P U B L I C H E A R I N G

before

SENATE COMMITTEE ON STATE GOVERNMENT, FEDERAL AND INTERSTATE RELATIONS AND VETERANS AFFAIRS

on

Senate Bills 1550 and 1811
(Create an Office of Administrative Law
in the Department of State)

Held:
February 24, 1977
Assembly Chamber
State House
Trenton, New Jersey

COMMITTEE MEMBERS PRESENT:

Senator Raymond Garramone (Chairman)

Senator Joseph L. McGahn

I N D E X

I N D E X (cont'd)

SENATE, No. 1550

STATE OF NEW JERSEY

INTRODUCED JUNE 21, 1976

By Senator GARRAMONE

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

AN ACT establishing an Office of Administrative Law Judges in the Department of State and setting forth its functions, powers and duties.

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

1. There is hereby established in the Executive Branch of the State Government an Office of Administrative Law Judges which shall serve as a central agency for the conduct of administrative hearings on all matters as required by law for all agencies of the State Government. For the purposes of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the Office of Administrative Law Judges is hereby allocated to the Department of State, but, notwithstanding said allocation, the office shall be independent of any supervision or control by the department or by any board or office thereof.

2. The Office of Administrative Law Judges shall be under the immediate supervision of a director who shall be an attorney-at-law of this State and who shall also serve as chief administrative law judge of the division. The director shall be appointed by the Governor with the advice and consent of the Senate and shall serve at the pleasure of the Governor during the Governor's term of office and until the appointment and qualification of his successor. The director shall devote his entire time to the duties of his office and shall receive such salary as is provided by law.

3. The Division of Administrative Procedure in the Department of State is hereby abolished and its functions, powers and duties are hereby transferred to the Office of Administraive Law Judges created by this act.

4. The position of Director of Administrative Procedure is hereby abolished. All functions, powers and duties now vested by law

in the aforementioned Director of Administrative Procedure are, except as otherwise provided, transferred to, and assumed by, the Director of the Office of Administrative Law Judges created by this act.

5. The transfer of functions, powers and duties directed by this act are to be made in accordance with the provisions of the "State Agency Transfer Act;" P. L. 1971, c. 375, (C. 52:14D–1 et seq.).

6. The Director of the Office of Administrative Law Judges shall:

a. Administer the work of the office;

b. Organize the office and establish such bureaus as may be required to carry out the work of the office;

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

d. Supervise the conduct of hearings on rules and regulations of all State agencies pursuant to the "Administrative Procedure Act," P. L. 1968, c. 410 (C. 52:14B–1 et seq.) and as may be otherwise required by law.

e. Supervise the conduct of hearings on contested cases as defined in the said "Administrative Procedure Act," and as may be otherwise required by law.

f. Develop uniform standards and procedures and administer and supervise such procedures pursuant to the said "Administrative Procedure Act," and as may be otherwise required by law.

g. Appoint and maintain a staff of full-time administrative law judges who are qualified in the field of administrative law or in subject matter relating to the hearing functions of the Office of Administrative Law Judges and who shall receive such salary as shall be provided by law and who, after 2 years of service as administrative law judges, shall be entitled to the full benefits and protections of Title 11 (Civil Service) of the Revised Statutes. Administrative law judges shall be attorneys-at-law of this State, unless the director decides upon the appointment to office as a full-time administrative law judge of any person who is not an attorney-at-law, but who is qualified in the field of administrative law or in subject matter relating to the hearing functions of the division;

n. Appoint such additional administrative law judges, qualified in the field of administrative law or in subject matter relating to the hearing functions of the office, on a temporary or case basis as may be necessary for the proper performance of the duties of the Office of Administrative Law Judges pursuant to a reasonable fee schedule established in advance by the director. Temporary

administrative law judges shall be attorneys-at-law of this State, unless the director decides upon the appointment to office as a temporary administrative law judge of any similarly qualified person who is not an attorney-at-law, but who is qualified in the field of administrative law or in subject matter relating to the hearing functions of the State agency;

i. Assign one or more administrative law judges who are to preside over hearings on rules and regulations for all State agencies and over contested cases as defined in the said "Administrative Procedure Act."

7. The determination of the administrative law judges assigned by the director of the office in any matter or proceeding shall represent the final agency decision within the meaning of said "Administrative Procedure Act."

8. Nothing in this act shall be deemed to affect any agency proceeding initiated prior to the effective date thereof.

9. All acts and parts of acts which are inconsistent with the provisions of this act are, to the extent of such inconsistency, hereby repealed; but such repeal shall not affect pending proceedings.

10. This act shall take effect immediately.

STATEMENT

The purpose of this bill is to create a central agency in the Executive Branch to conduct all hearings on rules and regulations, on contested cases, or on other matters as provided by law, for all State agencies. This agency, an Office of Administrative Law Judges, would be "in but not of" the Department of State. The aim is to up-grade the hearing process by improving the status, the compensation and the impartiality of individuals who conduct hearings. The position of "Administrative Law Judge" created by this act is a full-time position.

The Division of Administrative Procedure in the Department of State and the position of Director of the Division of Administrative Procedure established pursuant to the "Administrative Procedure Act," approved January 14, 1969, P. L. 1968, c. 410 (C. 52:14B–1 et seq.), are abolished and the functions, powers and duties thereof are transferred to the office created by this act.

SENATE, No. 1811

STATE OF NEW JERSEY

INTRODUCED DECEMBER 14, 1976

By Senator GARRAMONE

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 of 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 shall be appointed by the Governor with the advice and consent of the Senate, and 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 per annum set at a range equivalent to A-43 under the State of New Jersey Compensation Plan. He shall be eligible for such annual increases as are provided for under that plan. 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 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. Appoint and maintain a staff of full-time hearing officers, qualified in the field of administrative law or in subject matter relating to the hearing functions of a State agency. A full-time hearing officer shall not hold other employment. Within the limits of available appropriations, hearing officers shall be appointed as chief or supervising hearing examiners at a yearly salary set at range A-41, hearing officer I at a yearly salary set at range A-37, and hearing officer II at a yearly salary set at range A-32. They shall be appointed from among the unclassified service, but, after 3 years of service as a hearing officer, shall be entitled to the full benefits and protections of Title 11 of the Revised Statutes. Hearing officers shall be attorneys-at-law of this State, or any persons who are not attorneys-at-laws, but who, in the judgment of 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 hearing officers, 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 hearing officers shall have the same qualifications for appointment as permanent hearing officers.

n. Assign a hearing officer 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 a hearing officer 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 a hearing officer 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 hearing officers 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 hearing officers and agencies in regard to their responsibilities under this act.

5. (New section) a. Hearing officers shall as far as practicable be assigned by the director from the office to an agency to preside over contested cases in accordance with the special expertise of the hearing officer;

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 writing the reasons why the character of the case requires utilization of a different procedure for assigning hearing officers than is established by this amendatory and supplementary act.

6. 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.

7. 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] *hearing* officer may in his discretion exclude any evidence if he finds that its probative value is substantially outweighed 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] *hearing* officer 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 hearing officer,* 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 hearing examiner.* 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 hearing examiner* 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 a hearing officer 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 hearing officer*, shall adopt, reject or modify the recommended report and decision *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 hearing examiner 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 decision 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 hearing officer.* 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.

8. (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 hearing officer.

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.

9. (New section) Unless a specific request is made by the agency, no hearing officer 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 which requires an en banc administrative adjudication but which is permitted to be and is to be conducted by one or several of multiple members of the agency, including but not limited to the Civil Service Commission, the Public Utilities Commission, the Board of Education, the Board of Higher Education, or any retirement system in the Division of Pensions in the Department of the Treasury;

c. Any matter where the head of the agency determines to conduct the hearing directly and individually; or

d. Any agency for the adoption, amendment or repeal of any administrative rule, including the adoption, amendment or repeal of any rate, toll, fare or charge for a product or service provided by any business, industry or utility regulated or controlled by the agency.

10. (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.).

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

12. (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.

13. (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 $100,000.00, the obligation and expenditure of which shall be subject to the approval of the Director of the Division of Budget and Accounting.

14. (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.

15. (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 hearing officers 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 or the office will be appointed by the director for a 6-year term. Hearing officers, appointed by the director, and related employees 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 hearing officers possess expertise in the technical field in which

they are hearing matters, they will not be rotated among agencies, but rather will, as far as practicable, 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 hearing officer.

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

Hearing officers 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 hearing officer's report. Unless the agency head modifies or rejects the hearing examiner'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 Public Utilities Commission will be able to conduct contested cases.

An appropriation of $100,000.00 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 JOSEPH L. McGAHN: Good morning, ladies and gentlemen. I would like to call this public hearing to order.

I am Senator McGahn of the Second District. I am presiding at this hearing before the Senate State Government, Federal and Interstate Relations and Veterans Affairs Committee on Senate Bills No. 1550 and No. 1811.

Senator Garramone, the Chairman of this Committee, has been inadvertently delayed. He will be here this afternoon. In the interim I will be conducting the hearing.

Both of these bills, which are sponsored by Senator Garramone, are different from one another in some of their particulars but both of them have the same intent. The purpose of each is to create a central agency in the Executive Branch of State Government to conduct hearings on rules and regulations and on contested cases for State agencies. The aim is to improve the quality of the hearing process in the State of New Jersey.

Each bill would create a full-time corps of professional administrative law judges who would not have to face the problem of split loyalties in reaching decisions since they would not be based in the agency which was a party in the very case under consideration. Each bill creates an "Office of Administrative Law" or "Office of Administrative Law Judges" and places it "in, but not of" the Department to fulfill constitutional requirements. Each bill, if enacted, will absorb the power, functions and duties of the present Division of Administrative Procedure which was established pursuant to the "Administrative Procedures Act," approved January 14, 1969 (P.L. 1968, c.410, C52:14B-1 et seq.).

The Committee considers the idea of a centralized agency for administrative hearings to be an important concept. However, it recognizes that there may be honest differences of opinion concerning jurisdiction and scope of responsibilities of such an agency. For instance: Should some agencies continue to maintain their own in-house hearing function and, if so, why? It is worth noting that these bills reflect these differences in approach since one of them - S-1550 - would bring the hearing process for all state agencies into the central agency. The other Bill S 1811 - would exempt some agencies from the jurisdiction of the "Office of Administrative Law."

The Committee also wishes to determine the impact of the bills on personnel in each department presently performing these functions. With these considerations in mind, I would like to call the first witness.

In the absence of the Attorney General, who is on his way over, I will now call upon the Honorable Stanley VanNess, Commissioner of the Department of Public Advocate.

S T A N L E Y C. V A N N E S S: Good morning, Senator McGahn.

On behalf of the Department of the Public Advocate, I am pleased to have this opportunity to appear before you in order to support both S 1550 and S 1811 in general concept. Both of these bills, as you have indicated,

would establish an independent corps of full-time hearing examiners. One, as you indicated, uses the term Administrative Law Judge. Personally, I prefer that term. I think it elevates the concept but I'm using really the term Hearing Examiner and Administrative Law Judge to be equivalent terms in my remarks.

I congratulate the Administration and Senator Garramone for initiating this proposed legislation which I hope will receive your Committee's prompt and emphatic endorsement.

Our Department, established to monitor the operations of state government, has accumulated a great deal of experience with state administrative processes. The Division of Rate Counsel, for example, practices before the Public Utilities Commission and the Department of Insurance in rate cases. The Division of Public Interest Advocacy has had cases involving the professional boards and the Departments of Environmental Protection, Health, and Civil Service, while the office of Citizens Complaints investigates citizen problems involving nearly every state agency. Although this list of our activities is not complete, it is, I believe, extensive enough to show our deep involvement with the processes that S 1811 and S 1550 seek to reform.

Administrative justice today is at least as important as the justice meted out by our courts of law. A corps of impartial hearing officers with the expertise and independence of Superior Court judges is thus needed to give the administrative law system the equal status its importance warrants. The bills you are considering will help to achieve this goal.

Our present hearing officer system frequently fails to develop the expertise which is needed to resolve the complexities of modern administrative law. For example, decisions whether to revoke a doctor's license or to grant a permit under the Coastal Area Facilities Review Act involve analytical nuances that may be more difficult than the problems in the average case that comes before our Superior and County Courts, yet we would not dream of allowing part-timers to assess individual rights and obligations in a judicial court. We should require no less in our administrative courts. In sum, administrative justice is too crucial to be carried out by an antiquated part-time system which has outlived the usefulness it may have possessed in earlier days.

The present system, in our judgment, is deficient in appearance as well as substance. Hearing officers who receive their part-time appointments and compensation from the agency in which they are judging cannot possibly stimulate public confidence as much as judges who owe nothing to agencies whose conduct they may be evaluating. For example, when a judge appointed and paid by the Division of Motor Vehicles reviews a license revocation proposed by that Division, ordinary citizens may feel that they are not getting their day in administrative court. This practice should be changed.

We recognize that progress has been made even under the present system. The use of retired Superior Court Judges by the professional boards and the Department of Environmental Protection has added legitimacy to

the administrative process. However, this ad hoc response to the problems of expertise and legitimacy of authority does not obviate the need for a permanent reform such as that contained in the bills being considered by the Committee. Such an improvement must be institutionalized by the establishment on a continuing basis of an impartial corps of full-time, expert administrative judges.

These are our comments on the general objectives of the two bills, S 1811 and S 1550. Since we wish to provide as much assistance as we can to the Committee's deliberations on these proposals, we would like to go beyond our statement of general support and discuss specific issues which the two bills treat differently.

First, the salary question is extremely important since the compensation must be adequate to attract good, experienced personnel into this hearing officer corps. We therefore endorse the approach taken in S 1811 which establishes definite salary ranges. However, we hope that the salary range proposed in S 1811 for lower rank hearing officers will be raised. We also hope that there will be sufficient appropriations to finance the hiring of a reasonably sized complement of hearing officers.

Second, we are concerned about the exemptions from the hearing officer requirements that are contained in Section 9 of S 1811, page 7. We think that the exemptions are so broad, particularly the exemption contained in section 9d, as to almost swallow the whole bill. Section 9d would exempt such rate setting agencies as the PUC. In our judgment the use of administrative judges is at least as necessary there as in the agencies where there is no exemption.

It would be our strong recommendation that section 9d be deleted from S 1811.

Further, the language of 9b concerning multi-member agencies should be strengthened to emphasize any case before such an agency which is not heard solely by one or more of the agency's commissioners must be heard by a hearing officer appointed pursuant to this bill.

I think there it is just a question of the use of the language. The intent, as I understand it, is to provide either of two alternatives, either the hearing officer or the agency head. I think it's just a bit confusing and, while we are not prepared to offer a specific amendment at this time, should the Committee wish us to do so we would be more than glad to offer amendatory language.

Third, since these bills aim for greater procedural fairness, we question the inclusion in S 1811 of an amendment to the Administrative Procedure Act which appears to water down a party's right to cross-examine and present evidence in a contested case. See Section 7, page 5, which amends Section 10a of the Administrative Procedure Act. We believe that such basic rights of cross-examination should be fully protected.

Now I think that the language that is employed there is really unnecessary language. There is indeed discretion in the hearing officer as provided by the Administrative Procedure Act to limit useless cross-examination, duplicative cross-examination, but there seems to be a further suggestion that cross-examination can be restricted at the discretion

of the hearing examiner. And we think that unnecessary and, frankly, we think it dangerous.

Fourth, Section 41 of S 1811, which allows relatively unrestricted appointment of part-time hearing officers, should be tightened. In our view, part-time hearing officers are basically antithetical to the whole concept of administrative expertise on which these two bills are grounded. The use of part-time personnel should be made the exception. We therefore suggest that any part-time appointments be justified in writing by a statement filed with the Secretary of State which sets forth the reasons why the usual course of hiring full-time personnel is not being followed. A similar procedure should be employed in connection with appointments to handle individual cases pursuant to Section 5b of S 1811.

Finally, we wish to express the hope for legislative recognition that even these good and valuable bills are only a partial step toward reform of our administrative processes. Particularly in the area of professional boards we must improve not only adjudication but also the rule-making and enforcement processes to augment the quality of cases that are brought before our new hearing officer corps. In that context, I am distressed that there has been no action on Senator Greenberg's bill, S 1011, to reform all these processes in the professional boards. We believe that better judges will help little if rules are lax and prosecution is weak. S 1811 will improve the judging of cases brought before administrative tribunals; S 1011, in the area of professional boards, will improve the prosecution of those cases. I think New Jersey needs both.

Senator, I thank you for the opportunity to appear here this morning to make these brief remarks in support of the bills and I will certainly be pleased to answer any questions that you might have.

SENATOR McGAHN: Commissioner, thank you very much for your remarks. I think that in concept you do support it. I think the amendments that you have suggested are valid and I think on behalf of the Committee if you could draft those particular amendments and present them to Mr. Carroll, the Aide to this Committee, we would certainly appreciate it, and at the time that it is brought up in Committee I am sure that serious consideration will be given because you are an expert in this particular field.

I just wonder though, in the process of gaining efficiency and impartiality in the administrative law process are we losing any immediacy and understanding particularly in hearings on rules and regulations?

MR. VAN NESS: I think not, Senator. This is contemplated - you're talking, I presume, about my suggestion that 9d be exempted. Now 9d as drafted is somewhat confusing. It seems to lump rule-making and rate-making into the same sort of animal. It is not. Obviously in the past couple of years the public concern has been expressed most vocally about the rule-making process and the rate-making process, particularly the latter. There I would think the appearance of propriety and the necessity of impartiality would rise to the highest level. And clearly

that is where it is necessary to bring in a full-time impartial hearing examiner.

If there were some suggestion that rule-making be separated from rate-making, perhaps the immediacy argument might have more substance in my judgment, Senator. But, as written, I think 9d is clearly inappropriate and flies in the face of the intent of the bill, as I understand it.

SENATOR McGAHN: Being a member of a different profession than yours, I realize there is such a thing as professional jealousy. I am just wondering in comments concerning the salary range that we have in bill S 1811, certainly in order to attract competent individuals today and certainly on a full-time basis the salaries must be commensurate with basically their ability and the time they put in. Would you feel that there would be any adverse reaction from the members of the Judiciary if the salary scale was comparable for administrative judges or, by the same token, do you feel that they should be comparable with county court judges and possibly the --

MR. VAN NESS: Well, S 1811 contemplates several levels of hearing examiners. I think certainly those hearing examiners or administrative law judges who are at the highest level ought to be paid a comparable amount. I assume that they would be the ones handling the most difficult matters, the ones of greatest import. Without in any way speaking derogatorily of the Judiciary - you know I wouldn't do that - it has always concerned me that we may have a Superior Court judge paid I believe it is about $42,000 a year who may spend much of his time hearing intersection accident cases, and we may have at the same time a young man paid $16,000 or $17,000 who is hearing questions relating to a multi-million dollar Public Utility rate case. It just has struck me as totally incongruous. So I think certainly those people who are selected to be at the top of these ranges, those people who are most senior, ought to be compensated at the same rate as the law judges are. And, of course, I think the fact that you have the opportunity to bring people in at lower rates might dispel any feeling that the Judiciary had that they were somehow being degraded.

SENATOR McGAHN: It's my understanding then that you feel there should be no exemptions, basically.

MR. VAN NESS: I am not troubled by the exemption where the head of the agency or the heads of a multi-headed agency determined to hear the matter themselves. That does not concern me, but I think it ought to be spelled out clearly, more clearly in 9b than it is. And I am very much concerned about 9d which would exempt the rule-making and rate-making process entirely if the head of the agency chose to do it and, at the same time, chose not to hear it himself.

SENATOR McGAHN: There may arise certain instances or circumstances because of an emergency nature where the total corps of administrative law judges would be insufficient to hear these procedures. It would be upon this basis that I think Senator Garramone predicated use of part-time hearing examiners. Would you have any comments upon their qualifications? Would you consider the present system, ad hoc usage of retired Superior Court or retired judges in this circumstance?

MR. VAN NESS: In the limited experience that we've had with

hearings in which say a retired judge has been involved, I would have to say we were very satisfied with the procedure, if not the results on all occasions. So that I certainly would not object to allowing the Director to make those ad hoc appointments. But I do think it important that he be able to express the reason or reasons why he is moving in that direction and state those reasons in writing, so that at least it isn't done in a casual fashion, and that the basic tenor of the legislation is pursued, and that is the direction toward full-time.

SENATOR McGAHN: In other words you are saying actually that the hearing examiner or administrative law judge should develop expertise in the particular area in which he is going to be involved.

MR. VAN NESS: Yes. One of the things that I think concerned some people about this whole bill, and in fact gave me some trouble initially, was were you going to try to establish a fungible corps, in other words a fellow would hear Civil Service cases today and Public Utility cases tomorrow. And it struck me that that was not likely to work. As I understand the purpose of the bill now, the director would certainly have the ability to recognize expertise in a particular area and assign an administrative law judge who was expert in Public Utility matters to hear Public Utility cases, and not mix them up.

SENATOR McGAHN: This is the intent of the bill. That's my understanding of it. If there is expertise in an area, expertise in environmental matters, particularly where you find case law and decisions are changing, I think that certainly, not necessarily speaking for Senator Garramone, I can relay you his thoughts on this, this was the primary intent.

MR. VAN NESS: Yes, I think it is spelled out in the statement attached to the bill.

SENATOR McGAHN: Nobody else being present and nobody else having questions, thank you very much.

MR. VAN NESS: Thank you very much, Senator.

SENATOR McGAHN: Attorney General William Hyland. General, my apologies. We intended to hear you first but we started and we thought we would try to get rid of Stanley.

W I L L I A M F. H Y L A N D: It's entirely my fault. I can report that we had the great experience today of being able to convene the first working-training session under the new Alcoholism Act under the auspices of the Department of Health and my Department, and it was that that delayed me. And, Doctor, if I may refer to your professional capacity for a moment, I think you will agree with us that that is a great new step in the treatment of this disease problem and I felt I should go there first and apologize for the delay in getting here

SENATOR McGAHN: There's no delay in getting here. And I appreciate your remarks and I agree with you a hundred percent. I really thought though that you were taking your first lesson in casino gambling.

MR. HYLAND: No. I'm not very lucky at cards or whatever else will be used.

I appeared here last May, Senator, before this Committee during

the course of consideration of Senate Bill 1202, which was the proposed Department of Regulated Commerce Act. It's relevant to say that today only because one of the important aspects of that bill which I attempted to highlight in my testimony was the creation of a Division of Administrative Law Judges, which would hear cases involving banking, insurance and public utility matters.

I stated then that, given the impact of administrative decisions throughout our society, the establishment of an independent corps of skilled hearing examiners was "one of the most positive changes this Legislature can make in the area of regulatory reform."

The bills before the Committee today would extend the concept advanced in that earlier bill to nearly all agencies of the State Government. As noted in the statement to Senate Bill 1811, the need for change in our administrative procedures has long been recognized in this State. Former Justice Jacobs, in a dissenting opinion, referred to in that statement, characterized the basic problem as the "continued...policy of concentrating in a single administrator, wide powers of investigation, prosecution, hearing and determination."

And I should interject that former Justice Jacobs is indeed an expert in the area of administrative law, having been assigned as Counsel, I believe it was, to the Division of Alcoholic Beverage Control some years ago, before he began his judicial career.

I think that by removing hearing officers from the various departments and grouping them within a single office and separating the hearing and determination powers from other administrative processes cases can be expedited, they can be decided more impartially, and that the concept of due process of law will be better served.

