E S E. M O R F O R D: Mr. Chairman, Mr. O'Brien is in the State House. He was prepared to give the testimony of the New Jersey Education Association but is running into the difficulty of being in two places at once. The Joint Committee on Public Schools is also meeting at this hour and he stepped out to attend that. So, with your permission, I will proceed with the testimony of the New Jersey Education Association.

I am Jim Morford, Associate Director for Government Relations. Mr. Chairman, members of the Senate State Government and Federal and Interstate Relations and Veterans Affairs Committee, on behalf of the more than 83,000 members of the New Jersey Education Association, I wish to record with you our opposition to Senate Bill 766, in its present form.

With due respect to Senator Laskin, we may address some of the points raised by Mr. Dwyer and the previous witness, however I think our testimony takes a somewhat different thrust. With your permission, I would like to present it.

This legislation would make sweeping changes with respect to the administrative hearings. Changes in the present system, indeed, may be indicated in some areas. NJEA believes this bill goes too far. When he was Attorney General, William Hyland called for a new division of State Government to hear cases involving banking, insurance, and public utilities matters. That suggestion may well have real merit, but S-766 would envelope nearly all of the agencies of State Government, including the one with which we are most concerned, education.

State agencies dealing with state employees and internal departmental issues may share a commonality of interest. NJEA believes that the Division of

Controversies and Disputes within the State Department of Education does not share such a commonality of interest with the other state agencies. We are very much concerned that a "pool" of hearing officers - administrative law judges, if you will - will not have the necessary expertise in the complex area of education law to assure due process. Creating still another costly agency within the bureaucracy may appear to some to be reform, but NJEA believes that this bill in its present form is bad for the public schools of New Jersey and bad for the people who work in them.

The present system under the Division of Controversies and Disputes is understaffed. The proposed law does nothing to correct the understaffing. Keeping the hearing procedure under the direct supervision of those charged with the administration of New Jersey's vast educational system is, in NJEA's opinion, essential to provide due process, guarantee adequate safeguards and assure necessary expertise.

Mr. Chairman, our State's educational system has been the victim of too much chaos in recent years. We ask that you spare public schools from the provisions of S-766.

We have a number of concerns about this legislation and its impact on New Jersey School Law and the Division of Controversies and Disputes.

The Division performs a quasi-judicial function under school law and rules of the New Jersey State Board of Education. The Division's staff includes seven full-time members whose job it is to facilitate the resolution of controversies and disputes arising under education law. Although not perfect, this function has been carried out in the Department of Education since 1867 and has been based on sound educational expertise. We see nothing in the proposed legislation that would give us confindence that its enactment would represent an improvement over the present system. S-766 appropriates $500,000 and apparently assumes transfers of funds from the affected agencies to fund the new Office of Administrative Law.

NJEA does not believe that adequate fiscal information has been provided to assure that there will be enough funding available to provide sufficient administrative law judges to guarantee fair and efficient processing of cases.

How many administrative law judges are provided for in S-766? We can't determine. How many are needed? We are not sure. Will the Office of Administrative Law become a training ground for young attorneys to the extent that a continuing flow of administrative law judges will not have the necessary expertise to assure due process?

If the Division of Controversies and Disputes is to be dissolved and its duties transferred to the Office of Administrative Law, will all duties be so transferred? The Division presently provides information to local school districts to assist in the development of sound educational procedures. Division staff often lend their expertise to the solution of school problems before they become cases. The Division conducts workshops and seminars. The Division provides in-service training for school administrators and supervisors. These activities often prevent formal disputes. How will these services be carried out under the proposed law? We can find nothing in S-766 to suggest that these services will be continued. If these services and this expertise are lost, then we can expect a sharp increase in controversies and disputes - hardly a worthy outcome of the proposed law.

S-766 seems to suggest that the mere acquisition of a law degree and admittance to the bar will assure adequate due process. Our experience suggests that this is not the case. An intimate knowledge of the complex New Jersey School Law and related Administrative Code is far more important than a law degree in adjudicating controversies and disputes arising in public education.