As between the two bills before the Committee at the present time, I prefer S 1811. I think it's a more comprehensive bill and I am going to address my remarks specifically to that.

As it is presently written, S 1811 does not involve the assignment of an independent hearing officer to hear cases concerning the "adoption, amendment or repeal of any rate, toll, fare or charge for a product or service provided by any business, industry or utility regulated or controlled by (a State) agency" unless a specific request is made. And, as Commissioner Van Ness has just indicated, I suggest that that language found in section 9d of the bill be deleted in order to bring public utility and insurance company rate cases within the purview of the independent hearing examiners.

I don't have to point out the magnitude of those cases, the hundreds of thousands and the millions of dollars that are very often involved. And it's quite important to have those cases decided as impartially and as professionally as possible.

I would suggest, as a matter of semantics however, that the bill that I have indicated I would prefer to see adopted be amended to change the designation of the officer to Administrative Law Judge. This, as you know, is found in the federal system. I think it helps to supply dignity and stature to the hearing examiner and I earnestly suggest that as a further change.

One criticism that has been voiced concerning the concept of independent hearing examiners is that by removing the hearing officer from the regulatory agency he will not develop the necessary and appropriate knowledge peculiar to the agency's area of regulation. It's argued that the necessary expertise to acquire the ability to sit on cases involving some of these more technical agencies can be acquired only if the officer works within the agency. But I think the answer to that is the provision in S 1811 that "hearing officers shall as far as practicable be assigned to preside over contested cases in accordance with the special expertise of the hearing officer." I suggest this is no different really from the way the court system is operated. For extended periods of time, judges are assigned to the Chancery Division or to hear matrimonial cases or criminal cases or appellate cases, in large part because of the special backgrounds that they bring to those areas of the law. And I think that it would be very wise to include a provision at least as broad and liberal as the one that I have just pointed out so that we can provide special expertise wherever it's possible.

I have one comment that goes beyond the prepared testimony, which, Senator, I believe you have a copy of and I have tried for that reason primarily to paraphrase it so that I would not unduly occupy the time of the Committee, and that is the provision - if I can find the section - concerning the appointment of officers which specifies that after three years - although they may come from the Unclassified Service, after three years they would be subject to the provisions of Title 11, the Civil Service Act.

I can see arguments on both sides of this question. The experience in my own Department, however, in respect to the lawyers that we hire as Deputy Attorneys General, is that they are unclassified; they don't seem to need the protection under contemporary notions of how government should operate, they don't seem to need the protection of being in the Classified Service; they're hired without regard to political affiliation; they are discouraged from having political activity; and so when an administration turns over there really isn't the kind of feeling that there might have been in days gone by about cleaning out a section and bringing new people in. I have confidence that the hearing officers or administrative law judges, whatever we call them, hired under the provisions of this legislation, if it is enacted, will be able to justify their continued employment in those capacities so long as they demonstrate the competency that quite obviously they ought to have if they are to be utilized. It may be that there should be some protection as in the case of County Court Judges who after three appointments acquire tenure, or Superior Court Judges and Supreme Court Justices who after seven years and second appointment acquire tenure. But I would not like to see this new office locked in to people, especially when there are no specific threshold requirements, in as short a period of time as three years. My experience in government, which is fairly extensive, as you know, indicates that in many cases the least talented people are the ones who are most firmly locked into positions that makes it difficult for the heads of departments

and the heads of other agencies to deal with the flexibility that they ought to have. So I tend to have a bias against overdoing this tenure and classification business. While I have no specific suggestion to make in lieu of the three year proposal, I do suggest that the Committee and its staff give some thought to that and decide whether it is really in the best interest of the State.

And, finally, on the threshold qualifications, I suggest that some thought be given to a minimum period of time as an attorney-at-law of the State of New Jersey, in those instances where the individual is an attorney. I think perhaps three years would be a suitable time here. As you know, under the Constitution, a lawyer can't be appointed judge until he has been admitted for ten years in the State. It's a five year requirement as to prosecutors. And I think that when we are going to be giving individuals the very broad latitude and discretion that they have under this Act, there is no harm in injecting some minimum hiring standard which I suggest might be as low as three years.

I think, Senator, these represent my comments. During the further course of consideration of this bill, of course my Department will be available to assist in drafting any suggestions that we've made or that the Committee might want to discuss with us.

SENATOR McGAHN: Thank you very much, General. I have several questions.

Do you have any difficulty with this being in but not of the Department of State?

MR. HYLAND: No, I don't.

SENATOR McGAHN: That is perfectly fine.

MR. HYLAND: Yes. I think it's a neutral setting which is perfectly all right.

SENATOR McGAHN: Now, Commissioner VanNess, of course, basically had some doubts about the use at times of part-time hearing examiners. Would you care to make any comment concerning that?

MR. HYLAND: I think that part-time hearing examiners should be allowed for under the bill. But I would hope that recourse to that would be fairly infrequent. I mean no disrespect to those who have served us very ably in the past, including in my own Department, but there is a tendency for distraction, there is a tendency to have to make that decision about how your time is going to be allocated between one item of responsibility and another, if you are part time. And we do have the experience, on occasion, of waiting sometimes excessively for the completion of an assignment by a part-time examiner who may get involved in his private life and an extended case.

And one other comment that I have to approach most delicately, because there was a reference in the past to the hiring of retired Judges, which by and large I approve of and I have found to be thoroughly satisfactory, but we do know that these judges are retired, for the most part, because they have reached the age of 65 or the age of 70. And through no fault of their own they sometimes find it necessary to go into a hospital for surgery or they suffer some health problem which stretches out the disposition of a

case. It's unfortunate but it's a fact of life. So I would hope the use of part-time examiners would be left in most cases to those few instances where perhaps very specialized knowledge of the subject matter might be necessary, and the director of the division might decide for that reason to reach to the outside temporarily to get some help.

SENATOR McGAHN: General, do you think that the salary ranges in here are reasonable or do you think frankly - I don't know if you are familiar - the chief or supervising hearing examiner is $33,250 to $41,565; hearing officer, grade I, $27,000 to $36,000; hearing examiner, grade II, $21,000 to $28,000.

MR. HYLAND: Well, I haven't studied the salaries but just as an observation I would say that while I'm realistic enough to appreciate that the Legislature is not likely to make an adjustment in the salaries of department heads, cabinet people, that the time is increasingly upon us when the pushing of salaries against those cabinet limitations makes it difficult for me to rationalize some of the salary suggestions that are made in bills of this kind or in other forums.

There are a number of people in my department who should be earning more, forgetting myself entirely at the moment, but, as you know, we have a practice of limiting the salaries of sub-cabinet people to $500 of the department head and $43,000 of salary for a cabinet officer is likely to remain with us for a long time to come, which God forbid is the case. It doesn't affect me. It will affect people who follow me. Then it's going to be very difficult to rationalize salaries that go up to $41,000 or $42,000, that close to the salary of the cabinet heads.

I think it's time for another very careful look at the overall salary problem in State government, as the Hay Committee did. And for that reason I would prefer to defer any comment about the appropriateness of these ranges.

SENATOR McGAHN: I asked that question because, as I think you remarked, you do have Attorney General Assistants in your office who are extremely competent. It is very difficult for a young man with ability to get along on a minimal salary. You may find yourself having hearing examiners or administrative law judges, as the case may be, who have developed over a period of time a sufficient degree of expertise and the ability to handle a case very judiciously and effectively, only to find that they are locked into that salary scale. And then, of course, private industry or some other area offers them a much better advantage.

MR. HYLAND: Yes.

SENATOR McGAHN: After training them for X number of years we lose their ability.

MR. HYLAND: Yes. And I think it's shortsighted and it's poor economics. I would like to feel that anyone who has a genuine interest in serving in government, whether it be as a lawyer or in some other area of training, that he ought to find it reasonably comfortable to pursue a governmental career as opposed to the attractions of the salaries in the outside world. And the Legislature, as I have suggested, must address itself to this overall problem. I would prefer to see that done rather than

comment on just one narrow area.

SENATOR McGAHN: We appreciate that. Finally, General, would you have any difficulty with the exemption section of 1811 which excludes the Board of Parole, the Public Employees Relations Commission, and the Divison of Workmen's Compensation, and the Division of Tax Appeals from this jurisdiction?

MR. HYLAND: No. I think I'm correct in saying that each of those agencies sit at the Commissioner level. The Parole Board, for example, must sit as a Commission. So I don't think it's applicable. I believe that's true of PERC as well. Of course, if that shouldn't be the case, if they have the right to delegate the hearing assignment, then I think the act ought to be flexible enough to permit that to be done where the workload or other special circumstances require.

SENATOR McGAHN: No problem though when the Commission is sitting en bloc.

MR. HYLAND: No.

SENATOR McGAHN: Thank you very much for your testimony. It was very, very fine and we appreciate it.

MR. HYLAND: Thank you for your time.

SENATOR McGAHN: The Reverend Woodson, please. Howard Woodson, President of the Civil Service Commission.

S. H O W A R D W O O D S O N: Thank you very much, Senator.

Our Department has been requested also to comment on the proposals that are found in S 1550 and S 1811. And I might say, at the very beginning of this testimony that my staff and the Members of the Commission have reviewed the proposals before us today in this public hearing, and some of the staff may take an opposite view to that which I am stating at this point because they have some reservations relative to how well the administration of S 1811 will be carried out in terms of our ability to adjudicate the problems which we confront on a day-to-day basis relative to appeals from decisions of appointing authorities. I happen to support the idea, the principle of S 1811. I feel that the appointment of experts in the field, administrative law judges as is described in S 1811, would be an improvement. Currently in the Department of Civil Service we hire some thirty hearing officers, and we hire them under the statutory provisions of hearing officer programs as described in N.J.S. 11:1-20.

In that context, we assign, in the Department of Civil Service, a hearing officer to approximately two hearings per month and we schedule as many as sixty hearing days per month. This is reduced somewhat by postponements and continuations, but the number of cases in Civil Service is increasing steadily. And to give you some idea of the problems which we face in Civil Service in terms of hearings, in 1973-74 there were 240 hearings granted; in 1974-75 there were 327; and in 1975-76, 397, which is a 74% increase. And in terms of the number of hearing days held, in 1973 we had 346 against 1975-76, 480, which is an increase of 39%. The number of cases concluded between 1973, which was 193; 1976, 326; which is an increase of 69%. And in terms of the decisions rendered, in 1973, 200; in 1975-76, 309; which is an increase of 55%.

We, in addition, have now assumed jurisdiction over affirmative action appeals, under Executive Order No. 14, and we anticipate a substantial increase in caseloads as a consequence. And so it taxes our imagination to conceive of a small number of hearing officers being assigned to the Department of Civil Service to hear Civil Service cases.

In our efforts to secure information relative to the number of hearing officers who would be assigned to the Department of Civil Service to hear cases for Civil Service, we understood that probably three or four hearing officers would be available for our use, under the proposed legislation. And such a limitation, we feel, is a little unrealistic, in view of the fact, as I indicated before, we currently hire thirty hearing officers on a per diem basis to whom we assign approximately two hearings per month.

If you were to use the figures of simply three or four, we fail to see how we would be able to adjudicate the hearing procedures to a point that would be satisfactory to those who are involved.

Prior to my going into Civil Service, it is my understanding that for a period of time we had a backlog, even with the hearing officers that we did have - which were five, originally, and they were the Members of the Commission -- that our backlog ran as far back as thirty months' delay. We did secure from the Legislature the approval of appointing additional hearing officers with the result that we have reduced it from the thirty month period back to at least a two month disposition. And we have thereby satisfied the complaints of both the employer and the employees who indicated such a long delay was unconscionable on the part of Civil Service.

The pressure that we have received from the public sector, labor relations groups, has also indicated the need to adjudicate the hearings as quickly as possible and, at the same time, we recognize that any delays that might occur would be an increase in cost in terms of back pay. In many instances we discover that the appellant has been delayed in a hearing with the result that many times appointing authorities are forced to pay back pay over an unconscionable period of time, when they could have used the services of that employee at a much shorter period of time.

We, therefore, would point the Committee to the fact that if this bill becomes a reality, and certainly I have no objection to the concept at all, that it must be considered in the light of the number of hearing officers that are going to be assigned in the Division dealing with, at least, Civil Service. Under our present system we have appropriated $168,000 for compensation of both hearing officers and court reporters. The projected breakdown for expenses would be approximately $57,000, that is currently, for hearing officers per year with $111,000 remaining allocated to the payment of court reporters. Under the proposed law, relying on the four hearing officers which it has been estimated will be provided for us, these officers would conduct, hypothetically, three hearings a week. And we would assume that two days would remain for the preparation of reports and recommendations.

Estimating the rate of pay for these hearing officers at let's say $29,600 per year, the total salaries would amount to $118,000 with $111,000 still required for court reporters. Benefits would amount to approximately 25% of the salaries, bringing that compensation figure to $151,040. And, for purposes of comparison, the figures would appear as follows:

Under the old system, which we are currently operating under, hearing officers receive $57,000 per year. Under the new system hearing officers would receive approximately $151,000 per year; court reporters, $111,000; and court reporters, under the new system, we assume would be still receiving approximately $111,000. The total appropriation currently is $168,000, while the new appropriation, under the assumption that we would be having four hearing officers, would esculate to approximately $253,000.

These are the prohibitions which we see, or at least the problems which we see relative to the bill. On the other hand, as I indicated to you before, I am supportive of the concept itself.

As I review the cases that come before the Civil Service Commission, I recognize that we have various levels of competency. We do not have, in my estimation, the highest level of competency in some of the hearing officers, the result being that many of those hearing officers get fewer cases per month or per year than other hearing officers who are far more competent. Certainly I would feel that under the proposal, where you seek out the very best hearing officers to hear cases, we would have at least a more efficient system. However, I would point again to the fact that it must be taken into consideration that, if you do, adequate numbers of hearing officers must be assigned to the Department of Civil Service if we are to carry out the function of Civil Service in ameliorating the problems that exist relative to appellants who have appealed to us in cases where they are in disagreement with decisions rendered by appointing authorities.

These are the comments that I would want to make verbally. And I would like to reserve the option of sending to you a formal statement which could become a part of the hearings which you are currently conducting.

SENATOR McGAHN: Reverend, at the present time are your hearing officers part time?

MR. WOODSON: Yes, part time hearing officers.

SENATOR McGAHN: Normally, where do you get these hearing officers from?

MR. WOODSON: They are recommended to us by various Commissioners. I review their qualifications, and they are also reviewed by other staff members in my office, and then they are appointed as hearing officers. A large proportion of them are lawyers who work part time. One of the things that we have found, Senator, in terms of the hearing officers we currently have, is that if a hearing officer does not comply with our requirement of submitting a report and recommendation within a prescribed ten day period, we do not assign them any further cases until that requirement is met.

Another hearing officer is immediately substituted if a hearing officer cannot appear, for instance, on that date. That safeguard, it seems to us, may not be available with centralized hearing officers, and Civil Service would be required to wait its turn. And with the increased militancy of public employees and the deepening sensitivity of labor relations in the public sector, I'm sure that such delays would not go unnoticed. So we point those up as problems which we see may be involved in the passage of the bill. And certainly I would defer to the Legislature and to this Committee in terms of recommedning the number of hearing officers who ought to be assigned, particularly in the area of public employees' hearings, so that we not have the continuing or the growing caseload backlog that was existent just a few years ago.

SENATOR McGAHN: I think your case has been well stated as far as the number of hearing examiners or administrative law judges, whatever you want to call them, will be needed as far as the caseload that your particular Division handles.

Could you supply us with what might be an adequate number of full-time hearing examiners that would take the place of the thirty part-time examiners?

MR. WOODSON: We would certainly be willing to do that, Senator. We will forward to you and to the Committee the estimated number of hearing officers that we would recommend for cases that we would have to handle.

I brought with me, just as a show of the amount of time that would be involved in some of the hearings that we currently undertake, - one of my staff members there has a mound of paper which shows just what one hearing officer had to go through relative to a single case. There is quite a mound of paper which shows that it is not simply a matter of a short hearing, it is not a matter of simply hearing the case for a half hour or an hour and that's the end of it. This is just a show of two cases in terms of testimony taken. This (indicating) is one case alone, and this (indicating) is one case alone. It shows you the amount of work that has gone into one hearing. This case was heard by one of the retired judges. Of course, it's a very complicated case that he heard. But the fact is that in almost every instance - and since I've been in Civil Service I suspected that they were trying to keep me from finding the men's room by giving me all these papers to review -- but the fact is that we have cases of this kind continually before us and it's evidence of the kind of time that hearing officers must spend in Civil Service in their attempts to make certain that the employees, as well as the employers, have their fair day in court and that adequate hearings are held.

SENATOR McGAHN: Given the choice of total exemption from S 1811 as against having an adequate staffing that would be able to carry out the needs for your own particular Department, would you support this bill?

MR. WOODSON: I would support the bill. As I indicated to you before, there are members of my staff who take an opposite view to that, they feel that we ought to be totally exempted. I do not happen to feel that that is an absolute necessity. My one concern is that we have an adequate

number of persons who would be hearing the cases. I think it ought to be pointed out, of course, again that in the instance of Civil Service, the hearing officers whom we appoint are not a part of Civil Service per se, they are totally independent of Civil Service and their decisions are reviewed by us after the cases have been heard. Unlike any other department, we would not have our own hearing officer representing our in-house interests.

SENATOR McGAHN: I think that, with one proviso of course, realizing should an emergent situation arise that there would be the provision that you could appoint ad hoc part-time examiners I think to handle that particular situation.

I have no further questions. Thank you very much. And any information that you could supply this Committee concerning what you think would be the adequacy of full-time hearing officers, we would certainly appreciate. And thank you very much.

MR. WOODSON: Thank you for your consideration.

SENATOR McGAHN: Mr. Stewart Pollock representing the SCI.

S T E W A R T P O L L O C K: Thank you, Senator. Actually, although I am a Member of the SCI, the views I am about to state are not those of the Commission. I was invited here in another capacity and indeed I am honored to accept the invitation to address you this morning.

Since accepting that invitation, I would like to inform the Committee that the New Jersey State Bar Association, of which I am a Trustee, has authorized me and Mr. Kirby, from the Public Utilities Section, and Mr. Aronsohn, and I believe perhaps Mr. Klinger from the Administrative Law Section, to speak in support of the concept of the administrative law judge or the independent hearing examiner.

In the past I have written some articles on this and if what I say this morning sounds familiar I trust you will not ascribe it to a lack of imagination but simply to the fact that I believe now, as I have in the past, that the concept of an administrative law judge or independent corps of hearing examiners is a good one.

I was privileged for two years to serve as a Commissioner of the Department of Public Utilities, and in the course of that time worked with the very skilled group of hearing examiners that we have at the PUC and had the opportunity to observe firsthand how a properly functioning system of hearing officers can indeed work.

The enactment of either of the bills before the Committee, either S 1550 or S 1811, is in my judgment in the public interest. Underlying that conclusion is the recognition that the scope of administrative law has expanded to the point where state administrative agencies are as significant to the public as the courts and, indeed, the Legislature, and the initial recommendation on many major societal issues of statewide significance is determined by hearing officers in administrative agencies - whose supply of natural gas should be curtailed and in what order of priority does the construction of a nuclear generating station violate state environmental laws? is an automobile insurance company or a utility entitled to a rate increase? has an employer violated civil rights of an employee? has a school teacher been improperly deprived of his job? should a doctor's

license to practice medicine be revoked? The initial answers to those questions and to many others are provided in the context of contested cases heard by hearing officers. The time is right to improve administrative procedures by establishing a corps of full-time hearing officers or examiners. Senate Bills S-1550 and S-1811 authorize the creation of such a corps of hearing officers in an office of administrative law assigned to the Department of State.

Full-time hearing officers should expedite the disposition of contested cases before state administrative agencies and imbue the administrative process with increased impartiality. At present, many state administrative agencies employ part-time hearing officers, and indeed you've heard testimony to this effect this morning. This practice has in the past, on occasion, resulted in delay in the disposition of contested cases. Some part-time hearing officers are attorneys who may represent clients in other matters before the State. Even if those attorneys conduct themselves in accordance with the highest standards of the legal profession, there are lingering questions of conflicts of interest that should be removed. Some part-time hearing officers may not have sufficient expertise to determine a particular matter, and others, desirous of obtaining another appointment in the future, may be unduly susceptible to rendering decisions in accordance with the wishes of the agency which has appointed them. Perhaps because some agencies are inadequately staffed there occasionally is an improper confusion of the investigative, prosecutorial and judicial functions in the conduct of administrative proceedings. And indeed there are reported cases in New Jersey to that effect.

Some attorneys have complained that in certain administrative agencies the hearing examiners act like prosecutors bent on achieving a particular result. Nonetheless, on appeal an unsuccessful party is confronted with the presumption of regularity in the administrative proceedings. It is a fundamental principle of administrative law that an appellate court will not disturb factual findings of an administrative agency if the decision is supported by substantial evidence from the entire record. Frequently the head of an administrative agency, like an appellate court, does not have the opportunity to assess the credibility of witnesses. Consequently, the factual findings for some of the most important decisions confronting the people of this State are made on the basis of recommendations of hearing officers.

Section 5 (c) of S 1811 provides that the recommended report and decision of the hearing officer shall become effective unless notified or rejected by the head of the agency within 45 days. I question the wisdom of that provision. As previously indicated, the matters considered by administrative agencies are of such importance that final decision should be the result of positive action by the head of the agency and not merely the product of a recommendation from a hearing officer in the passage of a period of time, such as 45 days.

As you've heard already, S 1811 provides for a director who would be an attorney and would receive a salary set at range A 43, which begins at $36,658. The bill also establishes, as I recall, three levels

of hearing examiners. Perhaps there should be additional levels of hearing officers or perhaps the hearing officers, as Attorney General Hyland suggested, might be unclassified. But that is a matter that I leave to the discretion of the Legislature.

S 1550 contains a salutory provision changing the title of hearing officers to administrative law judges. That change, although not as tangible as increased compensation, should provide added prestige that would enhance the status of the office and I suggest make it more commensurate with the heavy responsibilities laid on the administrative law judges or hearing officers.

Consequently, I endorse the increased salaries and the added prestige for those who hear contested cases in administrative agencies. Those changes should encourage the hearing officers to regard service as an administrative law judge as a lifetime career. Unfortunately, that frequently is not the case at present.

The proposed legislation acknowledges that some administrative agencies have skilled full-time hearing officers which they should be permitted to retain in certain situations.

As you know, in rate cases, S 1811 provides that the PUC would be able to refer the matter to one of its skilled full-time hearing examiners. That exception for rate cases may not be necessary since the bill provides that hearing officers shall, as far as practicable, be assigned by the director from the office to an agency to preside over contested cases in accordance with the special expertise of the hearing officer. That provision acknowledges the expertise that is possessed by the present hearing examiners at the PUC.

In most instances the public interest, I believe, would be served by permitting the assignment of an administrative law judge from an independent corps in accordance with his or her special expertise. The bills acknowledge the need for recognizing the expertise but provides specific exemptions for certain instances.

Although it might be argued that the exceptions provided by S 1811 include some agencies that ought to be excluded and exclude some that ought to be included, the enactment of legislation even with those exceptions would be a significant step toward developing more adequate administrative procedures.

The implementation of the bill would probably involve some additional costs. S 1811 contemplates that 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. The only appropriation in the bill is $100,000 for administrative expenses. And, doubtless, the Legislature would want to get a closer focus on the costs of the bill. Nonetheless, I remain confident that any increased costs would be outweighed by the benefits to the public of improved administrative procedures.

In conclusion, I enthusiastically endorse the concept of the independent corps of hearing examiners or administrative law judges that is the common thread in the two bills. And I thank you for providing me with the opportunity to come before you to express these views.

SENATOR McGAHN: Mr. Pollock, thank you very much.

What was your recommendation concerning the 45 day filing requirement on the part of the hearing officer, then the additional 45 day waiting period for the head of the agency to make a determination? Did you say that you thought that was too long?

MR. POLLOCK: Senator, I think that is not a good provision. I think that more than the lapse of time ought to be required before the recommendation of an administrative law judge becomes the decision of a department. There should be a decision by the department head, I think. I know that, I think in the new Land Use Law, there's a provision that the decision of - or the request becomes a decision if it's not acted upon within a period of time. I think that concept emerged out of a different set of problems and I just think that these issues that the administrative agencies are making are so important that the department head should be required to decide them.

SENATOR McGAHN: Yes, I think that I would agree with you.

Now I have no further questions. Thank you very much for your testimony and certainly your recommendation will be given serious consideration.

MR. POLLOCK: Thank you, Senator.

SENATOR McGAHN: Mr. Herbert Gladstone. Assemblyman, welcome back.

H E R B E R T M. G L A D S T O N E: Thank you, Senator.

I am here on behalf of the Civil Rights Commission to register with your Committee a few small points that we would like to bring to your attention, and then for a more in-depth comment I will defer to Mr. Wildstein of the Division of Civil Rights.

The Civil Rights Commission has some misgivings about this bill as outlined very explicitly by Mr. Woodson. Mr. Wildstein will go into some depth on the points that we have some difficulty with.

To the best of my knowledge, any bottlenecks that we have had so far, as far as our hearings are concerned, have been caused at the top, from the Attorney General's Department, not from our hearing examiners. And these bottlenecks would continue in the same way. So there wouldn't be any correction there.

One final point, sir. Mr. Wildstein is from the Division of Civil Rights and he is here specifically at the request of the Commission on Civil Rights.

Just one small question. Mr. Pollock made the point that I was going to ask you before. Has there been any projection on the added costs for this? Has there been any economic impact sutdy?

SENATOR McGAHN: I've been informed that a fiscal note has been requested. We do not, at the moment, have it yet. I think that we do not have any firm impact as to the number of hearing officers that would be necessary or would be required, but hopefully this would be forthcoming.

MR. GLADSTONE: Thank you, sir. Mr. Wildstein will take it from here.

SENATOR McGAHN: All right.

Mr. Julius Wildstein, Civil Rights Commission.

J U L I U S W I L D S T E I N: At the outset I wish to make it clear that my appearance here is in an individual capacity, although I have been requested to appear by the Commission, to express my views.

My designation is Chief Hearing Officer in the Civil Rights Division by appointment of the Attorney General. In that capacity I have been functioning. I originally came to the Division as a Hearing Officer in 1963, believe it or not, when the Division was taken out of the Department of Education and put into the Attorney General's Office in order to obtain vigorous prosecution. In that capacity, under the law which governs the hearing officers within a Division, a hearing officer is appointed for one year. He must qualify for five years at the Bar. He is appointed by the Attorney General subject to the approval of the Commission. And I underscore "subject to the approval of the Commission."

Now, initially, a hearing officer appears in a case when he is designated a hearing by name. All he gets is the complaint and, if there's an answer, an answer. That's all he knows prior to the actual hearing. His contact then is at the hearing and he proceeds to hear the testimony and after the stenographic transcript is recorded - and under the contract case, 15 working days before you get a transcript of one day. That will be important when we come to the time within which to file a report. So underscore that.

Now the hearing is conducted very similar to a hearing in court. Justice Proctor, in David v. Vista, said, speaking for the Supreme Court, that the more formal the hearing the more apt to be due process resulting. And taking that cue - that observation was made by Justice Proctor in a case from the Division -- taking that cue, he examined the question of independence of the Division, its different functions, including the hearing officer which we so often hear is a combination of prosecution and attorney for the State and judge, and all that kind of stuff. It may be true in many cases but Justice Proctor said, after a thorough review of the law, that he had come to the conclusion that the setup that was made for the hearing officers was not a violation of independence, was in fact within due process, and that decision was joined in by Justice Jacobs who has been referred to as wanting to see administrative hearings conducted in a due process manner. So we have Justice Proctor making the observation.

Later on, in a case that went up to the Appellate Division, called Alston vs. Ivy Hill - which unfortunately I don't have with me because I didn't come from my office but I will be glad to supply the Committee with it -- in the Austin case there was an attack on the separation and manner of conducting a hearing and the Appellate Division - I don't remember the three Judges but the Appellate Division said, we've examined the record very carefully, we've read the testimony, and we have come to the conclusion that there is independency in the hearing officers, that they are above any possible pressure of any kind, and in fact they said, and this is very important, from a practical point of view the head of the Department knows nothing about the case until a report

has been submitted, and never interferes.

That case has been used and cited as recently as a few weeks ago in Chisolm vs. Riverside Estates by the Appellate Division.

Appellants contend that the merger of investigatory, prosecutory and judicial functions in the Division on Civil Rights violates the fundamental fairness right of procedural due process, the New Jersey Constitution and the 5th and 14th Amendments. These arguments attacking the constitutionality of the law against discrimination and the Division's procedures are without merit.

So whatever may be the conduct of a hearing outside the Division, of which I don't have too much knowledge other than Civil Rights - I know what's going on in the Division, I know that we've tried to be fair, I know we've succeeded. And let me say one more thing. Since 1963 the Divison has never been reversed on facts except on two minor occasions. They have been reversed on the extent of the relief which the Director gave but not on the hearing itself. And I don't want to question the people who have testified here but let me tell you, the Appellate Court - and this is based on over 30 years of experience -- the Appellate Court will review a record, review it carefully to be satisfied that it is fair and just. For example, the Court in one case said, we are satisfied that the hearing before the Division was conducted in a fair and proper manner and that the Hearing Examiner acted within proper bounds. They don't do that on a rule of evidence, they do it to satisfy their own conscience that a hearing has been held in a proper manner.

Now with Civil Rights becoming more and more sophisticated, and it is because it covers a great deal of sensitive areas - discrimination in housing is protected, discrimination in employment is protected, discrimination in public accommodations, discrimination in handicapped, and many others based upon race, color, creed and so forth.

I have, in a pamphlet which is put out by the Division, highlights of legislative history starting with 1945 and going through 1975, which I would like the Committee to have, just to give you a bird's-eye view of the nature of the legislation which has come step by step in our process.

Now one must remember that in the sensitive nature of discrimination we have a unique segment of legislation, very unique. In Jackson v. Concord Company, the Supreme Court of New Jersey said, we feel it desirable to add some further comments in view of the failure of respondents at this relatively late date in our history - this was 1969 - of legislation to appreciate the strength of the public policy implemented by this statute, the breadth and purpose of its provisions and the import of this Court's prior decisions.

I do call your attention to the fact that Civil Rights, the law against discrimination, that's what I'm talking about, is very unique in New Jersey legislation. It is the only one - and I know offhand - that says that the Legislature finds and declares that the practice of discrimination because of race, creed, color, and so forth, is a matter of concern to the government of the State and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State and menaces the institution and foundations of a free democratic state. That law is

in fulfillment of the Constitution.

SENATOR McGAHN: Mr. Wildstein, I don't mean to interrupt you. I concede the points that you have made. However, I think we're basically getting off the issue, we're not addressing ourselves to the provisions of the two bills.

MR. WILDSTEIN: I wanted merely to give background in order to understand our concern and my concern. My concern is that unless there is an exclusion in favor of the Division on Civil Rights - the concern is that they'll be watered-down situations with respect to the work that has been done by the Division so far. There never has been a case of reversal.

Now, every benefit that can be obtained by passage of this bill can be obtained under the present operation of the Division plus any rule-making that the Director wants in order to bring it up the same as the bill, if there are any such things. There are no benefits that I can see that will result from the bill because whatever the situation is in other aspects of it in other agencies, and I'm sure that there are, does not apply to this Division. And for that reason, the uniqueness, the sensitivity, the broad scope of the expertise is peculiarly affected.

SENATOR McGAHN: Mr. Wildstein, I think the same argument could be made by a number of other agencies. The same argument could be made by the Reverend Woodson, as far as PERC is concerned; the Division of Workmen's Compensation; Tax Appeals; all of these divisions could basically make that same argument.

In answer to that, I would ask you, could there not be specialists in this particular field that would be employed full-time? If so, how many would be necessary? They could be compensated on a per diem basis. These are the areas we would like you to address yourself to.

Now I am reasonably certain that you as a Hearing Officer have a tremendous amount of expertise in the years that you have been there but there comes a time when each and every one of us can no longer perform the functions that we are doing at the present time. What happens then? So really the basis of this bill is, rather than have part-time hearing examiners or judges at any particular level, it would provide for a full-time position. There is nothing that says that you cannot have specialists in Civil Rights appointed to the Division to hear cases, but this would be a full-time job. This is the issue that we are really addressing ourselves to. We're not addressing ourselves, at the moment, to the fact that you're having somebody that has never heard a Civil Rights case before sitting in an administrative hearing as far as Civil Rights are concerned.

MR. WILDSTEIN: Let me turn that around. What benefits does the Civil Rights Division receive as a result of this bill? Independency it has. Fairness it has. Courts have held this. We have a history of over 13 years where you only get paid for what you do. The money that's saved is a result. There can't be any more economical method of insuring those results that the bill attempts to do than being a part-time hearing examiner who doesn't get that 25% extra that you've added on, who works and gets paid only for the time he puts in, uses his own stamps, uses his own office, makes his own telephone calls, all for the State, because

a part-time hearing examiner conceives that in the area of civil rights he is serving the State as a citizen.

SENATOR McGAHN: What is the present total budget of the Civil Rights Division?

MR. WILDSTEIN: I wouldn't know that.

SENATOR McGAHN: Let me ask you this. What is your present caseload that has been unresolved and not heard? What is the usual time period for fully adjudicating a case in Civil Rights?

MR. WILDSTEIN: I cannot give you what happens before we get the case. I'm not prepared. That's not my function. My function is to hear the case.

SENATOR McGAHN: I realize that.

MR. WILDSTEIN: Now you must remember --

SENATOR McGAHN: Well who in your Division, then, could answer those questions? What are the total number of cases? How soon is it before they are heard? What is the time-frame from the time they are heard until they are finally resolved? How many cases are actually appealed to higher courts, regardless of what the decisions may mean?

When you ask what cost benefits are concerned, the only way that we can say this would be actually in hastier resolution of any particular cases that would have to be heard before your Division. And without those facts, I think that very frankly we cannot weigh cost benefit.

MR. WILDSTEIN: I can't give you that information because it's not my function. I have no access to it.

SENATOR McGAHN: My assumption then is that very, very honestly your chief criticism of this is that you want still part-time examiners in Civil Rights as against full-time men.

MR. WILDSTEIN: Because - this is why we want it -- because it has paid dividends at the lowest cost, in my opinion. And I think those are facts.

SENATOR McGAHN: Fine. I accept your assumption. However, we do not have the actual facts as far as total costs are concerned of maintaining this program. We don't have your budget figures.

Are the hearing examiners compensated on a per diem basis, a per hour basis?

MR. WILDSTEIN: $200 a day which is $25 an hour. I do want to emphasize that no hearing officer -- there are hearing officers available to hear the cases that are ready. The difficulty is that they are not ready. And they get to us through the Deputies. What they need is more Deputy Attorney Generals.

Now let me just say a few other things that are pertinent. As far as the bill is concerned, aside from the exceptions, I am not in opposition to it. I think it would be welcome and I think its overdue on that score. I am merely saying that we have a peculiar situation, independent, that's different from any other one here.

Second. I think that there should be a qualification of at least five years, because that's what we wrote into the bill in 1963. You had to be a member. To decide these cases where you're dealing with

thousands of dollars, where you're dealing with employers who have massive factories and problems, unless you have a man who has had, at least in my opinion, five years at the Bar, you're putting a person to work on a difficult problem where you wouldn't think of putting him to work in a judicial system. So I advise five years.

SENATOR McGAHN: Are all hearing examiners attorneys?

MR. WILDSTEIN: Yes, they must be.

SENATOR McGAHN: All right, fine.

MR. WILDSTEIN: Now, I do agree that the salary should be attractive. Unless you attract men of caliber, you will never succeed because a system is no better than the men who administer it. I have learned that. And, therefore, our hearing examiners are handpicked people who are dedicated to their work, who want to do it not for the money but for the sake of the fulfillment of their duty as a citizen. So you must have more money.

Secondly, tenure in office. This is a problem. We can see persons frozen into Civil Service who may lack competence. Under our present system, if he isn't capable, we have one year appointments, year to year, and, therefore, an incompetent person could be gotten rid of easily.

Third. I'm concerned with the method of appointment. With the sensitive nature of Civil Rights, it can very easily be subjected - and I pray to God it never will be - to political influences in this sensitive area.

SENATOR McGAHN: Well, what would you suggest?

MR. WILDSTEIN: I suggest some other method of approval than the one individual, such as a commission, such as a commission maybe of members of the Bar, members of the Attorney General's Office, or some other panel like that. Right now we have a Commission looking over the head of the Attorney General and so far it has worked out well. Who is going to look over the head of this sensitive area of Civil Rights?

Now as far as the 45 day rule, 45 days is unrealistic. I think it should be by a ruling of the Director how many days a hearing officer should get because I've had hearings lasting 13, 14, 15 days and I've had hearings 3 days, 4 days, and you've got to wait for that testimony 15 days after the last volume, and 45 days is not realistic. So I agree with Stewart Pollock on that point that you raised.

SENATOR McGAHN: I would like to acknowledge the presence of Senator Garramone, who just came in the Chamber, who is the Sponsor of these bills.

Mr. Wildstein, thank you very much. The Committee would appreciate hearing actually from the Civil Rights Division concerning, number 1, their total budget; number 2, the caseloads that they handle in a year's time; and, number 3, basically the resolution time of those cases.

Thank you very much.

MR. WILDSTEIN: May I leave this with the Committee, this exhibit?

SENATOR McGAHN: Fine.

SENATOR McGAHN: Is Mr. Humphreys here?

MR. HUMPHREYS: Yes.

SENATOR McGAHN: Fine. The Honorable Burrell Humphreys, Prosecutor of Passaic County.

B U R R E L L H U M P H R E Y S: Senators, let me emphasize at the outset that I'm speaking as a private citizen and not as a Prosecutor.

I support this Bill because I believe it will remedy a serious deficiency in the administration of justice. Now I use the phrase "administration of justice" advisedly because administrative agencies and hearing examiners do administer justice in the same manner and to the same extent as judges. The black robe does not make any difference. Any attorney who has lost a case before a hearing examiner, on a factual finding, realizes that he will have a very, very difficult job to reverse that finding in the courts.

I've observed administrative agencies for some years now, and I've had a number of vantage points to observe them. I've served in State Government positions in the last four administrations; I represented administrative agencies as a Deputy Attorney General; I, as a practicing lawyer for over 20 years, have represented a number of clients who have had matters before administrative agencies; and for 9 years I was a Hearing Examiner in the Division of Civil Rights.

I've reached two conclusions as a result of that observation. One, the quality of justice by administrative agencies is uneven. I picked up an opinion the other day from Mr. Lerner who has been a Hearing Examiner in the ABC for many years. It was masterful, absolutely masterful. It was the type of opinion that I think a judge would be proud to write. On the other hand, I've seen opinions and I've seen matters handled by administrative agencies in a fashion in which justice was not done.

The second conclusion I've reached is that I've been astonished at the phenominal growth of administrative agencies, and how today they touch almost every facet of our lives. I would like to see some figures on the growth of administrative agencies here in this State. I read an article the other day written by a gentleman of the American Bar Association which pointed out that President Truman signed the Administrative Procedure Act, federally, 30 years ago, and at that time there were 200 hearing officers in the federal government and now there are nearly 1,000, a fivefold increase.

I would suggest that we would find a similar increase here in this State. You can't escape administrative agencies no matter what you do. I came down here today, driving on the Turnpike regulated by an Authority which, in effect, is an administrative agency. I have a driver's license issued by the Division of Motor Vehicles. We're being heated courtesy of the Board of Public Utilities. My wife said, "Don't forget to get a haricut." and the barbers are regulated by a Board. I've got to deposit some money this afternoon - and so on and so on.

I think it's time that the public gets the quality of justice from administrative agencies which is equivalent to what they expect and to what they get from the courts. We're very proud of our court system here

in New Jersey, and I think justly so, but it's about time we get the same from our administrative agencies.

I've served as Prosecutor now for a year and a half and I have noticed that the people hunger for justice. They want a criminal justice system which is operated in a fair and just manner, in which outside influences and pressures are not brought to bear. And I know that they want an administrative agency system which operates in the same fashion.

We need better trained hearing officers. The Bill provides that. We need experienced hearing officers. The Bill provides that. And most of all we need independence. A man cannot serve two masters. It just doesn't work out to have a hearing officer with offices across the way from the agency. We know. We practicing lawyers know that in certain agencies we question whether we're going to get a fair shake representing a client when we're dealing with that particular agency, and I won't name names. I can't practice anymore, of course, but I knew as a practicing lawyer, the facts of life, that a client might go in with two strikes against him.

I won't deal with the specific aspects of the Bill. Others more competent and knowledgeable than I have done that. I would just like to say that I think it's time for the American people, for the citizens of this State, to get the same quality of justice in administrative agencies as they do from their courts. And I think this bill does that. I think you ought to be commended and the sponsors of this Bill ought to be commended for doing it.

Justice Jacobs pointed out in the Mazza Case, referred to by Attorney General Hyland, that he had a bill when he was in the Senate providing for a corps of independent examiners, and it was languishing there. I think it's time to stop languishing and do something about it.

I would just like to make one comment on Mr. Wildstein's statement with regard to the Division of Civil Rights. I join in his comments. It's quite true that the Division of Civil Rights is an independent agency. The hearing examiners have nothing whatsoever to do with the administrative operation of the Division. I was very proud of my service there as a Hearing Examiner. Mr. Wildstein is much too modest. The Division has been very fortunate over the years in recruiting - I'm excluding myself -- but in recruiting some very outstanding hearing examiners. For example, Sylvia Pressler, now a Judge of the Appellate Division, was a Hearing Examiner in the Division of Civil Rights. Mr. Wildstein has a nationwide reputation as an outstanding leader and figure and jurist in the whole field of Civil Rights. He has written opinions which have become really the standards for others to follow.

And when I first read the bill I came up with the idea, well maybe we ought to have an exception to the Division of Civil Rights. But the more I thought about it, the more I felt that if we have an exception for the Division, we're going to have to have an exception for somebody else and somebody else, and somebody else, and where do you draw the line. Civil Rights is still sensitive. It's still controversial. But perhaps

people have come of age more in the last few years. I've had a recent case in which two persons on a jury, I think, voted their conscience rather than their concern. I think that says a lot for where we've come in race relations here in this country.

I notice the bill does provide that the Director may appoint additional hearing officers on a temporary or case basis. I would have to respectfully disagree with my good friend Stanley VanNess when he says that ought to be tightened. I think perhaps that's a way to handle the Division of Civil Rights' problem. They have recruited outstanding people. If some of those outstanding people were willing to continue on a temporary or case basis, I think the Director would be very well advised to consider using that talent and not to just throw it out.

Thank you very much. I appreciate the opportunity you've given me to speak.

SENATOR McGAHN: Mr. Prosecutor, thank you very much. I appreciated your remarks and I think you've preempted the one question I was going to ask you in your final remarks.

MR. HUMPHREYS: Thank you, sir.

SENATOR GARRAMONE: I have one question for you. I understand Attorney General Hyland suggests a residence requirement. Do you concur with that?

MR. HUMPHREYS: Frankly, I haven't thought of it. A residency within the State, Senator, are you talking about?

SENATOR McGAHN: The time of practice.

MR. HUMPHREYS: Oh, time of practice. Yes, I would think that that would be advisable. As the Attorney General pointed out, we do have a residency requirement with respect to prosecutors and with respect to judges. If we intend to elevate administrative law judges to the same type of expertise and we expect respect and dignity to be accorded to them, I think it would be very helpful to have a residence requirement.

SENATOR GARRAMONE: Do you have any thoughts on what their compensation should be?

MR. HUMPHREYS: It has to be competitive. I know in the criminal law field when I first took office we had a great deal of difficulty with our own compensation scales. They were so much below the Public Defender's office. But, as I explained to the Freeholders, I don't think it's proper to have people defending defendants, representing crime, and then having their salaries at a much higher level than prosecutors. And the Freeholders decided to buy that competitive argument. I think the same type of argument should be used. It seems to me you've got to have a salary which will attract talented people who are in the same capacity as judges. Now what that would be, I don't know that from my vantage point now as Prosecutor I could make any decision. But I do know that our young Assistant Prosecutors - we're trying to make them career people - have a three year requirement and our salary ranges range from a starting salary of $15,000 up to approximately $28,000. So that you have to have a decent salary or you won't get good people.

SENATOR GARRAMONE: Thank you.

MR. HUMPHREYS: Thank you very much, Senators.

SENATOR McGAHN: Mr. Alan Klinger, Administrative Law Committee, New Jersey State Bar.

A L A N K L I N G E R: Good morning, gentlemen. I am Alan Klinger and I am Chairman of the Administrative Law Section of the New Jersey State Bar Association. I have come here this morning on behalf of the Committee, on behalf of the Section, and with the authorization of the Trustees, to advise your Committee that we are in favor of these bills, the principle of the bills. And Richard Aronsohn, the former Chairman of our Section, - and I would respectfully request that you hear from him after you hear from me - is one of the draftsmen, is the draftsman of earlier legislation on the subject.

Our Administrative Law Section and its predecessor, the Administrative Law Committee, has been patient in achieving some of the goals which are now coming to fruition. In 1962 Bill Cohen, then Chairman, and myself as Secretary went to then Governor Hughes to see if we could at least get all administrative rules published. We were told that budgetary requirements prohibited that. Well, of course, today we have an Administrative Code and we also have an Administrative Procedure Act. So the Committee, and the Section, has been laboring to achieve these reforms, and we've been patient and we continue to be patient.

In that regard, addressing myself to the particular Bill, we strongly urge its adoption and the creation of the corps of independent hearing officers or administrative law judges.

And addressing myself, very briefly, to some of the comments that were made today as they relate to some of the considerations of the Committee, I think when you consider the salary requirements and the stature to be attributed to hearing officers, the analogy to a county judge is not an accurate one. The decision of an administrative agency is the decision of the Director, or whatever his title may be, of the agency. A number of the agencies have internal administrative appeals. For example, in the Alcoholic Beverage Control Board a litigant may take exceptions to a hearing officer's report in writing, which are submitted to the Director and the Director ultimately decides. So the appeal to the Courts is from the Director's decision, not the hearing officer's decision. So though I think the hearing officer should have stature, respect, and develop a corps of professionalism, it is not, in my judgment, on the same level as a county court judge.

The Section's concern is directed primarily to the contested case and even more narrowly than the contested case to the quasi-judicial case. Therefore, the Section in the past has - and I would - respectfully disagreed with Attorney General Hyland and Mr. VanNess in regard to their concern about the exception in S 1811 regarding rule-making and regarding rate fixing, and the like. I'm not so concerned about that. I am concerned that we have administrative hearing officers or administrative law judges in the contested quasi-judicial proceeding, the one where it's one party fighting for its license, his or her license, or its very existence in an administrative agency.