Mr. Chairman, NJEA is concerned that S-766 is silent on any appeals procedure beyond the administrative adjudication. Under present procedures, the Commissioner's decision may be appealed to the State Board of Education and beyond to the Courts. The silence of the proposed law in this area gives us no comfort.

S-766 provides that it shall supersede and repeal any acts or parts of acts inconsistent with the proposed law. Will S-766 then abolish or alter the present filing procedures under the Tenure Hearing Act? Will the 45-day statute of limitations under the Tenure Hearing Act in any way be affected? Will the statute that provides for pay during suspension under specific time lines be affected?

Mr. Chairman, there are just too many unanswered questions about this bill. The NJEA believes that S-766 as proposed will create a cumbersome bureaucracy that will in fact diminish rather than enhance due process. Therefore, we must oppose this legislation as long as it includes the Department of Education. There may be some areas and agencies for which this legislation is appropriate.

NJEA respectfully submits to you that education is not one of those areas. Thank you very much.

SENATOR ERRICHETTI: Thank you.

Are there any questions by members of the Committee? (No questions.) Thank you.

Lewis Applegate, State Chamber of Commerce.

L E W I S R. A P P L E G A T E: Senator and members of the Committee, instead of reading my two and one-half or three-page statement, I will merely reiterate what we have been saying for about four or five years now, that we support this legislation, also that there have been a couple of changes which we advocated, one, eliminating some of the exclusions which we objected to in previous legislation. That has been taken care of. We, therefore, want to go on record in support of this bill. And I do have a prepared statement which I would like to file for the record.

(Written statement submitted by Mr. Applegate can be found beginning on page 6X.)

SENATOR ERRICHETTI: Senator Herbert.

SENATOR HERBERT: Mr. Applegate, would you respond to the adamant position taken by the last three speakers about the Commissioner of Education and the Division of Education. You support the bill with the Education Division in it.

MR. APPLEGATE: We have wanted as much coverage as we could get because we feel that a coordinated administrative branch for administering hearings would be preferable to allowing each department to do their own. Even in the area of education, we see no reason why those so-called experts could not be moved over into the Administrative Hearing Department and perform their functions in the educational area within the structure advocated by this bill. In other words, if

it is good enough for the rest of the departments, the majority of them, we think it is also appropriate for the Education Department. We say that with the knowledge of about 23 years with the educational branch.

SENATOR HERBERT: The point that was made today though - it is kind of cogent and it affected my thinking on the bill - was that most of the disputes in the Division on Education come from outside the Division, while most of the disputes elsewhere in the vast bureaucracy come within the Division. Now would you respond to that?

MR. APPLEGATE: I think there is some element of truth there, in that that does make it slightly different from the rest of the operation. But I still believe - and we still believe - that you could mesh into this overall operation the Education Department needs and have them operate in the area of education hearings. It is no different from Banking or Insurance. It is a hearing process. You can use the same experts they are using now and just put them in a new department.

SENATOR HERBERT: Do you support the bill despite the present exclusions or would you prefer that the present exclusions - that is, the State Board of Parole, PERC, the Division of Workers' Compensation and Tax Appeals Division ---

MR. APPLEGATE: These exclusions are in there because of statutory reasons.

SENATOR HERBERT: I see.

MR. APPLEGATE: And we would just as soon not bother them, particularly Workers' Compensation.

SENATOR HERBERT: I just wanted to get your view clear on that. Thank you very much. I have no further questions.

SENATOR ERRICHETTI: Thank you very much.

Mr. Applegate is the last listed witness. Are there any questions from my colleagues, Senator Laskin and Senator Herbert? Hearing none, I would ask for a motion to adjourn this public hearing.

SENATOR HERBERT: I so move.

SENATOR LASKIN: I second the motion.

SENATOR ERRICHETTI: Moved and seconded. The meeting is closed.