Mr. Wildstein at some length talked about the expressions of the courts in this State about the satisfaction of constitutional guarantees of due process, though we and I make the objection as to the merger of prosecution, investigation, hearing and determination, which continues. We are a government of law and not men. And consequently we've come to you, the Legislature, and we'll continue to go to the courts too. But we do think that it is time for our Legislature to recognize that these functions should be separated.

Mr. VanNess made the comment, and I think a very appropriate one in these times, that our procedures, the procedures which administer justice, must not only be just but must appear to be just. And the concept of having a hearing officer separate and apart from the agency, who is your adversary, I think is essential and desirable at this time.

I think the Committee is aware - and I have brought examples with me of some of the evils that the Bill will cure. I don't think the Committee needs that kind of explanation, though I am happy to respond to specific instances in that regard.

Other than that, I would leave more specific comment to Richard Aronsohn who is the draftsman of earlier legislation and is prepared to comment more specifically on particular provisions of the Bill.

SENATOR GARRAMONE: Just one question. In the specific shortcomings, was there any group of administrative agencies that fell into this category moreso than others?

MR. KLINGER: Sure. Mr. Humphreys said it. We lawyers who go to some agencies - and I don't go to a great many but I go to a couple -- I have a feeling, a judgment, an opinion that I'm going to get a fairer shake in some agencies than in others. And sometimes it's only because of staffing. That is - and I'm going to be very specific - in earlier administrations there is some history so I won't hurt anybody's feelings of those present - there was a time when the Securities Bureau was created and it had a very meagre staff, they had one investigator, perhaps two, and a director and, consequently, in proceedings before that agency the complaint was signed by the Director, he investigated it and you had a hearing before him and he decided it. And with all his good intentions he got involved in the process as a human being. Consequently, it was a very difficult agency to work before. It was a very difficult agency to get a specific, clear hearing which would be subject to review in the Appellate Division.

Another area where I think this will help. For example, there is provision in the Alcoholic Beverage Control Law for local - I think they're called local licensing agencies, to hold certain proceedings, and those vary from municipality to municipality. But there is an administrative appeal with a new trial at the Alcoholic Beverage Control level which, with an independent hearing officer, cures those defects. This Bill would cure that problem, even though you may not be able to cure it at the local licensing level.

So we urge the adoption of a bill creating such a corps and I think Richard could go into more detail as to particular aspects.

Thank you, gentlemen.

SENATOR McGAHN: Thank you very much.

Richard Aronsohn, likewise New Jersey State Bar Association.

R I C H A R D A R O N S O H N: Thank you, Senator McGann and Senator Garramone. I appreciate the opportunity to be able to come down here. As a matter of fact, because of the utility crisis here in New Jersey, I went South, and it was a lot warmer.

What I want to indicate to you is, I was most pleased to receive from the Governor's Counsel's office and from the office of Senator Garramone the draft of Senate Bill 1811. I hope it doesn't get lost. This has become, you know, an annual rite. In other words, we come down and we talk to one another and it's always a pleasure to see you gentlemen, but I'm hoping that this gets reported out of Committee favorably and very quickly for the following reasons.

Everyone misses the point, without going into individual recitations that have been given this morning. If they're going to talk about the fact that past history does not show in empirical numbers cases in the Appellate Division resulting in reversals, abject reversals of administrative decisions, because of the functions of administrative proceedings being combined, quite obviously it doesn't happen for a very clear reason.

As an Attorney who spends a large portion of my time litigating before State administrative agencies, once the findings of fact are made, proposed findings of fact are made by the hearing examiner, I've only had one case since I left the Office of the Attorney General in 1966 where the agency head has rejected the recommendations - they are almost always accepted - and that was in the Division of Pensions, and it wasn't in my favor, and it was reversed on appeal.

The fact of the matter is that once the findings are made you can forget about getting any reversal on appeal because there is a presumption of regularity that immediately attaches to those findings. And unless there is something that's totally out of base with the evidence presented before the agency, you are basically through at that point.

Now it is not a question that is missed,it is not a question of whether in the past empirically facts and figures demonstrate this need; it's a question of whether there is an appearance of unfairness.

Now let me just indicate to you three instances. When I was a Deputy Attorney General, during the first six months of my term in office, we were distributed to various agencies. One of the agencies that we all went out to was the Division of Motor Vehicles. My first case, the first case I ever litigated in my life, was a case involving potential loss of licensure of a man who had a driver education school. I represent to you the following. I presented the State's case. There was no rule or regulation governing the activities of that individual. The facts just didn't come within the ambit of the asserted violations of certain other rules and regulations. There was no violation. I stood up on my feet and I said, "Mr. Hearing Examiner" who will remain nameless, he is still with the Agency, "I move --" and as soon as I said it he knew that I was going to move to dismiss that case because I was representing the public interest, I wasn't supposed to be an advocate there to that extent. He slammed his gavel and said, without hearing the respondent, "License suspended. I don't want to

hear anymore from you." And I had to backtrack. It took a half hour. I had to call the Superior back at the Attorney General's Office, I had to call the present Governor's Counsel, to get this man to back down from a young boy who was trying his first case. I wasn't going to sit there, I told Alan Handler, and listen to this type of proceeding. Eventually the Respondent put in his case and the matter was dismissed that day. That's one agency.

Let me tell you about another. Alan Klinger mentioned the Bureau of Securities. The Bureau of Securities by way of past history, until the Supreme Court got hold of a certain case - which I believe I have with me, but it really doesn't matter, - where the investigation of the matter, the decisionmaking process, the whole process was involved with the Director of the Bureau of Securities. Impossible to get a fair hearing. The Supreme Court reversed on other reasons. But I guarantte you what was uppermost in their mind was this combination of the three functions that we've been talking about.

Another agency, the Department of Civil Service because sometimes they are not as formalized as they ought to be because of lack of staffing and lack of money. I had one case where a man had an oral examination for the position of detective in a certain county here in the State. Would you just realize that there was no record kept of the oral examination? He was asked a series of questions and there was no record by way of transcript, certified shorthand reporter or, alternatively, even a voice recording of what that examination consisted of. He was rejected. We went to the Appellate Division and the Appellate Division said, "We have to reverse you. You have no record." How do you have a right of appeal without a record.

So there is a need, isn't there for a formalized proceeding. And really, I am going to talk in a few moments to Senate Bill No. 1811. There are some things I would suggest but basically it's a beautifully written bill. It really is. And I commend you. I don't know who drafted it, whether it was the Administration combined with this Committee or whatever, but it's a brilliantly written bill. And it's taken from many of the provisions of the existing California bill. And they've had an experience with it to date that, as far as I know, has been a good experience.

Now the Board of Trustees of the New Jersey State Bar Association has approved the concept of a hearing examiner, and did so as early as December 13, 1974, by a unanimous vote. That had to do with Assembly Bill 530 but really it's the same type of thing. And I want you to know that the New Jersey Law Journal, by way of a beautifully written editorial, also approves of the concept.

Now, if we're going to start talking about agencies and being advocates on behalf of agencies, I had the unfortunate experience of appearing before the Division on Civil Rights on several occasions. And so that you know my background, I supervised compliance of the law against discrimination. When it became operative in 1966 then Attorney General Sills sent me up to Newark to go all over the State getting restraining orders. And I was embarrassed at times when I didn't even have to try a case, administratively. People well-intentioned who were employed

by the Agency, not even intending, cannot be impartial. It's impossible - we're all human - if you sit within the Agency's doors, if you're on the budget of the Agency. For instance, let's look at - cutting across to the Division on Civil Rights very quickly.

The Director of the Division on Civil Rights is employed by the Attorney General at will, without tenure. There is no legislative appointment involved. It's administrated through the Attorney General of the State. He's advised on legal matters through the office of the Attorney General. He's directed in the execution of policy by the Office of the Attorney General. He's subject to the Attorney General's criticism as an administrator. The Attorney General appoints the hearing examiners. The hearing examiners make recommendations. The hearing examiners are paid by the Agency and the hearing examiner sits, although he's involved in private practice but when he's hearing a dispute he sits in the Agency's doors. It is not a question of whether there is actual bias, for there is, because I'm going to tell you about it. It is a question of whether there is an appearance of bias.

Gentlemen, we're involved now and will be for the rest of our lives, whether we like it or not, with administrative agencies, so aptly said by the Prosecutor of Passaic County. We're surrounded by them. And we had better be in a situation where a person, whether his activities have been good or have been bad, - and although we're all in favor of eradicating differential treatment in this State and all of the grounds which are listed in the law against discrimination, that's not the question. The question is when the bad guy is brought before the agency as well as when the good guy is brought before the agency whether there is an appearance of objectivity.

Let me tell you why there isn't - and I hate to have to use the Division on Civil Rights. I litigated a case before the Division on Civil Rights. I'm going to tell you the name of it. And I had my office - I was out of the country yesterday - request the transcripts of that proceeding so that they could be offered in evidence so that you gentlemen could review them. The name of the Case is Karanja Njiiri, who was the complaining witness, versus Apartments and Homes of New Jersey which - and I don't want to mention the individual respondents -- which resulted in a finding of not guilty of an act of discrimination or acts of discrimination, but that's not the point. The point is that that hearing went on for over a period of time, approximately three weeks. The point is that I want you gentlemen to know that I might look like a nice fellow but I can be kind of a tough advocate and I wasn't going to sit there and see this happen to a client whether he was right or wrong. Confined to my seat, at times, I could not approach the complaining witness - and I don't have to tell you gentlemen that the pace of a cross examination is a most important aspect. If you have a man who is not telling the truth and he's on the run, you're much better off near him with some papers in your hand than back at Counsel table. I want to represent further to you that I was at least five feet from him. I was confined to the Counsel table. I was told that I was going to be held in contempt. I said to the then Hearing Examiner "I welcome it. Please hold me in contempt. I want

the Superior Court to see this transcript." I never was. And I might indicate that although I think the client did not commit an act of discrimination, at least I felt in part that the best thing that Agency could do was keep that transcript within the confines of the Agency's doors because had it been seen by the Appellate Division I think it would have embarrassed all involved, including myself. I didn't enjoy the proceeding. It was a rough, tough proceeding. It was a much more difficult proceeding than I've ever had in a court of law of this State.

I offer, Senator McGahn and Senator Garramone, that transcript which I requested but could not receive yesterday. I am respectfully requesting that if there is subpoena power in this particular Committee that I be able to utilize it if necessary. I think if we're going to get down to annual rights every February, without meaning any criticism to you gentlemen because I know what public service involves, - I think that that transcript should be offered into evidence as an indication of the type of activity that can take place within an agency.

And I want to say very quickly that the problem of expertise within an agency is a bugaboo. There's nothing complicated about pensions that someone can't learn, other than certain words of art. There is nothing complicated about the substantive law of Civil Rights It's a question of whether or not differential treatment has taken place. There is nothing technically difficult about the Civil Service Laws, nor about laws in just about any other agency. And let me tell you, where a difficulty exists, you just take a person from the agency and if there's a word of art, such as longevity or whatever, you put him on the stand and he describes what longevity is. It's very easy. So there is no problem of expertise.

You know, we've had the introduction since 1948 in this State of 61 administrative procedure acts, most of which have had a provision for an independent corps of hearing examiners. California has it, the Federal system has it. Although it's adulterated within the Federal system, the examiners usually sit within the agency itself. There's a prejudice created by the following factors: Number 1, the informality of administrative proceedings; number 2, the broad discretion vested in the hearing examiner; number 3, as I mentioned, the presumption of irregularities.

I think these gentlemen should be called administrative law judges. I think that attendant expenses pale into insignificance when compared with the principles and necessities involved. And as one Supreme Court Justice said as early as 1955, "But our system of laws" and this is in the case of in re Murchison found in 345 U.S. 133, and more particularly at page 136 - "But our system of laws has always endeavored to prevent even the probability of unfairness." And I would add to that, even the appearance of unfairness. It is public appearance in the administration of justice which is so very important.

On the Bill itself, and with regard to those provisions in the bill itself, there certainly should be a provision regarding admission to the Bar of the State of New Jersey. As a criterion of it, I would respectfully suggest five years. I think after five years a man or woman

is experienced enough as an attorney to make findings of fact.

I think that the term "competent evidence" ought to be defined. It is not.

With regard to the agency being found within the Department of State, I have no problem with that for I don't know where else it could be better put or better placed.

I think that some comments in a letter to Howard Kestin, who I understand is next going to address you, as early as May 8, 1973 from the then Director of the Division of Administrative Procedure, Albert Bonacci, to Mr. Kestin are pertinent, in which he says, and he's referring to a then pending bill A 2367, "Since the Bill's introduction, I have met with several agency heads in order to determine some of the practical effects of A 2367. The reactions were generally the same. 1. Most agree with the objectives of insuring maximum due process and equitability. 2. Most contend that the unique nature of their agency requires expertise from hearing officers who should be trained in the specific work of their agency." And he then goes on: "I represent to you to say that that has merit in some agencies and doesn't have as much merit in others." 3. - and let's get to it because this is really what's going on -"Some fear that by losing control of scheduling hearings a backlog would result which would be harmful to their agency goals and the ultimate enforcement of their rules and regulations." Mr. Bonacci says, "We feel" - on behalf of that Division of Administrative Procedure - "that just the opposite is true and backlogs throughout the State would be reduced." One agency asked to cite specific instances where due process was being violated and to show specifically where the office of administrative proceedings would insure improvement.

I think that it's a problem of control. I think certain agencies are going to object every time this bill is brought into committee, and it's going to happen each and every time. It reminds me of Shakespeare because the agencies that object protest too loudly. I want to indicate that Mr. Bonacci says that he's grateful to all of us attempting to see this project through and that he basically is very much in favor of it. And I can offer this letter to you. I think that it indicates that he has done much work in the area of questioning the agencies.

And really, gentlemen, in closing I respectfully say that what has become - I don't mean to be cynical, I really don't -- but what has become an annual rite, really if it's going to become an annual rite let it happen on the floor of the New Jersey Senate.

I respectfully submit that this bill ought to immediately be brought out of Committee, and I hope unanimously, to the full Senate, and reviewed. If they're going to hold hearings on it again, fine. I think that this ought to be discussed at large and let each individual stand up against it, if he is.

Thank you very much.

SENATOR GARRAMONE: Do you feel hearing officers - you mentioned hearing officers - should be attorneys, which is what 1811 says? How about those who may have had particular expertise in an administrative role, do you think they should be given the opportunity to fall into this category?

MR. ARONSOHN: Yes. I think, Senator Garramone, that the rotation - if you have a competent Director of the Division of Administrative Procedure, whatever it's going to be called, he's going to be able to rotate them out to the agencies in such a way that - it's going to be a problem initially but eventually you're going to get people who really have a feel for Civil Rights matters, Civil Service matters, or whatever. As I said, if there is anything that is technically bothersome - I can remember our late Chief Justice saying when I was handling pensions down in Trenton, "Richard, we have these cases coming before us and we don't know what these words mean." Well the cure to that is that you bring someone in from the agency and put them on the stand, the hearing officer puts him on the stand and says what is meant by accrued leave. I only use that as an example. And he explains it. It's the words of art, the concepts that can prove troublesome to an attorney, but you pick that right up. Judges every day sit on all kinds of matters and there's nothing difficult about that.

I might say in closing that I would respectfully request that if I can secure that Division on Civil Rights file, the transcripts of it, it's 8 or 9 volumes, that they ought to be forwarded to the Committee and be part of this record. And I respectfully request to offer it.

SENATOR GARRAMONE: Just a moment. Was that case resolved?

MR. ARONSOHN: Yes, it's been resolved. It's a closed case.

MR. WILDSTEIN: In favor of whom?

MR. ARONSOHN: In favor of the respondent. I said that.

MR. WILDSTEIN: In favor of your client.

MR. ARONSOHN: That's right.

MR. WILDSTEIN: Mr. Chairman, I rise to a personal privilege.

SENATOR GARRAMONE: I think we've created an adversary situation. What we're looking for is information on the bill, not a proceeding in the court of law.

MR. WILDSTEIN: That doesn't belong here. If he's going to talk about particular cases, he ought to bring the report in.

MR. ARONSOHN: I have a report right here. The report is an excellent report and I have it right here.

SENATOR GARRAMONE: Just a moment. We're trying to get information on the viability of one or both of these measures and I really don't want to go astray on a personal involvement that occurred in the Commission unless it directly addresses itself to these two bills.

MR. WILDSTEIN: I don't think it has anything to do with this hearing. I think it's out of place.

SENATOR GARRAMONE: Let me make this suggestion, if I may. Mr. Wildstein, why don't you then, if you have a memo, give us the memo and we will put it in the record. I think that will at least acknowledge --

MR. WILDSTEIN: I have no memo to give. I say it's a matter of practice and decency in conducting a hearing. You don't go behind a case that's been tried in his favor and make comments at this time. What could that do to help us in this hearing.

SENATOR GARRAMONE: Well then, I think this is what we're extending to you, if you have a statement we'll put it in the record.

MR. WILDSTEIN: I will not put anything in the record because

it's improper.

SENATOR GARRAMONE: Well I think your statements are in the record, sir. I think you've made your point.

MR. ARONSOHN: But I would like the opportunity to offer that. I really think that you ought to have that, a transcript of an administrative proceeding where no malice was meant but as an indication of what type of problems can exist, and why the concept is so very necessary. I'm sure that I'm not going to have to subpoena it but, if I do, I would respectfully request the subpoena powers of this Committee.

MR. WILDSTEIN: Is this Committee here to hear a tryout of that case?

SENATOR McGAHN: I think the Committee could accept that for its own personal use but it would not be made a part of the public record because of the expense of printing its reproduction.

MR. ARONSOHN: Thank you, Senator. Thank you for permitting me to testify.

SENATOR McGAHN: Mary Lou Petitt, League of Women Voters.

I am sorry you're so late but we didn't want to be discriminatory so we figured we better at least get one woman in in the morning session.

M A R Y L O U P E T I T T: Well, I'm glad. We didn't expect to be heard until around 2 o'clock. I'm glad we were here when you did call out our name.

I am Mary Lou Petitt,Housing Chairperson, League of Women Voters of New Jersey. We appreciate this opportunity to comment on S 1550 and S 1811, which we will address only as they relate to the Division on Civil Rights.

Not only do you have a woman but you have someone following the past testimony whose testimony will be in opposition to what you've just heard. I won't be representing any particular legal point of view or someone who has been involved in directing hearings but as someone who perhaps can represent people who are affected by testimony at the Division on Civil Rights, more or less the consumer, the individual who has experienced discrimination.

The League is concerned about the potentially detrimental effects of these proposals on the Division. We believe an effective and expeditious administrative hearing process is necessary to the enforcement of laws prohibiting discrimination based on race, religion, sex, in housing, education and employment. The laws lose their meaning without a procedure to provide relief - a procedure that is realistically within the reach of the people that the law is designed to protect, a procedure that adjudicates disputes swiftly and conclusively.

The League feels that this type of hearing process is jeopardized by the provisions of S 1550 and S 1811, which create the possibility that cases brought before the Division on Civil Rights will not be heard by officers specifically trained in and sensitive to the work of the Division. Although we feel that our reasoning applies to all categories of cases under the jurisdiction of the Division, we will focus our remarks on the area of discrimination in housing - an area which has been a major concern of the League of Women Voters in New Jersey for several years. Recently, we have been involved in researching certain real estate

practices as they relate to racial steering and consequently we have learned more about the work of the Division in connection with housing discrimination. Our research has reinforced our concerns for the need for experienced and expert hearing examiners in this field. We do not feel that the issue of expertise is a bugaboo and we do not feel that we're protesting too loudly. We feel that perhaps those people for whom we're speaking today are people whose voices are heard seldom and too softly before hearings here in the Legislature.

The work of identifying and measuring discriminatory practices, which tend to limit housing options for minorities, calls for specialized knowledge based on careful study of a very complex field. Not only is a thorough knowledge of the complexities of the housing market required, but a complete understanding of discriminatory practices, which are often hidden and deceptive, is essential.

Recently, in our own personal experience as we have come in contact with individuals who have wished to present their complaints about discriminatory practices to someone who was willing to listen with concern and understanding, they are extremely reluctant, these individuals, because they lack perhaps the necessary resources or legal understanding to go before a court of law or to assume the burden as individuals, which they so often have to do. They have come with complaints that are now hidden as far as racial practices are concerned in discrimination in housing. And without assurance that someone will listen to them who understands what they are saying, even as an individual who has experienced something, in contrast to an agency or industry, such as the Real Estate Agency, they need someone who understands what they can't perhaps verbalize, who is sensitive to their needs. And this is not a bugaboo, this is a real concern. And in order to insure that they will get that kind of hearing, you have to be able to tell them that there are people who will listen to them or understand all of the ins and outs, the complexities with hidden meanings, of all the practices that we so often encounter in housing discrimination cases. And I think we have seen it in the past, and it is not a bias. Sensitivity and bias are sometimes confused. It's an understanding of the individual and his concerns that we think would be jeopardized by this provision.

The more blatant acts of discrimination have decreased since the passage of fair housing legislation. We don't see those practices as often anymore. Overt acts have been reduced because of the more sophisticated practices that are making use of delaying tactics and red tape. It is a highly complex field. And when you get into it, you can see that the new procedures that are being taken need someone who is aware of them, because they are no longer so easy to spot and people often are not even aware that they have been discriminated against. Since proof of housing discrimination, especially in tight housing markets which we are experiencing all over New Jersey, can be exceedingly difficult, knowledge of basic discriminatory ploys is crucial for a hearing examiner.

As a long time supporter of the purpose of the Division on Civil Rights and as an advocate for strengthening its operations, the League is concerned that removing the hearing examiners from the Division may diminish

its effectiveness. The Division has an established procedure for hearing cases which has been in effect since 1962. Since that time, almost all decisions which might have been appealed to the Appellate Division and the State Supreme Court have been upheld by these courts.

Therefore, based on its hearing record and the importance of assuring the availability of qualified hearing examiners, the League urges that the Division on Civil Rights be excluded from the provisions of the legislation under review.

Thank you.

SENATOR GARRAMONE: Would you happen to know how many cases have been appealed to a higher court from this Division?

MS. PETITT: I know there have been a number and I think all but perhaps only two have been rejected.

SENATOR McGAHN: We've asked for that information through Mr. Wildstein.

I would like to call your attention basically to both Section 4 and Section 5 of the Bill, 1811. One is a continuous training program as far as the hearing officer is concerned; and 5, which is a supplementary section that simply says that they shall be assigned in a particular field of expertise.

Now I was really impressed more by Mr. Humphrey's testimony, as a Hearing Officer in the Civil Rights Division for six years, when he concurred with the fact that he thought that they should not be excluded. I think he very specifically told you why.

Likewise, I think that the last gentleman who testified stated that basically the procedures and what is accomplished in Civil Rights should not be predicated upon the number of unsuccessful appeals to the Superior Court for the simple reason that once a determination of fact is made it is usually accepted by the Director and, of course, the appeal to the higher court is on the record, and unless there is something in law or in fact that is not right, this will not be overturned. I think basically what is attempting to be accomplished by this Act and what we're talking about is simply the bills, is the fact that you will have a fulltime staff of professionals that will be devoted simply to this. Now until such a time as we can find ourselves getting figures as far as caseloads, backlog of these caseloads, resolution of these cases, time involved, these will be the benefits to the consumer as against possibly the increased costs I think it's an assumption on your part to believe that you're going to have a rotating group of hearing officers. It's the intent and purpose of this bill to have professionals in a particular field. The same argument could be made as far as environmental law is concerned. And it could be made for each and practically every one of the other agencies. But I think this is not the intent of Senator Garramone's bill and certainly if the language can be more explicit it can be made so.