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STATEMENT

by

James L. Wilson , President

The New Jersey Association of School Attorneys

to

The Committee on State Government

The General Assembly of New Jersey

on

S 766

An Act to establish an independent Office of Administrative Law in the Executive Branch of State Government, to transfer to it the functions of, and to reallocate the existing Division of Administrative Procedure, to amend and supplement P.L. 1968, c 410, to repeal section thereof, and to appropriate certain sums.

I asked for this opportunity to speak on this Bill because the organization I represent feels that the Bill contains a grave risk of serious harm to our educational system. Title 18A constitutes a plan compiled by our Legislatures over the years to carry out the educational mandate of our Constitution. Basically it is a good plan- susceptible, I am sure, to improvement, but still good enough that in seeking improvement, we should not risk the present level of performance.

These are particularly critical times. The Legislature recently enacted Chapter 212 of the Laws of 1975, which, with the regulations that followed, contains many new directives, rights and procedures. Many of these are yet to be tested. Legal problems will arise as Boards of Education and the staffs they employ attempt to carry out these directives. To avoid catastrophe there must be a forum for rapid and reliable resolution of these questions. This forum must be educationally oriented, but have as well an understanding of the legal standards to be applied. The Division of Controversies and Disputes is so organized. S 766 does not describe an effective substitute.

In the 1953-54 school year, in which I began the practice of law, the Commissioner published his 12 decisions, together with the 2 appellate decisions, and all of the amendments to Title 18, all in an 83 page booklet. The most recent ~~publication~~ bound edition of School Law Decisions, covering 1975, runs 1167 pages, in two volumes. I didn't attempt to count the cases. I would ask that you each examine briefly the nature of the cases that are reported in those two volumes. You will find many that required careful evaluation of educational values, not merely by the decision maker, but by the hearer.

This revolution we call educational reform is nation-wide, but New Jersey has become one of the leading jurisdictions. We have come to grips with the major problems, have settled some of the fundamental issues, and we are publishing the results as they emerge. We were not the first in the arena. Robinson v Cahill was preceded by similar cases in several other States, notably Serrano v Priest in California. In spite of the apparently interminable trauma we have suffered through, it is worthy of note that Robinson v Cahill was completed, including all six hearings before our Supreme Court, before the final decision in Serrano v Priest.

New Jersey's reputation and impact in school law is due in no small part to the fact that we are one of the States that have given decision-making powers to the Commissioner, and that his decisions are published.

These decisions are of such importance that our Organization finances an index, which is published and distributed in cooperation with the New Jersey School Boards Association. There is another index compiled by NJEA. The Commissioner's more important decisions are reviewed nationally in the School Law Reporter, published by the National Organizational on Legal Problems of Education (NOLPE).

In anticipation of the impact of Chapter 212, the Trustees of our organization last year commissioned a study, to be concerned with the legal implications of T & E, and their probable impact in the problems to be faced by school attorneys. This study provides food for thought to anyone concerned with the forum in which our educational disputes are to be tested.

We do not know what the future holds in this field any more than any other. We can be sure, however, that the decisions made in the coming years in the field of education will have a great impact, not only upon the litigants, but upon our whole society. The wisdom of these decisions, therefor, is of crucial importance. I assure you that the quality of the decisions by the Commissioner can be of no higher an order than the insight and ability of the hearer of the facts. This, in my judgment, is the weakness of S 766 in its present form, as directed to the Department of Education. If the hearing examiners are taken out of the Department of Education, and particularly if the method of selection and training is lost, their expertise will

inevitably diminish. We can't afford it.

Permit me in closing to summarize in three reasons, why I believe the present plan benefits our educational system more than the new proposal is likely to do:

1. Efficiency. The hearing examiners are to a man, familiar, through training and experience, with educational theory and practice, and with the precedents of School Law Decisions. They are not infrequently more familiar than counsel with applicable law, Consequently, matters are frequently adjusted at preliminary hearings, and in any event, can procedeexpeditiously.

2. Economy. I do not know what is paid the present hearing examiners, or proposed for administrative judges, but there should be better salaries with the new level of judges, and in practice, I can't imagine the per-judge load of cases disposed of will match present performance.