MS. PETITT: May I reply to that. The intent and purpose of legislation is often not what is accomplished when the legislation goes into effect. I think those of us who are basically concerned with the individual rights of people who may have felt the've been discriminated against, their experiences in the past have been that in the Division

and in the State we haveI think, oftentimes pullbacks on this commitment, but they have felt that in the Division and in the hearing process there are people there who have been sensitive, not biased but sensitive to their concern. Writing it in that this is the intent of the bill or saying that this is not going to happen because these will be experienced people, they will be assigned to insure that, is something else. And our concern is, and we hoped that that would be what your concern might also be, that the Division on Civil Rights in its concern and its sensitivity to individuals who have a difficult time coming and testifying themselves, that it's not an easy burden to assume. We have found that sometimes you really have to urge people to take on this burden. If they feel that there is not going to be that sensitivity to their complaints - and that's all we're expressing today. You might write it in and that might be the intent but as with so much legislation, not only at the State level but at the Federal level, writing it in does not insure it.

SENATOR GARRAMONE: I don't think we are after dissimilar goals. I don't know if what you're suggesting will happen completely because the hearing examiners who have this sensitivity in this area of Civil Rights certainly, I would think, would be employed initially to do the hearing work on these problems, and hopefully we would be expanding this expertise and this sensitivity to the other hearing officers.

I happen to agree with you that many times we write a law with a specific policy but the administration of that law develops an entirely new policy. And I think we recognize this is part of the shortcomings of the whole administrative procedure. But the point that was made, when you put a hearing officer within that administrative agency do you not normally lose that check and balance that we're looking for, this sense of independence and consequently why we think the need for this particular legislation.

I appreciate the point you're raising. I would hope that we would not be sensitized, that those groups of hearing officers, when they're faced with a Civil Rights act, I would think that this would not happen but we would have to see.

MS. PETITT: Well, it's just our concern that with the discriminatory practices that are still very, very prevalent, not only in this State but across the Nation, with the really small degree of progress we have made in integrated housing, that this issue is looked at very, very carefully by those of you involved in this legislation. It's extremely important that the Division on Civil Rights not be weakened, not have powers taken away. Whether you write it into the bill or not, I think you have to be very sure that that's not going to happen if this bill is adopted.

SENATOR McGAHN: There is nothing in this bill that would delete the powers, frankly. Of course, there are also provisions that the Director could hire part-time individuals. And I think really, as I understood the argument this morning, - I think Mr. Wildstein, as he was speaking here, was defending the part-time hearing examiners. And I think that by the same token, if we look prospectively and not retrospectfully, we must therefore develop a type of hearing examiner or administrative law

judge who has expertise in a particular field. And having that, then he can attain that degree of sensitivity. We also are providing, most likely, that there will be a particular time that an individual has been licensed before the Bar of New Jersey before he is eligible for this particular requirement. So you are not taking a young attorney fresh out of law school and placing him in an extremely sensitive position. I think these are other factors that must be considered. Also you must consider down the line. The hearing examiners that you have at the present time may or may not be with you for the next two, three or five years time and, therefore, you must continue to develop upward, ladder type, individuals who are extremely sensitive in these adversary areas that we find ourselves involved in now.

MS. PETITT: I think the past record of the hearing examiners in the Division has been one that is known to those of us involved in the field of Civil Rights and representing people who have had discriminatory practices put upon them as being a strong area, now not a biased area but an area that we feel that we can get response and at least understanding of the complexities of the whole issue. And if you feel that this is going to continue, I think you're going to have to be extremely careful that in guaranteeing this in the bill that is adopted, if it is adopted, that it really is carried through that way. That's going to be the problem that all of us will be concerned about.

SENATOR McGAHN: I think in evaluating also the benefits of this one must take into consideration - as I say this is information we do not have - what is the time frame? how long does it take? I mean actually for an individual that's been discriminated against to get satisfaction. I mean, is the present system uneconomical from the standpoint of time? I mean, what is the total amount of time elapsing? What is the backlog of cases? This is information we would also like to see and I think upon that we could make a much more rational decision.

MS. PETITT: That, of course, involves the investigatory practices of the Division.

SENATOR McGAHN: Right. Thank you.

We will recess for lunch until 2 o'clock.

(Recess)

(Afternoon session)

SENATOR RAYMOND GARRAMONE (Chairman): The public hearing on Bills S-1550 and S-1811 is presently being reconvened. I want to thank Senator McGahn for Chairing this meeting this morning in my absence and maybe I can match or attempt to achieve his performance this morning. In any event, we'll try.

I would like to conclude this hearing by four o'clock this afternoon, if at all possible, and yet I would like to hear from everyone who would like to be heard from. So at this time I wonder if we may hear from Mr. Michael Mehr.

M I C H A E L J. M E H R: Gentlemen, thank you for this opportunity to speak. I will say I am here not just as an individual but these remarks do represent the views of President Jacobson and Commissioners McGlynn and Barbour. And also, as Chief Hearing Examiner of a staff of 12 full-time Lawyer-Hearing Examiners at the PUC, which already exists, I also am here representing their views. And, believe it or not, with all those constituents I must say that we fully support the spirit, intent and language of this Bill.

The Board does not feel threatened by an independent corps of hearing examiners. They feel it is something that they have been fighting for, long and hard, which was really initiated in the days when Attorney General Hyland was President of the Board. So this is no shock to us, it's no surprise to us. The Board can live with an independent corps of hearing examiners.

And speaking as Chief Hearing Examiner of a corps of hearing examiners who are now working full-time and who are lawyers, we believe that this bill can only help in our efforts to upgrade the system. And we do not feel threatened by the language or the spirit of this Bill. It's a remarkable bill and we think it's a bill whose time has come.

With that, you have our written remarks, I would say we feel this bill is vital. I don't want you to think we're not interested by my not reading the remarks but I just feel that you will give it all appropriate attention if it is not read verbatim into the record.

I would just like then to briefly move to specific sections of the bill which I think are important enough for you to consider at this time. I would also like the opportunity, through the Chairman and through your staff, to submit fine tuning on some of the specifics of the bill as to language, which we have in the past and we would like to do now, to work with your staff.

There is an internal tension which is contained in Section 5(a).

SENATOR GARRAMONE: You are referring to 1811 now.

MR. MEHR: Yes, sir. By the way, we believe 1811 is, as the Attorney General said, a comprehensive bill and is really the one which we think does the job.

Section 5 (a) really tries to solve a tension between the agencies' requirements and their need for continuing expertise. Very frankly, our agency would like to retain and build our staff rather than lose it. And also the need of the new Director to have an independent office. And we

believe that that does the job as good as possibly, possibly with the exception that it could be strengthened somewhat. And our specific suggestion would be that the language in 5 (b), which requires the Director to certify the special reasons, also be in section 5 (a) to replace the language which talks in terms of examiners not being rotated where practicable. We believe the words "where practicable" are somewhat loose and that the Director should have the discretion to rotate but he should do so on some affirmative action showing that it is necessary and not merely be limited by the rather loose language "where practicable". And we think that the very words in section 5 (b) would do the trick. And we also think that that would be pretty good draftsmanship because section 5 (b) applies to special assignments and that sort of certification of the Director could also apply where he feels that examiners could be rotated.

We, of course, endorse what the Attorney General and Commissioner VanNess said in that we believe this is an administrative law judge bill and we don't believe that it serves any useful purpose to call it anything but that. This is the Federal practice, the better state practice, it's the position of the Bar in this State for a number of years.

Our third suggestion is with regard to Section 9 (d). The Board of Public Utility Commissioners has absolutely no objection to removing and deleting this exception of rate cases. We believe that rate cases, like any other cases, should be tried under the same rules of the game, and we heartily endorse the Attorney General's and Commissioner VanNess's remarks on this point, even though it would affect the vital interest of the Agency. We believe that rate cases should be handled like all other contested cases.

We don't see the problem in making a distinction between judicial contested cases and legislative rule-making cases. There is nothing in here that I see which requires the Director to appoint hearing examiners in a rule-making kind of proceeding. The language now talks in terms of - in Section 3 (o), I think on page 3 -- that if the agency requests then the hearing officer will be assigned to rule-making kind of proceedings. That's okay. But very frankly, what happens in practice is that the line between the quasi legislative and the quasi judicial hearing is somewhat blurred, and the contested case really goes to the legislative kind of hearing also. A rate case is quasi legislative but it has all the accouterments of a judicial hearing, hotly contested, the public advocate is in there, and I don't have a specific suggestion at this point except the feeling that the quasi legislative matter should somehow be included in the purview of the bill under the same terms and conditions as a contested case.

I only have two more specific remarks, gentlemen, which go to Section 4 (l) to start with. This is found on page 3.

We believe that it's essential - and this is speaking for President Jacobson as well as myself - that the ranges set forth in the legislation be retained and that the idea of ranges be retained. We will not feel constrained by being set in a legislative straitjacket by the setting

of ranges. We trust the Legislature, we trust their judgment, and we believe it's in their prerogative to set ranges. And we would rather have the Legislature set the kind of ranges which they believe are necessary to fulfil the purposes of this bill than let it be left in the air. I think the consensus among Commissioner VanNess and the Attorney General was the ranges pretty much are in line. There has been some talk that they could be raised or they could be lowered. We believe the ranges, as they are, will do the job.

SENATOR GARRAMONE: How do they compare with the present ranges within your Bureau?

MR. MEHR: I have a range sheet with me, if you would care to have it as your very own.

SENATOR GARRAMONE: We have a breakdown on what the ranges are A 41, 37 and 32.

MR. MEHR: Okay. Right now our lower range hearing examiners are in Range A 29.

SENATOR GARRAMONE: What is the dollar range on that?

MR. MEHR: That starts at $18,500.

SENATOR GARRAMONE: It starts at $18,500.

MR. MEHR: Right. Under the bill that would go up to $21,400.

SENATOR GARRAMONE: How many do you have in that category? You said you have 14 hearing examiners?

MR. MEHR: We have 6 in that category.

SENATOR GARRAMONE: So you have 6 at the lower range.

MR. MEHR: And about 7 in the higher category, plus myself. Now at the higher level in the bill, at A37, which starts at $27,000, presently our higher range is A32, which is $21,000.

SENATOR GARRAMONE: That's your upper limit?

MR. MEHR: Yes. Now I am Chief Hearing Examiner and I am presently at range A 35. And we've made various efforts to raise that through Civil Service and the Budget, and that's why we trust the Legislature to perhaps --

SENATOR GARRAMONE: We'll have to get a schedule of what the salary ranges are for hearing officers throughout the various departments.

MR. MEHR: Yes. Now I will say they're all over the map in State Government. So I think that this would be an opportunity to just not say they shall be paid according to law, it will be an opportunity to have some uniform system, because they really are all over the map.

SENATOR GARRAMONE: Okay. That's a good point.

MR. MEHR: And, again, all I say on the ranges is that we would like you to keep the ranges because frankly if the bill is to have a chance to work I think the kind of salary level should be set because that will key the kind of people that you are going to get, very frankly.

And in that respect I would say that Attorney General Hyland's concern that standards be set in the bill, for example a three-year member of the Bar, I think that is an appropriate concern but it might not apply, for example, to the lower range. Our experience has been that we shouldn't perhaps discriminate against the younger lawyer with one or two years out of law school, perhaps a law review student who has been a Law Clerk with us for perhaps four years and is doing an excellent job and who is now, by

the way, classified. We would hate to see him lose his job because of a three-year restriction. We think that perhaps on a lower range, either a lower standard should be set of one year or two years or that it be left to the discretion of Civil Service.

We also, very frankly, are concerned. Most of our full-time Attorney Hearing Examiners are now in the Classified Service and they have classified tenure. This bill specifically says, in line 46, that the Director shall appoint from the Unclassified Service, and then there is a three-year probation period. Now we do not see the concern of picking up dead wood by permitting people who have now already Classified Civil Service status in the comparable job of permitting that status to continue because we believe that, very frankly, the Director probably has a discretion in this bill to appoint who he wants, but if he appoints them I think they should have that Civil Service status which they have retained. You can argue that you should start fresh, but I think those competent attorneys who have achieved Civil Service status and have gone through a probationary period, it would be a fairly bitter pill to swallow to have to start all over, go through a probationary status and be unclassified.

I know that's an open question but we believe that if there has to be an additional probation period perhaps it should be shorter and then the bill should make clear that after a certain point in time the hearing officers ought to be classified and removed, because if they are not, gentlemen, the Director would have the power to remove or replace his staff at will. And it would all be in the hands of the reasonableness of the Director.

SENATOR GARRAMONE: Would you have any objection or any criticism to any hearing officers presently in the system who are not attorneys being carried over into this, even though the bill says you shall be an attorney.

MR. MEHR: Well, the bill provides now that the Director can pick other than attorneys as full-time hearing officers. We have a reservation about that, and I'll tell you why. The bill also provides on the bottom of page 2, section (j) that with the consent of the agency head the Director can utilize the staff of the affected agency. So this means, in effect, that the Director can reach into the staff, can use non-attorneys, with the consent of the agency. So we question, with that provision, whether it's also necessary for the Director to have the ability to hire non-lawyers since he can go into the staff to get non-lawyers in that transition period where, very frankly, there just won't be enough Attorney Hearing Examiners to go around. We think that the general intent of the bill ought to be that you have judges judge and you have staff on the record giving testimony, and that a judge ought to be a lawyer. But we recognize the practicalities. And we think (j) would probably do the job, on the bottom of page 2, without that further discretion in the Director to hire non-attorneys.

Those are my comments, gentlemen, and I appreciate your listening to a non-Cabinet Officer who really believes from the point of view of administrative procedure at the working level that this is a fine bill

and we just hope that it can be fine-tuned and that it can be passed and that it will work.

Thank you.

SENATOR GARRAMONE: Would you be able to carry out the functions of your office at the present time with the present cadre of hearing examiners that you have, or do you feel that you require additional hearing officers?

MR. MEHR: We're handling perhaps about 75% of the formal caseload now, and we've been attempting to pick it up as we add people. And this has been a slow process. Very frankly, to handle the entire caseload, which is running six or seven cases a day and, as you know, they're big cases, we would have to augment that staff or continue to utilize the staff during that transition period. We have to augment it.

SENATOR GARRAMONE: Would you need more hearing examiners or additional staff? or both?

MR. MEHR: Yes. The idea is, we have 12. To handle the whole formal caseload we would need at least another 6. If we couldn't get the other 6 right away, we would continue to utilize some staff members in selected cases, under the bill, but we would try to move toward the full-time hearing officer attorney in all cases. And to do that overnight it would take at least another 6.

SENATOR GARRAMONE: Is there any general rule of thumb concerning the number of hearing examiners in relationship to staff personnel under them. I mean, is the ratio one-to-three or is it simply one of these things that's a very difficult thing to predict?

MR. MEHR: No. We have 12 Attorneys and we have a staff of two to three hundred employees who are separate and apart from the lawyers but you're using them basically on a pool basis. I mean, you don't have certain staff personnel directly assigned to you as an examining officer. We've been moving toward the Attorney Hearing Examiner independent function slowly. As we add more attorneys, we've been able to relieve the staff of that responsibility. So as time goes by fewer and fewer people hear cases. For example, the head of the Division of Rates or a Rate Analyst may very well hear a rate case, or that has been the practice. We're getting away from it and we would hope, very frankly, with or without the bill, to be in a position in perhaps a year or two from now, if we could augment our staff, where only full-time Attorneys would be hearing all contested matters, and the staff would be relieved of that additional responsibility.

SENATOR GARRAMONE: Thank you.

MR. MEHR: One further point. Of course, we're funded by the utilities and we would hope that you would keep that in mind when the idea of augmenting our staff might come into play.

SENATOR GARRAMONE: Are you suggesting a further tax on the utilities?

MR. MEHR: Well --

SENATOR GARRAMONE: I kind of question agencies that depend on their funding from that area of industry that they're regulating. This seems to be an incongruity in my mind.

MR. MEHR: Yes, but we're not funded according to the kind of job we do. What the money does, it goes into the treasury and then it filters back to us. I really don't think that plays a concern. You have to understand that the Public Advocate is more directly funded. They get paid on the number of cases the utility files, and we just get it out of general revenues. But I just suggest that to you, the fact that the taxpayer would not have to pay an additional - or it wouldn't come out of the Treasury. With respect to the impact of the Public Utility Examiners on this whole bill, which would be a substantial portion of the bill, that portion of the bill could be funded according to the Assessment Act and could relieve the total package dollar of this bill.

SENATOR GARRAMONE: All right.

MR. MEHR: Thank you, gentlemen.

SENATOR GARRAMONE: Thank you.

Mr. Howard Kestin.

H O W A R D H. K E S T I N: Gentlemen, thank you for the privilege of appearing before you.

Like my former law partner, Mr. Humphreys, I come with a varied background as well in scope of interest in respect to this bill. I, too, am a former Deputy Attorney General and spent several years arguing cases before and otherwise representing the Division on Civil Rights as well as the Department of Education, the Motor Vehicle Division, and the Pension Boards.

I have some different expereinces and thoughts with respect to each of the administrative agencies I have represented but they all reduce to one bottom line and that is that a corps of independent hearing examiners is not only desirable but essential.

Also as a private practitioner I have had some significant experience before agencies such as the Motor Vehicle Division and Department of Education. And as a private practitioner, like Mr. Aronsohn, am a former Chairman of the Administrative Law Section of the New Jersey State Bar Association.

It's these experiences that color my judgment. It is my present position, however, as a Professor of Constitutional Law at Seton Hall Law School that really brings me here today.

I don't think it would be productive for me to repeat what others have said today concerning what is wrong with the present system. It appears to be unfair and it is unfair in many respects. Several of the speakers have made these points well but there is one very important point that I don't think has been made today in respect to how the present system works.

The capacity for the system to be unfair, the capacity for the system to leave the citizen who has been exposed to it with a question, if not a definite feeling, that he or she has not been freely dealt with, places an excessive burden on an already undermanned court system. The Appellate Division, the hardest working branch of our judicial system, is burdened with some substantial number of appeals from administrative agencies annually. The citizen who feels that he or she has not received

a fair shake from the system has no other recourse. The Appellate Division is the only place to go.

I feel that the concept of special expertise, as articulated today, has been overstated and I really think is misunderstood as it would exist under the provisions of this bill.

First of all, the concept of special expertise was developed in the early days of the administrative process as an articulation for the subject matter needs of agencies that functioned in highly technical areas. To the extent that many of the State agencies function in highly technical areas, then special expertise is something that a hearing examiner must have or have access to in order to render a workable decision. The hearing examiner, him- or herself, need not have the special expertise since the hearing examiner really does not make any decisions but does make recommendations of fact, findings of fact, and conclusions, which tend to be rubber-stamped by the individual to whom the hearing examiner reports but need not be.

The special expertise that the agency requires can exist on two levels. It can exist as part of the record before the hearing examiner on the basis of testimony or evidence submitted as part of the record, and it can also exist in the administrator who is passing on the hearing examiner's recommendations and either adopting them or modifying them or rejecting them. So agency expertise will continue to exist.

The concept of special expertise has come to mean a special position, a special feeling, a special orientation, a sensitivity - that term was used this morning - to issue. That means with respect to the person whose position is not shared by the hearing examiner that that person is receiving something less than a full understanding, something less than a fair hearing.

As one who has devoted all of his professional life - not nearly as long as my mentor, Mr. Wildstein, - to the area of civil rights and civil liberties, I feel that something has been lost sight of today. The question is not what the courts will sustain as meeting the minimal requirements of due process but rather what the citizens have a right to expect from government, and of government avoiding even the appearance of anything less than abundant fairness.

Civil rights are equal. Violations of equal protections, as they are legislated against by the law against discrimination, are no less invidious than denials of due process, and require no more the maintenance of procedures which give citizens a reason to once again trust the governmental process. The Legislature is a partner in the constitutional process. It has no secondary position to the courts. Even where the courts have sustained a process as meeting the minimal requirements of due process, as has occurred with respect to the existing system, the Legislature has a responsibility to furnish the citizens with something more when demands of fairness require.

What are the direct benefits of this bill? First, it will satisfy basic due process requirements. Secondly, it will professionalize State Government in a very significant way in respect to a very visible function. And, thirdly, it will take a substantial load off of the Appellate Division

as people come to trust the governmental process a little more.

The shortcomings of the bill are few and none of them terribly significant. They are significant, they are not irremediable. Commissioner Van Ness and Attorney General Hyland mentioned some with which I would agree. One that they didn't mention is one that I feel very strongly about. I think the tenure provision in the bill has a negative potential. It has the potential that all tenure provisions have, of causing people to be less than substantially productive. I understand the need to protect hearing examiners from the vagaries of politics, both party politics and personal politics, and I suggest that perhaps some creative talents could be applied to innovate a system which eliminates the dangers on both sides of this coin, something such as a suggestion Mr. Wildstein made should be given serious consideration, the creation of a merit appointment system in respect to which a panel representing appropriate interests, including the Legislature and the public, would have some input, some review, some capacity for making a judgment - a Missouri plan, if you will, on the administrative level.

Finally, the question occurs to me, can the system as proposed by these bills work? And I think quite obviously it can. The experience in other states and on the Federal level has demonstrated that it can. And certainly, I think, that the requirements of due process demand that we at least give it a try.

I was going to hesitate to read into the record a part, a very short part of an article that I wrote. I wasn't going to do it. But when somebody as substantial as my good friend Commissioner Pollock has read an excerpt from an article he has written, I feel a little less constrained, if I may.

SENATOR GARRAMONE: Public hearings do this to witnesses.

MR. KESTIN: Well, if you would rather I not --

SENATOR GARRAMONE: No. Go right ahead.

SENATOR GARRAMONE: "Anyone who has been exposed to a power exercise of the State administrative agencies knows the problem well. Entire procedures often lack any relationship to the requirements of due process and first level hearing officials, the primary adjudicators of the agencies' actions, being employees of the very bodies whose actions they are supposed to scrutinize are of no mind to require more. They are quasi judicial officers but they are neither disinterested nor impartial. In some cases they are not even able. They are agency employees whose primary function is to promote agency policies. When the internal party line of the agency conflicts with individual rights, procedural or substantive, it is the latter which normally yield. It is left to the overburdened Appellate Courts to achieve the proper balance between government and justice. This is not to ignore those agencies which are scrupulous in their regard for the requirements of due process, but even the best of them are too often put to the inexorable pressure of a conflict between established policy and significant individual rights. And though the compelling public interest standard must govern in such cases, even the best agencies yield too often to the pressure. Among those agencies which are the worst, in terms of their disregard for standards of due process, details of injustice and

inequity are legion. The bizarre occurs too often. Lawyers charged with the responsibility of representing such agencies are sometimes embarrassed by the record.

"One of the matters for consideration in respect to this proposal" meaning the present bills "is its cost. But can poor government ever be justified by cost considerations? No government is better than poor government. There is a need to pay enough to independent hearing officers so that especially competent people can be attracted to fill such positions. An improvement in the quality of justice rendered on the administrative level is sorely needed. Perhaps when clearly impartial quality adjudication becomes commonplace it may be possible to persuade many citizens that they have received justice on the administrative level. They might then be less inclined to burden the judicial system with this category of appeals."

Thank you, gentlemen.

SENATOR GARRAMONE: Thank you.

I just have one question in terms of the overburden on the Appellate Court. Would you have any idea what proportion of the cases before the Appellate Court come from --

MR. KESTIN: It occurred to me when you asked for figures earlier that that would be a question, and I will attempt to secure that from the Administrative Office. They have a very good data collection system and they ought to be able to supply us with that. I will secure that and send it to you, Senator.

SENATOR GARRAMONE: All right. I would be interested in knowing what the proportion is from the administrative level.

MR. KESTIN: Yes.

SENATOR GARRAMONE: Senator McGahn?

SENATOR McGAHN: I would assume it would be quite a few from the Board of Education and Higher Education. Well, my understanding is that you feel there should be no exemptions, none at all actually under this bill.

MR. KESTIN: None at all. I'm a little concerned by a line of inquiry that occurred with the last witness. I gather there has been some suggestion that present hearing examiners be absorbed into the system whether or not they are lawyers, and that present hearing examiners who have tenure be absorbed into the system with tenure. I can understand the latter suggestion a lot more than I can understand the former. People who have a tenure right now probably ought not lose it and probably have a due process right to retain it. Or one could make an argument. But certainly if these bills are necessary to improve the present system and if one of the evils of the present system, one of the shortcomings, is the fact that too many people who are not equipped by training or temperment to handle hearings are doing so, then to absorb these very same people into the new system would be postponing the beneficial effects.

SENATOR GARRAMONE: Yes, but that's to assume that the only people with the temperment and the experience and the capability are attorneys, and I would question that.

MR. KESTIN: That is not so, Senator, and I would not argue that it is. But I think if you were able to quantify the criticisms against hearing examiners, I think you would find that those lodged against people who are not law trained, whether they were admitted to practice or not, have their law degree or not but don't have some training in law and the requirements of due process and fairness, that the complaints against them far outnumber the complaints against lawyers.

SENATOR McGAHN: Apparently the Civil Rights Division, the ones that basically feel they should be excluded from this particular section, and we have attempted to elicit information from previous witnesses as to actually how the procedure and process is actually working in terms of caseload, in terms of backlog, in terms of promptness of resolution of the complaint.

MR. KESTIN: Well, Senator, my official connection with the Civil Rights Division terminated in 1965 so my information would at best be stale. So I cannot respond to that.

SENATOR McGAHN: Would you say, however, prompt resolution of a particular claim would be a beneficial effect even though the price may be higher?

MR. KESTIN: I think that price is a poor consideration if that would indeed be a result of such a provision. Yes.

SENATOR McGAHN: I think again the point has been made that probably the sensitivity of a hearing examiner or an administrative law judge, particularly in the Civil Rights field, may be an extremely important consideration as far as he is concerned. My feeling is that the term "sensitivity" is implying on the part of the judge or the hearing examiner that it's subjectivity on his part and he's not acting objectively. And I personally feel that any qualified individual, particularly an attorney, who would be acting as a judge would certainly be impartial. Unfortunately, impartiality under all circumstances is not to the benefit of the adversaries and sometimes the charge of being biased may actually rise.

MR. KESTIN: We are all the victims of our backgrounds and our exposures. There isn't a single one of us who is capable of being impartial unless we work very hard at it.

One of the things that we attempt to teach in law school anyway, and I think succeed fairly well in doing,is the importance of the need to strain to be impartial and the development of some judgmental senses which will help an individual to determine when he or she is in danger of losing that essential impartiality.

SENATOR McGAHN: Am I correct? The function, of course, of the hearing officer is simply to make determinations of fact, determination of law, and then to make a recommendation, that recommendation to be acted upon by the Director, so that the final decision to accept, reject or modify is actually the Director's.

MR. KESTIN: Correct.

SENATOR McGAHN: Thank you.

SENATOR GARRAMONE: But, in fact, generally the Director will honor the recommendation of the hearing officer.

MR. KESTIN: In a very, very high percentage of the cases, I am certain that occurs in all agencies. Yes.

SENATOR GARRAMONE: We thank you for your participation.

MR. KESTIN: Thank you very much.

SENATOR GARRAMONE: I would like to invite some members of the Teaneck Together Group - Ms. Lynda Gomberg -- is Ms. Lynda Gomberg here? - and Ms. Phoebe Slade? Would you both care to testify or speak before us?

P H O E B E S L A D E: Good afternoon, gentlemen. I am Dr. Phoebe Slade and I am speaking for Teaneck Together. That is a civic organization whose purpose is to combat any unethical real estate practices.

I am sorry that I was not here earlier to listen to the commentary by those who favor the exclusion of the Division of Civil Rights in Section 9. So I find myself at a disadvantage. Nevertheless, I will try to bring forth the views that I feel are necessary. I will be reiterating points made by others but I feel that the emphasis is necessary.

Teaneck Together strongly endorses Senate Bill 1811 which will provide professional hearing examiners for all State agencies, other than those agencies specified in Section 9.

The omission of the Division of Civil Rights from Section 9, I am sure, was not intended but due rather to the lack of familiarity with the nature of the rules of procedure observed by the Division in its handling of cases in order to insure due process of law.

Since the bill's stated purpose is to insure due process and to have competent and independent hearing officers sitting on state agency cases, the basic idea of the bill is not inconsistent with the Division as it presently exists.

In regard to the agencies covered by the bill, hearings are only an incidental part of other functions.

With respect to the Division on Civil Rights, however, hearings are an integral part of the nature of the agency. The Division is then more closely aligned in operation and subject areas to the agencies that are exempted from the bill than it is to the agencies included in the bill.

No rational reason appears, after listening to several gentlemen today, for treating the Division differently than the related agencies excluded by Section 9 of the bill.

It is an ambitious undertaking, notwithstanding the economics of it, to establish an independent office of administrative law. A centralized hearing office of this type may become a diluted and ineffective organ in administering and enforcing antidiscrimination law if there are not sufficient safeguards.

In your bill, 1811, Section 4, it states that "Hearing officers shall be attorneys-at-law of this State, or any persons who are not attorneys-at-law,but who, in the judgment of 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."

Now this Teaneck Together objects to, in terms of individuals who are not attorneys, and also we feel that, unlike other State agencies,

the Division of Civil Rights, enabling statutes N.J.S.A. 10:5-7 and 10:5-10 provide for the appointment of hearing examiners who must be attorneys for at least 5 years, and the Bar, and who are appointed by the Attorney General subject to the approval of the Commission on Civil Rights. These attorneys, over time, become proficient in antidiscrimination law and are attuned to the nuances and subtleties inherent therein.

We know that human and civil rights are being abridged. We also know, or should know, that there is a dire need for a hearing body who understands the sensitive and complex nature of appraising, correlating and evaluating acts of proscribed discrimination.

I would like, if I may, to read some remarks from Judge Pressler regarding Hinfey against Matawan Regional Board of Education. It was argued November 30, 1976 and decided January 21, 1977. "The law against discrimination is based upon the expressed legislative finding that discriminatory conduct prohibited by the Act threatens not only the right and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a free democratic society." N.J.S.A. 10:5-3. "The Act whose purpose is to eradicate such invidious discrimination is thus a cornerstone of our fundamental, social and political philosophy which demands assiduous and solicitous protection from casual or unintended erosion."

One more statement, and that is, "Indeed, the entire legislative history of this Act has been one of continual enlargement of the power and jurisdiction of the Division to enable it to more readily discharge its awesome responsibilities in the quest for a just society. The unique nature of the proofs in discrimination cases and the trial orientation and regular experiences of the hearing examiners require a special expertise."

Mr. Kestin, who just spoke, stated that there are many synonyms that may be used or perhaps that this term has been inaccurately used. But he did state that it is a special orientation, and I would subscribe to that. Special expertise is a very special orientation, one which would not be found in a generalized or non-specialized body of hearing examiners.

The hearing examiners in the Division of Civil Rights are involved in construing the law against discrimination. N.J.S.A. 10:5-1 suggests this, and this particular law was enacted to prohibit discrimination implicit as well as explicit.

The inclusion of the Division in the bill's coverage can in no way assure that discrimination law will be properly and effectively investigated, interpreted and enforced. It seems clear, therefore, that the Division on Civil Rights should be added to the list of agencies exempted from the Bill's provisions.

SENATOR GARRAMONE: Senator McGahn?

SENATOR McGAHN: Doctor, you were talking about a special degree of expertise. How is this special degree of expertise actually acquired by a hearing officer?

MS. SLADE: By the hearing officer? Well, I feel, although I do not have the legal background and so perhaps I may not even be the person for you to address this question to, but I would assume that working

in this particular area a person becomes - and I am going to use the word again which you seem to be dealing with - sensitive. I feel that a person becomes sensitive and they can therefore pick up more clearly or - well, I can't think of the word I would like to use - but I think they can probably pick it up far better or they develop a second sense, so to speak, in the kind of bias that is being perpetuated in real estate and the kinds of subtleties that are prevalent in other forms of discriminatory acts.

SENATOR McGAHN: I agree. Trial by fire permits them to realize what the problems are and to acquire expertise in that particular area.

MS. SLADE: Experience and also knowledge.

SENATOR McGAHN: Fine. Now, the primary intent of this - there's no great problem in seeing that you have your hearing examiners or administrative law judges mandated to a particular section, whether it be Civil Rights or not. My question, of course, is simply this. We're talking about full-time employees here, not part-time, and I get back again to the basic question which maybe you may or may not be able to answer, and that is the extent of the caseload, the resolution of cases, how much time it takes. My question then is, certainly given full-time administrative law judges sitting five days a week, working eight hours a day, as the case may be, could not more cases be resolved without the system of rotation? And this, I think, is a very pertinent question.

MS. SLADE: Yes, and I think it's quite logical. The only difficulty that I see with that is that according to the bill hearing examiners will, at the discretion of the Director, be assigned to various cases. And if that is so, I don't think that you can build up a corps of lawyers who are proficient in antidiscrimination law.

SENATOR McGAHN: Doctor, I would like you to address yourself to the question I asked. I am not addressing myself to this. The bill can be amended. I said, given that particular set of circumstances, what would your response be? The set of circumstances, okay. Law judges strictly in the Division of Civil Rights, working full-time, I believe this should meet your objection.

MS. SLADE: I know. But you see what you're trying to do to me.

SENATOR McGAHN: I'm not trying to do this. No, really.

MS. SLADE: There is no doubt that that is logically a very good solution to resolving caseloads, having full-time personnel who can spend a great deal of time with various cases. I am sure there would be less of a backlog in many areas. But again I think that was a loaded question and I feel, that being the circumstance, if there was a corps of lawyers, of hearing experts who were just assigned to the Division of Civil Rights, then I would certainly subscribe to what you're saying.

SENATOR McGAHN: Oh, that's the only question I asked.

Now, I think on the other side of the coin too. You've been talking about court decisions handed down on appeal. I think we have to look into the number of appeals from administrative decisions. And as the previous gentleman stated, one of the unstated problems that we find ourselves being involved in, if there are a sufficient number of appeals from administrative decisions then something is wrong at the administrative

level. We're overburdening an already overburdened court system.

MS. SLADE: Yes.

SENATOR McGAHN: And then, of course, if the number of appeals can be cut down because you find yourself getting a better quasi judicial decision on an administrative level, and there is no feeling on the part of either the adversaries that they have to appeal that decision, you are improving the system.

MS. SLADE: Yes, I would agree with you, but on the other hand I think too - and this, of course, is not the place, I have to go carry my banner somewhere else, but I do feel that there needs to be a restructuring and an overhauling of the judiciary system as well, so that there isn't that number of cases that are backlogged. But I do feel, though, that administratively there is a great deal of merit in this bill.

SENATOR McGAHN: Since you're talking to two non-attorneys, we agree with your comments concerning the judiciary.

SENATOR GARRAMONE: I have just one observation. I think the point was made very well by you that at least in this commission the investigatory function and the judgment function were very much inter-related, yet the thrust of this bill is to separate these functions. And there is a bit of dichotomy here.

MS. SLADE: Exactly. And I do not think that you can separate those two.

SENATOR GARRAMONE: Yet the criticism of most hearing officers is that they are wearing more than one hat.

MS. SLADE: Well, don't we all?

SENATOR GARRAMONE: Yes we do, but we try, in an imperfect manner, hopefully if you are going to sit in judgment should you also be the investigatory individual and the prosecuting individual, if you are? There is a little conflict, in my own mind, in assuming all those roles, though I can appreicate what you're saying in terms of the nature and complexity of this particular issue. I would hope that we could take the best of two worlds. Why can't you still have the staff that can do the things that you speak of and yet present this very forcibly before a hearing officer or an administrative judge to make that determination.

MS. SLADE: Certainly. I think hearing officers certainly should be selected with utmost care. And I think that their talent should certainly be in both areas.

SENATOR GARRAMONE: Fine. I thank you very much.

MS. SLADE: Thank you.

SENATOR GARRAMONE: Ms. Gomberg? Oh, you are deferring to Mr. Martin.

Arthur Martin.

A R T H U R M A R T I N: The one reason I asked the young lady to defer, unlike the lady before me, I am a former Deputy Attorney General with the Civil Rights Division, as recently as of a year ago, and I think I can answer some of the questions Senator McGahn thrust out, and I thought while the iron was hot you still may have them on your mind and I may be able to field them for you.

I am not going to the statement I just handed you. I think I am going to be very terse, very short, and to the point. I think it's obvious why I'm here. My background is, I was former Deputy Attorney General, Civil Rights Division. I was very unique in this regard. I was the first and only Black Deputy Attorney General to deal with the Civil Rights Division. I clerked for the Honorable John J. Gibbons, Third Circuit Court of Appeals, prior to that. And also I am the Secretary of the Garden State Bar Association, which has a membership of 200 to 300 Black Attorneys now in the State. It's obvious what our concern is. And we are speaking toward an exemption under 9 (a) for the Civil Rights Division.

I would like to say a few things and then field your questions, if I may.

One. Contrary to the testimony given this morning about specificity of the law, it is a peculiarity. I think we shouldn't equate sensitivity with a bias. I think what you're saying, Senator McGahn, is that maybe if a person becomes sensitive they may become a little biased to the law.

Presently, I have ten cases in Federal Court. Being you are not a lawyer, that wouldn't impress you, but you may have heard of Herbert Stern. Five of the cases before the Honorable Judge Stern. Judge Stern is a very fair Judge. Judge Stern is a very hard Judge but he knows the law in Title 7. I would rather have ten cases before Judge Stern than ten cases before someone else who may be a little sensitive because I don't want a sensitive judge, I want a judge who says, yes, I know the law, Mr. Martin, and the relief you seek or the action you want I can grant to you.

There are some cases - and I'm sorry that some of my brothers of the Bar aren't here, but if you were to say to me Defunis, MacDonald Douglas V. Green, Franks v. Bowman, Albermarl Paper Company, Griggs v. Duke Power Company, they would automatically trigger something in my mind because I am a Title 7 Attorney. Title 7 is the equivalent to the New Jersey Law Against Discrimination. That is my expertise. Unlike a lot of attorneys in the State, I do know this area of the law.

Senator McGahn, you were speaking earlier - and, again, I am a proponent of this bill. I am definitely a proponent of the bill for all the reasons given before. That is not my concern. My concern is exemption.

I can count - and this is legitimate and I challenge anyone to tell me differently - on both hands, and maybe on one, the attorneys in the State that really know this area of the law. There are very few. The reason I happen to have an expertise is, one, I did Clerk in the Federal and Judiciary for a year, I did work with the State of New Jersey as a Civil Rights Attorney, Deputy Attorney General. But for that reason, I would not have that expertise. I could almost name for you the Defense Attorneys, as well as the Prosecuting Attorneys in this State who are expert in this area. I would suggest it would be very hard for you, one, to entice these types of individuals, and these are the types of individuals you want,to serve as hearing examiners. When you are a defense attorney and you're representing someone like ATT or Prudential and you receive a retainer of $50,000, or whatever, a year to represent them, it is going to be very hard - and this is just one client -- it's going to be very hard

for you to entice them to come into private practice of law.

The reason I have ten cases in Federal Court now is because there are not that many attorneys that really know that area of the law. So what I am suggesting is, by the real nature of manpower you are going to have a very hard time finding someone who is going to become an expert in this field.

Now, I read the bill and I understand and I appreciate your comments that a person will have that opportunity to learn the law. The problem I see, and this is a sincere problem, is do we have the time? can we afford a lapse of a year or two for someone to become educated in this area of the law?

I have been out of law school approximately three and one-half or four years in June. I have been a member of the Bar for three years. Now I honestly admit I do not know this area of the law as well as I should. I'm going to have to learn it. It's going to take me another two to three years before I really will be an expert. We're talking about a six year period of time. I am quite sure if you were to indicate certain things to me about PUC or Workmen Comp, what is a finger worth or a toe, I couldn't tell you. I wouldn't know how to go about it. For the same reason I suggest that I think very few attorneys would know how to go about dealing with a Title 7 matter.

Discrimination in this State, and I will say throughout the country, hasn't changed. It's more subtle. People do not refer to other people in derogatory names anymore. That's not done. When it does happen, you're shocked, you're amazed, you don't believe it. Things are very subtle. Things are done with nuances you wouldn't even believe. I could present, and again not that you are lawyers, fact patterns to you that would just be dictated by plain common sense and you would not be able to distinguish whether in fact it was a discrimination case or it wasn't a discrimination case. I think it's very important for the community at large to see that this State is still concerned about the nature of Civil Rights. I kid people often. I say, I'm always going to have business because until the modes and minds of people change I am going to be employed as a Title 7 discrimination lawyer because discrimination is present and it is still going on.

I think there are certain things that the Civil Rights Division does have and does bring that I can probably answer your questions. I was a recent Deputy Attorney General. I will put forth this suggestion. The backlog wasn't because of the hearing examiners. That was not the reason for the backlog. I would suggest now that the backlog isn't because of the hearing examiners. You have a situation where people will come in and maybe not have a good case, not a valid case, but in an effort to overkill or to impress people that yes we are fair and that we will look at your complaint, complaints are taken that should never have been taken because people didn't want to make that hard decision to tell someone, no you do not have a racial or sexual discrimination case. For that reason you have a backlog of

cases. I believe the Civil Rights Division is now in the process of trying to wean those cases out.

As a Deputy Attorney General, in the course of one month in 1975, February, there are say 22 days in the month, excluding weekends, and I had hearings on 18 of those days on four different matters. The cases can be pushed. The cases can be moved along. I repeat it is not the fault of the hearing examiners.

Because of my unique position, I think I can field some of the questions that you may have and,with the Committee's permission, I would like to do that at this point.

SENATOR GARRAMONE: What was your role? Was it as a hearing examiner?

MR. MARTIN: I was a Deputy Attorney General, a litigator-prosecutor for the State, as Civil Rights Attorney.

SENATOR GARRAMONE: So that you would be presenting a case before a hearing examiner, would you not?

MR. MARTIN: Exactly. And I have appeared before Mr. Ben-Asher; Miss Dougherty, who is no longer a hearing examiner; Miss Dugan; Mr. Dugan, who is no longer a hearing examiner.

SENATOR GARRAMONE: Although your experience with these hearing examiners, the point that was made - the reason you want to keep them in the Civil Rights Division is that they do more than just being hearing examiners, they're involved in the investigatory processs.

MR. MARTIN: They're not.

SENATOR GARRAMONE: They're not. Then what is the justification for keeping them there because what you're taking is the same body of knowledge, these same people, and they are going to do the same function but only within the envelope of a group of administrative judges. What do you lose in the transferral if you're not doing what Dr. Slade suggested, an investigatory function.

MR. MARTIN: Okay. What you're saying, we have two hearing examiners at present, I believe a Mr. Wildstein and Mr. Ben-Asher. I don't know what numbers you would move to. I don't know whether you would move to five or six. But my suggestion was earlier in what I stated, I don't know where you're going to find three or four additional attorneys who know this area of law. You have two that do. You have two Hearing Examiners now who are fairly well versed in this area of law. I'm not saying sensitivity. I repeat, I am not saying Judge Stern is not a sensitive man. I understand he is a knowledgeable man. I would rather have a knowledgeable and bright judge as opposed to a sensitive judge.

SENATOR GARRAMONE: But the way I would foresee this, you have this heavy expertise within each of these groupings, certainly we're not going to dismiss that, that has to be the nucleus of what this administrative judge role is about.

MR. MARTIN: So what you're suggesting - and again, if I'm wrong, correct me, but you do have a nucleus and you would build around this nucleus. I guess they would kind of guide the novel ones in the field

field until they become expert. Is that your position?

SENATOR GARRAMONE: I suspect if it's going to grow, like most things, you're going to have a good lawyer all around your foundation.

MR. MARTIN: Like a good lawyer, I would answer your question with a question. How would you --

SENATOR GARRAMONE: That's not only a good lawyer. I've seen that in business too.

MR. MARTIN: How would go about getting the people? Because, you see, the problem is what kind of mechanism would you set up? How would you say who is interested in becoming a --

SENATOR GARRAMONE: I'll play the same game. I'll ask you the same question. How would you get them in the Civil Rights Division?

MR. MARTIN: You would almost have to go to the Bar. Not that I'm anti non-lawyer by any stretch of the imagination but you would almost have to go through the Bar and have someone from the New Jersey Bar or the County Bar Association or local bar associations almost proffer a name. These are the people that we know that have expertise in the area. And the problem I have, I know, I could name to you, attorneys in the State, both defense attorneys and litigating attorneys and prosecuting attorneys, who know and have a fair knowledge of Title 7. The problem I have is, I don't know whether we can afford to risk a training period, if you can appreciate what I'm saying.

SENATOR GARRAMONE: But in my own mind, you would have to train, even to expand within the envelope of the Civil Service Commission. If you need more attorneys, let's face it, and they're not available, you have to train someone. Whether you do it there or you do it within a very detailed title group, is there a difference in your mind, do you feel?

MR. MARTIN: Let me give you an example of what happens. When I started with the Division, I had just clerked for a judge, the federal system which is different from the State, I had no litigating experience. My experience was with my client. I didn't know how to proffer evidence, I didn't know how to do direct testimony, cross examine, and I learned, in the first few months I was a Deputy, on my clients, and my fumbles, my errors possibly could have hurt them. And for what it was worth, the few cases I had, were clear-cut enough that I won and also some were settled. Now, to me, that never should have happened. That was a serious problem. I should have been taken aside for two to three months and trained properly. I am not saying that the State was at fault but I should have been trained to properly litigate these cases. The same rationale with hearing examiners. Can we afford to have a hearing examiner three or four or five or six months out of his hearing examiner capacity to learn this area of the law. That's a concern. Again, I appreciate what you're saying and I agree with what you're saying. My concern is, can we afford six months to a year to elapse. If there is some way to eradicate that then maybe we can solve this problem.

SENATOR GARRAMONE: That's a valid point. I'm not completely

convinced that there should be a lapse. If you're dealing with X number of hearing officers within the Civil Rights Division and it is just a transferral, assuming they're all very capable, and I would suspect that at the initial stage they will be performing the same role, but you still have a problem. If We have to expand this base and we have to go somewhere to get these people and you are going to train them, you know, whether it's under Civil Rights or it's under the boundary of this bill. Thank you.

SENATOR McGAHN: How many hearing examiners are there in the Division of Civil Rights? You mentioned two?

MR. MARTIN: Presently there are two, I believe. No, there are three presently. One was recently added. I am not sure of the date. When I was there there were five.