3. Democracy. The law provides that the Commissioner shall hear and decide, without cost to the parties, cases arising under the school laws. Petitioners to the Commissioner are frequently without counsel, or any clear understanding of applicable law. These persons get a careful hearing at the present time. I doubt if administrative judges will be equipped to do the same.

STATEMENT OF

LEWIS R. APPLEGATE, VICE PRESIDENT
NEW JERSEY STATE CHAMBER OF COMMERCE

before the

SENATE STATE GOVERNMENT, FEDERAL AND INTER-
STATE RELATIONS AND VETERANS AFFAIRS COMMITTEE

Relative to Senate Bill Number 766

Senate Chamber, State House
Trenton, New Jersey
March 20, 1978

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The State Chamber of Commerce, having played a leading role ten years ago in the development, adoption, and implementation of the Administrative Procedure Act, is intensely interested in any proposals to make major changes in that law, or, for that matter, in the general administrative process in State Government.

Therefore, we have followed with the greatest interest the proposal during the 1976-77 Legislature of Senate Bill 1550 and that bill's development into Senate Bill 1811 and subsequent admendments to the bill. We now appreciate the opportunity to offer our comments on the 1978-79 version of the bill, Senate Bill 766 sponsored by Senators Yates and Weiss.

We regard these proposals to create a corps of full-time, professionally trained and impartial hearing officers to conduct hearings and make determinations in contested cases arising under the rules and regulations issued by State departments and agencies as a most salutary development.

We have long been concerned that the present system represents the antithesis of due process in that investigative, prosecutorial and adjudicatory functions are handled entirely within the agency involved, and often by the same individual. Moreover, the present appointment of

hearing officers by the agency head inevitably brings into question their impartiality. Additionally, today's hearing officers are often part-time, either being public employees with other duties within the agency or persons having non-public employment or professional practice. The use of such part-time hearing officers, who are often not proficient in administrative law, has often led to delays in the handling of cases, inexpertly handled cases, and poorly prepared records that cause a variety of problems, particularly when appeals are taken to the courts. Furthermore, the use of attorneys as part-time hearing officers who may also represent private clients before State agencies raises an important question of conflict of interest.

We feel that the use of professional, full-time, and independent hearing officers will remove or substantially reduce these several serious defects in the present system for dealing administratively or in a quasi-judicial fashion with contested matters. In fact, the provision in S-766 setting time parameters for the disposition of contested cases is itself a major improvement.

We also find benefits encompassed in S-766 other than those relating to contested cases, namely that the new Office of Administrative Law, with its trained cadre of personnel, would be in a position to assist State agencies in their rule-making process, in investigative hearings, and in other areas of administrative practice that have long needed improvement. Therefore, we urge that the bill not only direct and empower the new office of Administrative Law to play a positive role in the improvement of administrative practice in all State agencies but also clearly state as public policy that those agencies shall conform to established uniform administrative procedures. In other words, we feel strongly that a person must enjoy equal administrative process rights and protections no matter what agency he is involved with.

We are pleased to note the amendments made to Senate Bill 766 contain amendments that were suggested by the State Chamber in our previous testimony. One of our original objections was the sizeable list of agencies that were exempted from the use of the new hearing officers, as contained in the original version of this legislation in 1976-77 session, Senate Bill 1811. We feel that this list of exempted agencies should be pared to a minimum of agencies whose statutory function cannot accomodate the hearing procedures contemplated in this legislation. A second objection was the inclustion of compensation schedules for employees of the proposed agency. We have always regarded statutory salary setting as a poor practice for a variety of reasons and in previous testimony before this committee, the State Chamber recommended that provision be omitted.

We thank the sponsors, Senators Yates and Weiss, for adopting amendments to the original legislation to meet the concerns of the State Chamber of Commerce.

In summation, we endorse Senate Bill 766 as being a most desirable improvement in the administrative process in New Jersey State agencies, one that will redound to the benefit of all our citizens.

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