SENATOR McGAHN: Would you have any idea of their ages?

MR. MARTIN: I would suspect Mr. Ben-Asher is between 32 and 35, no older. Mr. Wildstein, I will say approximately 65, maybe older.

SENATOR McGAHN: I wonder how those two gentlemen got their training. I ask you this because I think that in any institution, any system, there has to be a training program, there has to be a farm system, whether it's hockey, baseball or otherwise.

MR. MARTIN: There's no question about that.

SENATOR McGAHN: And certainly, as a matter of fact, even the gentlemen that are appointed to the bench go out to Nevada, at the present time, to take a judicial course. Basically my question here, we have mentioned this before, do you object to full-time administrative judges in the Civil Rights Division?

MR. MARTIN: No, with a caveat. If you tell me that these full-time judges will be trained - and I'm not speaking about the present judges. What happens for whatever reason if the two gentlemen or three gentlemen now serving as hearing examiners can't serve, what happens to that lapse? Where will you get your replacement, your pinch-hitter, for lack of a better word? Now, getting back to your original statement, I as a Deputy Attorney General did learn the area; David Ben-Asher who is a Hearing Examiner was a former Deputy Attorney General, Civil Rights Division, i.e. his expertise. If you look at a large law firm, your prosecuting attorney, your criminal attorneys, where do they come from? They come from the U. S. Attorney, they come from Essex County Prosecutor, your Middlesex County Prosecutor, whatever the local prosecutor is. You get your background prosecuting and then you become a defense attorney. Just like I am a prosecuting attorney or litigating attorney in the Civil Rights Division because I learned that expertise. And that's where that expertise comes from. And it's just a natural transfer. So you would almost have to go to that field. And I'm sure, upon trying to fill these jobs, you are going to look to a lot of your Deputy Attorney Generals who have dealt with Civil Service or State Board of Ed business, or whatever it is. Just like the gentleman from the PUC stated, they have a student program and after a few years some of these students do become hearing examiners

because they have that expertise, they have their training. And I suggest that something like that would also have to be done with Civil Rights. But until that can be accomplished, if nothing else but on a temporary basis, they should be excluded until some mechanism can be established whereby we can have a school transfer because I feel any hiatus would be too much, and any hiatus would really hurt in terms of the situation. And the law is changing, the law is growing. And again I can't overemphasize the specificity of it, regardless of what people have said, because I'm doing that, I'm doing it now.

SENATOR McGAHN: Well, Section 4 of the law provides for developing and maintaining a training program. And certainly I think today you have graduating from law school or from medical school, for that matter, individuals who are actually advocates of civil rights and various other areas, and I think a lot of times one chooses their particular goal in life because of the opportunities that are offered to them at that particular time. Two gentlemen who spoke today, the Prosecutor from Passaic, Mr. Humphreys, and the other gentleman, apparently also, at some time in the past, sat as hearing officers on the Civil Rights Division. This was simply an hiatus to where they are at the present time. And I'm just wondering how many, like those two, have done the same thing in the Civil Rights Division. So that, therefore, when they do acquire a certain degree of expertise, that expertise then is lost to some other field of law and their replacement has to be brought in. So that really, in order to continue this, because, God forbid, if there should be an accident, no matter what the situation may be, a catastrophe wiping out all your hearing examiners at one time, - it's a hell of a possibility but it's still a theoretical consideration - what then do you do?

MR. MARTIN: They would have to be replaced. But, short of that phenomenon, we do have them now, and I think unless some mechanism can be - maybe this would be an amendment -- can be developed whereby the pinch-hitters could be developed to take their place, I think at this point they should be exempt. I am indicating an example. I'm a young attorney, my practice is a year and a little old. Right now we're doing a fairly good job, I'm very busy, extremely busy. If I were to be approached about becoming a hearing examiner in the Civil Rights Division, I would have to turn it down. I can't afford it. I can't afford to do it. Maybe five years from now I could. So I am saying to you, the pool that you would go to, if you accept my statement that this is an expertise, -- the pool that you would go to to draw out these hearing examiners necessarily wouldn't want the job because - maybe I'm flattering myself that I would even be approached, but they wouldn't want the job for the sole reason that they couldn't afford to do it. So for that reason you would almost have to train and develop. And it is a big field. And you would almost have to try to establish those who would want the job. But what I suggest, until a mechanism could be developed where this transition could be brought about smoothly, I would say let the Civil Rights Division be exempt. And the reason for that

is because it is an important area, a very sensitive area of the law, things have been changed, and the people are looking to the Civil Rights Division now to see what can be done because in many cases it's frustrating. I assure you, I have had many dealings with clients and I have won cases and I've lost cases, and it can be very frustrating and it can be a very emotional thing. And for some people the Civil Rights Division is the last hope because you are provided a free Deputy Attorney General and free investigatory procedures because people can't afford to go to court. I couldn't afford to go to court if I had to get a lawyer. And Civil Rights does provide that type of service to the people.

SENATOR GARRAMONE: That would not be denied an applicant just by the changing of where the hearing officers preside.

MR. MARTIN: No. I understand that. I'm just saying that right now I don't know whether a lost stride or skipped step would hurt at this point. I view this as a possibility.

SENATOR McGAHN: Mr. Kestin made the statement that the number of appeals from administrative decisions on civil rights to the Appellate Division overburdened an already overburdened court. Could you address yourself to that in terms of number of --

MR. MARTIN: I don't have the exact statistics but I am willing to bet you that 75% to 80% of those appeals are taken by the respondents or the defendants. When you have a case and a person feels - and what happens with civil rights, it becomes a credibility thing. No one wants to be tarred as a discriminator or a racist, for lack of a better word. So it is more an ego and face-saving thing that they attempt, because in many cases the cases are settled. I think that on very few occasions, when I was a Deputy, we would appeal it because we would very seldom appeal a case. But it would be on the other side that they would want to appeal a case and not because they necessarily thought they had a meritorious case but they didn't want that stigma, because you're talking about something now - and unlike a lot of your other administrative agencies, Civil Rights has very broad power and they use it and use it properly. When you talk about an ATT consent order and you talk about an affirmative action plan against a union, or Prudential, or New Jersey Bell, you're talking about a lot of money. And these differing respondents have no choice but to go on to court and fight it because they have to in order to save face. You find that when a person admits that they were wrong - and I'll give you one example of that. When I was a Deputy I settled a case for $50,000 and, I won't mention the respondent, the purpose was that they didn't want to re-employ the gentleman, they would rather give him $50,000. Now I'm not saying that's an inference of discrimination or anything else but if they had their druthers, they would have preferred to go with that case. They didn't appeal that. So what I am saying is, they acknowledged that, yes, maybe we made a mistake and we have to pay for our mistakes. So I don't think the appeals in the Civil Rights Division, anyway, are overburdening the Appellate Division. I think maybe, as one agency in eleven, other things could be doing it as well, but I don't believe that

Civil Rights is overburdening the Appellate Division with appeals.

SENATOR GARRAMONE: Thank you very much.

MR. MARTIN: Thank you.

SENATOR GARRAMONE: Ms. Gomberg, would you like to give us the benefit of your thinking?

L Y N D A G O M B E R G: Thank you. I am not a lawyer. I am speaking as a citizen. Today I am speaking for Mrs. Lee Porter who is Executive Director of the Fair Housing Council of Bergen County.

The Fair Housing Council of Bergen County urges you to exempt the New Jersey Civil Rights Division from the provisions of Senate Bill 1811.

Our experience with the Civil Rights Division over the past ten years has demonstrated to us that the role of hearing examiners in the Civil Rights Division requires a special combination of legal expertise and experienced judgment in understanding and resolving complex and subtle issues. Randomly assigned hearing examiners are unlikely to have the required qualifications. The Civil Rights Division has built up a significant body of experienced and distinguished examiners over the years and it would be a loss to the people of New Jersey if their services or the equivalent were to be terminated by this new law. The Civil Rights Division safeguards the freedoms of all the citizens of New Jersey; to weaken it by a failure to grant it a warranted exemption under Senate Bill 1811 would be an act inimical to such freedoms.

The Fair Housing Council was organized to combat discrimination in housing. Over the years we have come to know the most blatent and most subtle forms of discrimination and seen the adverse effect such discriminatory practices have on society. Yet there are still those who perpetuate the segregated housing patterns by steering, the practice of showing white homeseekers white neighborhoods and minority homeseekers minority or an interracial area while at the same time minority homeseekers are steered away from a white area and whites directed to it.

Steering has many hard to recognize elements. The minority home buyer may be treated courteously, even feel pleased with the apartment or house-hunting experience, even though he has not found a dwelling he wants and can afford. This is attributed to the high cost of housing. The fact is he has been steered by the agent by not showing the minority what is available in his price range on the white market. Recently, a black couple was told "there is nothing in your price range in this community". A white tester from the Fair Housing Council was shown several homes in the same price range on the same day.

On the other hand, a white couple was advised against moving into an integrated neighborhood. When the couple told the broker "this is exactly the home I want, I want the benefit of bringing up our children in an eclectic neighborhood", the disgruntled agent told the couple, "I will give them your bid, but if you were my kids I wouldn't let you buy there." The couple moved in and were extremely happy with their home and community. This property was not readily available to them. It was designated for the minority market. The seller of the property was damaged, unknowingly, because his house was not made available to a wide

market and therefore not sold at a competitive price.

Everyone in the above circumstances was a victim of discrimination, the white home buyer, the black home buyer, and the seller. Since segregated housing practices continue, other means of integration become necessary, leading to strain on the social fabric and expense to the community and the State. But discriminations such as steering are subtle, such that the victims aren't always aware and so experienced hearing examiners are especially valuable to implement the State's commitment to fair housing opportunity.

The Division on Civil Rights is the agency that insures individual rights in housing. It is important for the examiners to know the laws and the subtleties and investigatory techniques developed by the Division over the years so that even the most subtle acts of discrimination can be expeditiously and fairly dealt with.

We, therefore, urge you to exempt the Division of Civil Rights from S 1811 just as you have other agencies with similar requirements.

SENATOR GARRAMONE: I guess the arguments have certainly been made very forcibly by the proponents of keeping the Civil Rights Division outside the purview of this bill.

Let me ask you the same question. Do you feel that the same talented hearing officers that now do, as I gather, nothing but hearing, filling the hearing role in the Civil Rights Division, if placed under the framework of a special department - do you think that this would diminish their effectiveness in this area?

MS. GOMBERG: Well, at the present time I see no way that it is insured that these hearing examiners would take full-time jobs with this umbrella organization. And in that way I would see that it would weaken individual freedoms. These people are used to hearing such cases as the ones that I've described. Now they are very subtle. Many of these cases won't get to court. Many people do not know that they've been discriminated against.

SENATOR GARRAMONE: But that avenue is still available. That's not denied any citizen of the State. He still can appeal to the Civil Rights Division, can he not? By transferring the hearing officer we haven't denied that.

MS. GOMBERG: No. But I think it is very difficult to get people to bring their cases into court.

SENATOR GARRAMONE: This I appreciate, Ms. Gomberg.

MS. GOMBERG: Yes. And when you have someone who is not knowledgeable, to know that they can go down to the Civil Rights Division and there are hearing examiners that they will go before, who will listen to them, who knows what their individual rights are, it is very important.

SENATOR GARRAMONE: Then if the ease for an individual to go before a hearing officer were translated into the context of this bill, would this make you less comprehensive about the nature of this bill?

MS. GOMBERG: Well, again, I don't know if this question should be addressed specifically to me because in reading the bill, not

as a lawyer, I saw several loopholes in it, and I am sure that we could go over it for a long time and you could explain them to me but I do not see any safeguards that people who would be hearing these cases would have the same kind of training and the same kind of commitment that our present examiners have. I think that the people who have been in the Civil Rights Division, such as the Ben-Ashers and Sylvia Presslers, have shown that they do have the understanding, and it isn't a bias. And they have gone on to help people have their rights.

SENATOR GARRAMONE: Well, I would hope that all of the hearing officers would have this compassion and this capability. I think that is essential, that role.

MS. GOMBERG: Well, you're talking about different kinds of cases.

SENATOR GARRAMONE: That's true.

MS. GOMBERG: You can't put the Division of Civil Rights in the same category as some of the other cases that they will be hearing.

SENATOR GARRAMONE: I imagine that we could suggest a parallel with the judicial system, the judges that sit and hear a variety of cases are not necessarily schooled and trained in a specific calling of the law yet their being asked - Sylvia Pressler is a case in point - - is being asked and I am sure to rule on a variety of cases of different subject matter.

MS. GOMBERG: Well, I hope that you are telling me that the hearing examiners that you are going to get are going to have the same qualifications as the judges who are hearing a variety of cases.

SENATOR GARRAMONE: I would hope the caliber is topnotch.

MS. GOMBERG: Well, we all know the difference between a written bill and what comes of it. So before something is destroyed, like my civil rights, I would like to have it examined much more closely than it has been already.

SENATOR McGAHN: I would like to thank you very much for articulating for the first time something that I've been waiting to hear all day, that you stated it for the first time, and that is that you did not think that the present hearing examiners would work full-time, that you could not get them, that you could get them only as part-time employees. That's what you said?

MS. GOMBERG: No, that isn't what I said. I said, I did not know.

SENATOR McGAHN: You said you did not think.

MS. GOMBERG: Well, if I did, I meant, I did not know.

SENATOR McGAHN: And this, to me, is the whole crux of the matter because the point I have been trying to make here, and everybody has vacillated upon a yes or no answer, and that is would they go for full-time hearing examiners in the Division of Civil Rights, regardless of whether it's excluded from this Act or not, and nobody has answered me directly "yes". You, for the first time, made the statement.

MS. GOMBERG: Well, I am sorry if I inferred that. I am not the person to ask that of.

SENATOR McGAHN: I'm sorry. But, actually, that is the statement that you did make because I was very happy to hear it.

MS. GOMBERG: Oh, please. If it came from me it was from a point of ignorance.

SENATOR McGAHN: No, I think it's a valid point but I wish this point had been addressed before. The point I hear is, would the present examiners be willing to work full-time or not. And I would assume that most of them basically could not afford to. But if that's the case, and that's the primary objection to it, I wish it had been stated as such. By the same token, what is the turnover? We have two young examiners. How much longer are we going to have them? We have a dedicated gentleman back there that started this. He is certainly going to be there as long as he can. I don't think there is any doubt about it. But what happens if you lost Mr. Ben-Asher or the other gentleman, whom I do not know? And there is no training program, there is no farm system to actually bring these people up.

MS. GOMBERG: I certainly think that your points are extremely well taken. And perhaps when the Division of Civil Rights is excluded from this bill something further can be developed to train people in this specific area.

SENATOR McGAHN: Maybe it can but there are no efforts, apparently, being made at the present time. And they are excluded from this bill because this bill is not operational.

MS. GOMBERG: Well, when it becomes operational. I am not a lawyer.

SENATOR McGAHN: No further questions. Thank you.

SENATOR GARRAMONE: Thank you very much.

Is Mrs. Lee Porter with us?

MS. GOMBERG: I have spoken for her.

SENATOR GARRAMONE: Fine. Thank you very much.

Mr. Lewis Applegate

L E W I S R. A P P L E G A T E: Thank you. I am Lew Applegate. I am Vice President of the New Jersey State Chamber of Commerce.

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 of S-1550 and that bill's metamorphosis into S-1811, the subject of the present hearing.

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-1811 setting time parameters for the disposition of contested cases is itself a major improvement.

We also find benefits encompassed in S-1811 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. Therfor, 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 troubled, however, with at least two provisions of S-1811. One of those is the sizeable list of agencies exempted from the use of the new hearing officers, as contained in Section 9 of the bill. We feel that most of the agencies there exempted are in as much need of improved hearing processes as are the agencies not so exempted and we would urge that that list of exempted agencies be pared to an irreducible minimum of agencies whose statutory function cannot accommodate to the hearing procedures contemplated in this bill -- the National Guard would perhaps be one example.

A second objection is the inclusion in this legislation 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 recommend that the provision be omitted.

In summation, we endorse S-1811 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.

Thank you.

SENATOR McGAHN: Thank you very much.

Lew, I think as far as the scale setting is concerned, these are in conformity with existing Civil Service scales for comparable levels.

MR. APPLEGATE: They are also written into law? Our point is that the budgetary and administrative process should set them.

MR. CARROLL: It has been done in the past. It has been argued both ways, that by setting it, you do lock it into a legislative pattern. But the Public Utilities Hearing Officers said that that was more desirable than having it at the whim of the executive. But it is a point.

SENATOR MC GAHN: That is a point, of course, that will have to be considered when further consideration is given the bill.

MR. APPLEGATE: I think it is in keeping with our general policy on legislation to make sure we don't write it in stone.

SENATOR MC GAHN: Well, of course, what we are really talking about, we're talking about administrative judges as against civil judges and, consequently, since the pay of judges is in statutory language, by the same token this is consistent with that concept.

MR. APPLEGATE: Right.

SENATOR McGAHN: Thank you very much. I have no further questions.

MR. APPLEGATE: Thank you.

SENATOR McGAHN: Mr. Sol Kapelsohn, New Jersey General Counsel, Ladies Garment Workers' Union.

S O L K A P E L S O H N: Senator, Mr. Chairman, my name is Sol Kapelsohn. My office is at 24 Commerce Street, Newark, New Jersey. I have been a member of the New Jersey Bar since 1927 and have represented a substantial segment of International Ladies Garment Workers' Union constantly since 43 years ago.

Presently their membership in the industry in New Jersey exceeds 50,000, and to this you may add another 15,000 of their pension retirees living in New Jersey.

I am also speaking here on behalf of Communications Workers of America, whom we represent for the State of New Jersey, and that involves probably about 60,000 members employed in the communications industry today.

I regret, and it's certainly no fault of this Committee, that I was not aware of this scheduled hearing until about noontime of yesterday. And my opportunity to examine the legislation question didn't get to me before noontime today. This impels me to ask this question, Senator. I have here Bills S-1550 and S-1811. Am I correct in assuming that we can disregard 1550 and S-1811 is what is actively under consideration now, or

am I wrong?

SENATOR McGAHN: No, sir. Both bills are actually under consideration. One may or may not be discarded by the Committee. There may be parts of one amended into the other, but both bills are actually under active consideration. I grant one thing, that most of the comments made today, most of the testimony has been relating to S-1811 because apparently that has been described by the Attorney General and others as the more comprehensive bill. But by no means does that mean that 1550 should not be addressed. Certainly both bills will not be released from Committee and/or enacted. One or the other. Both may not be released. One most likely will, not both.

MR. KAPELSOHN: As I have indicated, my opportunity to analyze either of the bills, and I did concentrate on 1811, was not adequate for thoroughness. There is a great deal of important and complex material which is the subject matter of 1811, and it does reflect a great deal of work and, no doubt, rework and rework.

SENATOR McGAHN: Mr. Kapelsohn, not cutting you short, because I want you to continue, but rest assured that any comments, written comments that you would want to make concerning this bill can be mailed in to Mr. Carroll. The record will be kept open for approximately 30 days, and certainly this will be incorporated in the public record, if you want to make specific recommendations, because obviously you have not had time to analyze the bill in depth.

Continue, please.

MR. KAPELSOHN: But there are some items to which I wish to address myself.

Now, the question of performance, all questions of performance in administrative agencies, of which I am aware from prior hearings in other matters, including hearings in Washington on the Federal Administrative Agency Act, adopted finally in the mid '40's, has as a focal point and central theme the need for expertise on the part of hearing officers as well as those officials responsible for the initial, what you might call, trial level decisions.

In the federal sphere, I am not aware of any administrative agency which uses other than full-time hearing officers whose official duties are related to that agency only.

It seems to me that no doubt in an effort at - well, I won't say frugality exactly, it's non-wastage of State energies and public funds, the principle of attachment of a hearing officer to a specific administrative agency is not involved here. It seems to me that this proposed legislation provides for a body of hearing officers basically who will serve full-time but not full-time with one agency, not full-time in one field, but will rotate or be available for assignment in rotation to one after another of the dozens of agencies that we have. Today it may be making a determination relating to safeguards against brucellosis in livestock or their importation into New Jersey herds, and tomorrow it may be dealing with questions of ventilation and heat in a manufacturing

industry, and the next day to rate-making or transportation or any other purpose in the State.

The note attached to the bill indicates the very worthy desire to provide this State, its government and its citizens with a corps of trained and expert hearing officers. But the provisions for their use almost insures that we will never have such a corps because they will not be or are not apt to be long enough in any one area to learn much about it.

The very purpose of administrative agencies is to enable those who make the decisions to understand not only the legislation applicable to that agency but the social and economic and other factors which made it essential that such an agency be called into existence, and the operational problems.

The program of an administrative law judge is not in very many respects similar to that of the judges in our judicial system. Quite the contrary. The very purpose is to avoid the burden on the court of having expert after expert, such as each of these hearing officers is designed to be, testify first on one side and then on the other side on the technical aspects and features related to the issues in dispute. And with this kind of setup, it is doubtful that that can ever be achieved. It doesn't matter whether you call them hearing officers or administrative law judges, either one is all right. The largest number in a single body that we've ever had are those attached to the National Labor Relations Board who started off with the title of Trial Examiners and they are now called Administrative Law Judges and they perform the same function. And that's what we must have here. That's what we must have here and it would be destructive of the rights of litigants and those served by the administrative agencies whose decisions and needs and responsibilities are being litigated to have the hearing officer sitting perhaps in some complicated matter for the first time and without knowledge of the actual in-the-field, minute-by-minute workings, the history of need which called the legislation into existence, and all the other factors that have been mentioned.

I note the concern, and it is a large and sharp one, of those directly interested in the Civil Rights Division, for that very reason. Well, I'm interested there too. I doubt that there is in existence today in New Jersey any law firm or official body involved in protection of civil rights whose history of substantial activity in the field goes back as early as that of my firm and me personally. I don't mean that I invented Civil Rights. There were good men, and better men, in the field before I was old enough to dream of such a thing. But the others have gone. One member of my firm was a Director of the Division of Civil Rights for some years and I believe he did distinguish himself there.

Well, their concern is a real concern and a worthwhile concern but it doesn't overshadow the similar concerns in respect to every other administrative agency which we have. I just heard this afternoon's session and I did not hear there any mention of the very important factor,

the factor related to great authority and decisional effect of the work of the hearing officer. His rulings are more than simply advisory. His rulings either will be adopted as stated or they are, in effect, the one solid piece of persuasion which will influence the agency head in modifying or accepting or otherwise acting in respect to the decision on the issue in question. And it would be a sad perversion of the development over the last fifty years of the administrative process for those decisions to be rendered by anyone who is not an expert.

I've heard some questions raised here this afternoon regarding the present existence of experts in all these fields to sit as hearing officers. I can only say in that respect that just as you and I were not born with the knowledge of civil rights and administrative procedure neither was there any person born an expert in the problems attaching to any administrative agency. And that has never been accepted as a reason for taking people who aren't qualified.

I do personally, without perhaps having made a thorough analysis of its validity but instinctively I do veer to the principle of full-time service by hearing officers. But not full-time service hopping from office to office and agency to agency and learning not very much about any of them. And if it takes time to develop the experience which is needed, well I guess we just have to take that much time because otherwise we have nothing. In actuality, whatever may appear to be there, you can give yourselves and the public a little protection by deferring tenure long enough to allow people to demonstrate whether they are capable of acquiring the expertise, the specific actual knowledge and to display the temperment appropriate to a hearing officer. But the split personality, and not split in half but fragmentized personality, that this legislation proposes would require of every hearing officer a practical guarantee that few, if any, of them will ever achieve the abilities without which the entire principle must go by the board.

This, to me, is an outstanding defect in legislation drafted with so much difficulty, because of its inherent complexity. And that I believe when I see the basic excellence of self-expression in the language which is used. When I see how great and heartening changes for the better were made as between the June or July draft of a proposal and what came through in December. I can't have much doubt that another few months for reflection and possibly even another hearing on the issues involved could give us something for which New Jersey and those whose names are attached to the Bill will be recognized in a leadership position in this field in this country. That sort of thing has happened again and again with New Jersey legislation, just as it has happened with some of our emanations from the courts, and it can again. And this thing which is so crucial deserves nothing less than that.

Whatever may be the percentage of people who have exposure in their lifetime to judicial action, there probably are not 10% of any of our bodies of citizens at any time in New Jersey who can go through

any substantial part of a lifetime, maybe not even many days without exposure to administrative agency decisions, because that is how governments function today, and that is the only way that they can function. However precious it is, however important it is that absolute perfection be sought and substantially achieved in architecting our judicial system and judicial procedures, those principles are even more compelling with administrative agencies. Just as one of this afternoon's speakers remarked, and not at all facetiously, that there is nothing that he could do, there's nothing that he could have, there's nothing that he could be, there's nothing that he could work at without involving himself, without being in a web of the procedures and authorities and regulations of administrative agency after administrative agency. And this very legislation should not be pursued to the point of submission to the Legislature or the public until every last available bit of energy has been expended in making it complete, including what it must, excluding anything which has the potential for harm. And there is no exigency of time whose importance even approaches the importance of that effort. And I urge and request and beseech and implore this Committee and this Legislature to have before it as a presentation for the public nothing less than the best possible product of the combined intelligence, wisdom, energy and sincere effort of representatives of every segment of our society, representatives of the best forward-thinking of each body of our Legislature.

Please do not misunderstand me. I have the highest respect for the effort which is memoralized in this draft. And many have worked hard and long on this subject and come up with much less. But the job isn't finished and this proposal needs much more. And I think we have the time and I know that we have the need.

I thank you very much for the opportunity to speak to this Committee.

SENATOR McGAHN: Thank you very much, Mr. Kapelsohn. I think your remarks are very pertinent to the point and certainly will be well taken.

I would like to say that Section 5 of the Bill says: "Hearing officers shall as far as practicable be assigned by the director". I would say that as far as I'm concerned personally I would delete the term "as far as practicable". I think that certainly the intent of this was to develop full-time administrative judges, whatever you wish to call them, with expertise within a particular field, and certainly not to be rotated, regardless of the language of the original draft. And I am sure that this will be given serious consideration as far as this Committee is concerned. And I think, as the Attorney General mentioned this morning, he says: "As with the Judiciary, the first concern with regard to the assignment of hearing officers should be to ensure that cases are heard in a procedurally correct manner. If such is the case, the adversary system will ensure the presentation of all of the substantive arguments." He further goes on to say that expertise is needed in this particular field as far as these individuals are concerned. We certainly hope also

that we would release from this Committee the perfect bill. But, unfortunately, if we release the perfect bill it is going to be putting the judges and the attorneys out of business because they will not be able to litigate it and the judges will not be able to hear it.

MR. KAPELSOHN: May I have a moment? I appreciate the hour and, Senators, you have been very kind to me in the allowance of time to so late a point, and for that reason I didn't want to go into that. So I will just mention an outline of my thought there.

The very provisions that are in this bill for hearing officers clearly, to me, espouse and illustrate the fact that it isn't good. Look what you have. Full-time hearing officers assignable to any agency except where the director of the administrative law judges decides that he needs a part-timer for a few cases or some other cases, but in either case they must be lawyers. Or, however, there's a third alternative. The director of the administrative law judges can make a different decision, that it's all right this time to appoint somebody who doesn't know any law and never studied any of it but he has some knowledge either of administrative procedure - but not how much -- some knowledge either of administrative procedure or of some of the issues that are apt to come up in that case. But he has a fourth choice or there is a fourth choice. The fourth choice is that he can appoint anybody, some special person, if he has a good reason for it. I think there's a fifth but it escapes me for the moment.

I am a newcomer to the shores of this particular legislation, as of this afternoon, but I might recall the fifth. But it doesn't matter. What kind of an agency are you going to have anyway? What kind of a body of hearing officers are you going to have altogether? How does that hodge-podge over which - is there any control? Not that I can see. How does that fill the bill, the need that's expressed initially in this legislative proposal. I say "initially", it's expressed at the end of the proposal, in the note attached to the legislation, that you need full-timers with a lot of expertise, and you must develop them. This reminds me too much of an old system. I think it might still be usable in New Jersey. The use of chancemen instead of jurymen, or maybe I should say today, the use of chancepersons instead of jurymen. Where you don't have enough jurors, the sheriff sends somebody outside of the court house, or used to, and he has the authority and, if he was well chosen, the physical power to lay his hand on the shoulder of anyone passing by and saying "you are a juryman, the case will be heard as soon as you get up to room 203." You don't have much different from that here. No, there is something still left to be done.

Now I remember very vividly the proceedings which led to the adoption of New Jersey's Mine Safety Act where I and a couple of officers of the State CIO and one officer of a mine workers union who was concerned with two iron mines - I don't know how many people here would imagine New Jersey had iron mines but it still has - against an array of a dozen representatives of the mining industry and the gravel pit industry in New Jersey, and we had seven, eight or ten sessions looking for accommodation and agreement between two bodies who at that time had practically taken

blood oaths of no quarter each as against the other. We gentlemen know what the situation was in the 1930's and 1940's. And although New Jersey is far from being anyplace close to the forefront in mining in the United States, that legislation is still virtually unchanged, after 30 years. It is still regarded as the model mine safety law for any basically non-mining state in the United States or Province in Canada.

Well, I think in the aura that surrounds legislative activities today, and industry viewpoints and labor viewpoints, preparing, drafting, architecting, giving birth to an administrative procedure in New Jersey that well could serve as a model for the other 49 states doesn't even come close to being an impossibility.

And I thank you a second time, and I am not going to impose on your attention and energies, or this young lady's or that one's, a third time.

SENATOR GARRAMONE: It has been a personal education, Mr. Kapelsohn.

Joe, do you have any questions?

SENATOR McGAHN: No.

SENATOR GARRAMONE: We thank you very much.

Mr. Kirby?

E D W A R D K I R B Y: I am appearing as an Attorney. I have been a member of the Bar since 1940. This particular year I happen to be Chairman of the Public Utility Law Section of the State Bar. I want to announce at the outset, though, that we have not had an opportunity to have the entire Section review this legislation, but I did review it with other officers and the Board of Consulters and what I am saying is what they approve of.

In the first place, we are very much in favor of this proposed legislation. I would like to say that with regard to the selection of the hearing examiners, as they are now called but for which we would like to see the phrase "Administrative Law Judges" used. That is something that, for example, on the Federal side they have been fighting for for years. Back in 1968 the Law Section invited as a speaker Chief Judge Zwerdling from the Federal Power Commission, and one of the great things that he was pressing at all times was to get the title changed to Administrative Law Judge. And in 1973 it was so changed on the Federal level.

What they do there I think is something that we should at least consider in selecting the law judges. It goes like this. They have a panel which is composed of an executive member of the Civil Service Commission; it also has on it a member of one of the agencies involved, and then it has a member of the American Bar Association. Now those three gentlemen interview prospective candidates. Part of the examination consists of a set of facts that they give to the hearing person, a proposed person, and ask him to write a decision. This takes about three hours. After that they have a one hour interview with the person. This serves a great purpose. It gives you an idea of the temperment of the person, their sobriety, their age, and so forth.

That brings me to another point. When I spoke about age, on the Federal level they require seven years of experience at the Bar, and two of those years must have been in federal agency work or judicial work

of some sort at the same level. Now I am not saying that in New Jersey we have to have seven years' experience, but I think some qualification with regard to experience should be put into the bill.

Now it's a little bit different on the Federal level. When a man is appointed Hearing Examiner or Hearing Judge, he immediately gets tenure. And this is why the original examination and interview are so important. Not only do they do what I have suggested to you but they also have a private investigation made of the qualifications of the candidate. In other words, they write and get recommendations and they find out, on their own, just what type of a person are they thinking of appointing.

Of those who take the examinations, about 20% pass, and they are put on a register and then this register is referred to whenever an agency needs somebody and they can take from that register. They usually get three names and they pick one from that. That's how it seems to work down there and I think that's a very good system. I don't know though about the idea of tenure. They get that immediately. And some of the other witnesses here have testified that they would like a seasoning period before tenure is allowed. Anyway, it is allowed down there on the Washington level. They have, incidentally, about - I guess someone else mentioned it here -- they have over 750 law judges down there.

I would say specifically, now referring to the bill, Section 9 (d) I believe should be eliminated. I see no reason why rate cases should be given a different type treatment than any other type cases. I work for a public utility and I've tried rate cases and to my mind there isn't any reason to change it.

Now, with regard to the qualification that hearing judges should be lawyers. There is a great body of expertise that has already been developed by hearing examiners who are not lawyers. Now take specifically the Public Utilities Commission. I've appeared before men like Mr. Peschel, Mr. Zarillo, Mr. O'Hara. These men are engineers and accountants, they are not lawyers, but they have done excellent jobs, outstanding jobs, and I would be in favor of having some sort of a grandfather clause in this legislation so that we can still use the expertise of these men while we are developing a new group of lawyers for the future. Hopefully, in the future they'd all be lawyers. But I see no reason why these fine men who have been doing a job should not be grandfather-claused, as we say, into it.

I am also in favor of the bill which sets forth salary ranges. Now I'm not competent to speak to the exact dollar amount but I think salary ranges should be a part of the bill and get it out of the never-never land for them.

I know the hour is getting very late and I don't want to impose on your time any more. I do have with me, though, an Administrative Law Review which has three articles in it. One is called The Education and Development of Administrative Law Judges by John Miller, who is an eminent member of the Bar and he is an American Bar Representative on these panels; he has written a nice article on the development of Administrative Law Judges. Another great expert in it is Joseph Zwerdling, Chief Examiner, Federal Power Commission and he has an article here called Reflections on the Role of Administrative Law Judge. And then the third article in it

is the personnel program for judges. I would like to leave this with the Committee, and the staff might find it worthwhile.

SENATOR GARRAMONE: Does that direct itself to the Federal level or the state level?

MR. KIRBY: It directs itself to the Federal level but the Judge says this could be of help to state levels.

SENATOR GARRAMONE: Fine. We would appreciate having that.

MR. KIRBY: Thank you very much.

SENATOR GARRAMONE: Thank you.

Mr. Shanahan of Hunterdon County.

J O S E P H F. S H A N A H A N: Mr. Chairman, I am Joseph F. Shanahan of Lambertville, New Jersey, representing the Hunterdon County Citizens and Taxpayers Association, an organization of working taxpayers who want to go on record as favoring the idea of having an independent corps of administrative law judges or hearing officers as a part of the State administrative processes. Our interest in the matter has come about as a result of our past experience with the system. It started out with protests about certain fiscal expenditures or matters directly related thereto, then continued through the agency and on to the Appellate Division, and in one case on to the Supreme Court of the United States. We note that the statement of explanation attached to S-1811 includes the following sentence:

"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."

To that we say amen. And to further emphasize it, we would like to take the liberty of briefly paraphrasing the thought of the immortal Robert Emmet in his famous address to the court which had just condemned him to hang: "My Lords, - For many years now, State administrative agencies have been dispensing policy, not justice."

But the idea of these bills has put your finger on the major problem, the biased hearing officer. For he is the one who establishes that ever so important record, or lack of one, which is the keystone to the triumph of agency policy as it follows its predestined appellate course. We heartily endorse the concept of these bills in the abstract.

However, when it comes to the concrete these bills, as presented, will not cure the problem and we would like to respectfully point out why.

In both bills the Director is empowered (a) to appoint additional administrative law judges or hearing officers "on a temporary or case basis". In our opinion, this defeats one of the major fiscal advantages which was to eliminate the unnecessary expense of having part-time hearing officers. If this discretion is included, we foresee that we will now have, not the same but even more expensive part-time hearing officers on top of a new full-time bureaucratic empire. If the system of part-timers was an unnecessary expense before, why would it not also be the same under this new system. We urge that paragraph (n) line 30 of page 2 of S-1550 and paragraph (m) line 154 of page 3 of S-1811 be deleted.

In both bills the Director is empowered (b) to appoint similarly qualified persons other than attorneys based on his qualifications in administrative law or in the subject matter. This is another self-defeating amendment. In our opinion, in all likelihood, we will eventually find most of the same old hearing officers who were involved in dispensing policy under the prior system back in business as similarly qualified persons. And with their built-in bias disguised as experience in the subject matter, they will be just transferred on paper to a new department, and the administrative atrocities will continue.

Therefore, we respectfully urge that the remainder of the paragraph after the words "attorneys at law" on line 50 of page 3 of S-1811 and lines 25 to 29 of page 2 of S-1550 be deleted; or else the stated objective of the bill "to inject greater impartiality into that process" will be compromised or totally defeated.

As we read the bills, we favor S-1550 as tending to achieve the greater impartiality in that (1) it permits the determination of the administrative law judge to represent "the final agency decision". We hope that means that it supersedes the authority of the head of the agency to reject or modify it. At that level the impartiality of the decision-maker is most critical, particularly where the issue is one of principle only. In such cases further litigation is precluded because of the costliness of the judicial review. To quote a famous attorney, "A right that has to be taken to the Supreme Court of the United States to enforce is no right at all."

And we favor S-1550 for the second reason. It omits the principle of assigning the administrative law judges among the agencies according to their experience as is described for hearing officers in S-1811. We believe that the principle of impartiality is better served by assigning by lot rather than by expertise. Such errors are more readily corrected on appeal.

In summary, we urge the passage of S-1550 with the above-recommended deletions as the best vehicle to inject greater impartiality into the system and to restore the concept of due process and equal protection as they relate to the administrative procedures of this State's agencies.

Thank you for having afforded us the opportunity to present our point of view.

SENATOR GARRAMONE: Thank you, Mr. Shanahan, for giving us your thoughts on these bills.

Senator McGahn, do you have any questions?

SENATOR McGAHN: No.

SENATOR GARRAMONE: Thank you so much.

Is Mr. Jack Silverstein here?

J A C K S I L V E R S T E I N: Senators, in the interest of time I have rewritten my statement six times since the hearings began, lest I be repetitious.

I speak for the Director, Sydney Glazer, Division of Taxation. I speak as Chief Tax Counsellor of that Division, a Hearing Officer, former Deputy Attorney General, many years ago Secretary of the Administrative Law Committee of the New Jersey Bar Association.

We favor S-1811. This is a concept whose time has been too long delayed but, to the credit of the sponsor of this bill and probably with his

belief that its time for passage has come.

The only comment we originally had on this 1550 was that the Division of Tax Appeals resulted from prior legislation and was already comprised of judges. I must admit and I must concede that I at times have felt uncomfortable when I've been asked to serve as a hearing officer or designate someone in the Division as a hearing officer.

Certain continental countries, such as France, have long recognized the concept as reflected in S-1811 in its administrative law because of the ever-widening impact of governmental agencies upon its citizens.

The development of administrative law divisions has emulated in that system what corresponds to our law and equity decisions in the Superior Court. Now to whittle away the concepts in S-1811 by cutting out certain agencies would be a reversion and actually would slaughter the concept.

We urge the Committee with all haste to follow the prescription by MacBeth in Lead on MacDuff, so that this may be brought to the floor of the Legislature as soon as possible. It may be conceded that there may be shortcomings in this bill, but we have a Hebrew expression translated into English which says, "Let's not try to marry the boy before he's bar mitzvahed". Thank you.

SENATOR GARRAMONE: I think anything else would be anticlimactic don't you, Senator McGahn, on that note?

SENATOR McGAHN: Mr. Silverstein, you support the exemptions under 1811 and particularly in relationship to the Division of Tax Appeals. Are they not heard directly by the members of the Division and not by hearing officers, or am I incorrect?

MR. SILVERSTEIN: Yes, you're correct on that. The Division of Taxation appeals in taxation cases, Appeals from the determination of the Director of the Division of Taxation go to the Division of Tax Appeals. Sitting on the Division of Tax Appeals are judges who are named by the Governor. And that's the reason we made our original comment as far as S-1550 was concerned.

SENATOR McGAHN: Okay. I understand. Thank you.

MR. SILVERSTEIN: Thank you.

SENATOR GARRAMONE: We thank you very much.

SENATOR McGAHN: Does that apply to the Division of Workmen's Compensation? I know that this is not in your forte. The Division of Workmen's Compensation, the appeals there, are they also judges sitting on that appeal?

MR. SILVERSTEIN: They are Judges of the Division of Workmen's Compensation. Actually how they are constructed, I am not familiar with.

SENATOR GARRAMONE: Well, thank you very much.

Does anyone else care to be heard on these bills? If not, I want to thank you, Senator McGahn and Jim Carroll for holding these hearings and sharing with me the information that we've garnered today. Hopefully we will come out with a better product when we do look at all of this material.

Thanks again for appearing, and this ends the public hearing on S-1811 and S-1550.

(hearing concluded)

MAR 28 1977

STATE OF NEW JERSEY
DEPARTMENT OF CIVIL SERVICE
S. HOWARD WOODSON, JR., PRESIDENT
EAST STATE STREET
TRENTON, N.J. 08625

March 18, 1977

The Honorable Raymond D. Garramone
Senator, District #39
175 Westwood Avenue
Westwood, New Jersey 07675

Dear Senator Garramone:

RE: S-1550 and S-1811
Amendments to the Administrative
Procedure Act

Please accept my thanks for having had the opportunity to testify before your Committee on February 24th.

As you know, both the Civil Service Commission and I wholeheartedly support the concept of an independent Hearing Officer corps to conduct plenary hearings on behalf of State Agencies. The above bills, particularly S-1811, are singularly consonant with the beneficial safeguards proposed by Justice Jacobs in his Mazza v. Cavicchia dissent. For essentially the same reasons, 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 v. public employers, for the most part.

However, as I mentioned in my testimony I am most anxious to avoid any adverse impact on the administrative due process provided under Title 11, the Civil Service Act. Unforeseen practical drawbacks often have a way of counteracting even the most carefully contrived legislation. My concern focuses on three specific areas:

a. A need to avoid backlog and delay in Commission decisions.

b. A need for flexibility and options in calling on Hearing Officers, and

c. Fiscal constraints.

Discussing these problem areas in their order, I note the following:

a. We are fearful that, because of budget limitations, the proposed Office of Administrative Law may cause a reversion to the unconscionable delay which was eliminated by our hearing officer program under Chapter 158 Laws of 1971. Before this legislative remedy, (which has been an unqualified success) appellants and agencies endured an 18 month wait from the date our Commission granted a plenary hearing to the date the matter was actually heard. Additional processing contributed to further delay, and decisions often were rendered two years from the time of hearing granted. Relying on current methods, only 1 1/2 to 2 months elapse from the time a hearing is granted to the time it is held. Approximately 1 month later, following receipt of exceptions and administrative preparation, a decision is issued.

Perhaps a partial solution would be statutory assurance that an adequate number of hearing officers are assigned to Civil Service. Our present complement of 30 per diem hearing officers, most of whom are attorneys, are assigned approximately two hearing days per month. We schedule as many as 60 hearing days per month (reduced somewhat by postponements and continuations). As the figures below indicate, the number of appeals is steadily increasing:

HEARING GRANTED

1973-74	1974-75	1975-76	
240	327	397	74% increase

HEARING DAYS - # OF DAYS HELD

1973-74	1974-75	1975-76	
346	441	480	39% increase

CASES CONCLUDED

1973-74	1974-75	1975-76	
193	286	326	69% increase

DECISIONS RENDERED

1973-74	1974-75	1975-76	
200	262	309	55% increase

N.B.: No increase in staff during this period.

To compound our difficulties, we have recently assumed jurisdiction over affirmative action appeals under Executive Order #14. We have reason to expect that a significant number of these disputes will warrant plenary hearing.

Further, turning to the language itself of S-1811, we observe that Section 7(c) specifies that within 45 days of a concluded hearing a report and recommendation will be issued by the hearing officer. Moreover, the agency head shall adopt, reject, or modify that report no later than 45 days following its receipt. Notwithstanding an agency's neglect to affirm, and absent a clearly stated intent to reject or modify, the agency forfeits its right to adjudicate upon expiration of the 45 day period. When that time has passed, the erstwhile "report" is transformed to a decision.

We have no quarrel with the substance of this procedure. However, we are somewhat apprehensive of the time frames.

Under our current Civil Service Hearing Officer Program, the Hearing Officer is required to submit his recommendation within 35 days of hearing. (This includes 15 working days for receipt of transcript.) S-1811 allows the Hearing Officer 45 days to submit a recommendation. However, from the date of the recommendation, we allow the parties 10 working days to file exceptions and an additional 10 working days to file cross exceptions. Further, we find that it takes a minimum of 10 working days to prepare the record (recommendations, transcript, exceptions, cross-exceptions, briefs etc.) to go before the Commission at their next bi-monthly meeting. Thus, the total elapsed time from report and recommendation to decision is a minimum of 30 working days, or 42 calendar days.

Section 7(c) of S-1811 provides an agency only 45 days to take action upon a hearing officer's report and recommendation. Our concern is that, while this period can be enlarged by joint action of the agency and the Director of the Office of Administrative Law, this standard may be used to the prejudice of litigants who legitimately seek an extension of time to file exceptions or briefs or, for that matter, to the prejudice of an agency which wishes more time to deliberate a knotty problem of fact, law or policy. (We would be skeptical of any regulation promulgated under the bill which would give a litigant less than 10 working days to file exceptions or cross-exceptions, since such an opportunity to be heard seems a necessary part of fundamental fairness and due process. On this point, compare the bill with New Jersey Court Rule 2:6-11 respecting time for filing appellate briefs.) At a minimum, the coordination of effort needed to create exceptions to the 45 day rule seems to be a time consuming step which hobbles rather than facilitates administrative decision making.

b. Secondly, we are dismayed by the prospect of losing that flexibility we now enjoy in assignment of Hearing Officers as needed. Our Commission is able to draw from a pool of 30 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.

In addition, it is obvious the sheer number of hearers we employ itself enables us to adequately respond to our overall quantitative load. In conversations with Judge Handler, 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.

We think it unlikely that comparable options and depth could be offered by an Office of Administrative Law under its currently suggested funding of only $100,000.

c. Lastly, we mention for your information what we perceive as a substantial disparity in costs of projected services from the Office of Administrative Law, as compared to current Civil Service expenditures. The following chart supports this concern.

PRESENT COST OF CIVIL SERVICE PER DIEM HEARING PROGRAM

Support Staff	
1 - Director Level Professional	
1 - Professional	
1 - Part Time Law Student	
3 - Clerical Support	$ 57,493
Benefits (28%)	16,098
Hearing Officer Appropriation including Court Reporter/Hearing Officer Per Diem Salary	168,000.
TOTAL COST	$241,591

PROJECTED COST OF FULL TIME HEARING OFFICERS

Hearing Officer II- Range 32 (mid-range)	$24,650 annual	$94.44 day	
Hearing Officer I- Range 37 (mid-range)	31,459 annual	120.53 day	
	Benefits (28%)		47,151
Six (6) Hearing Officers Required by Civil Service*			168,327
Court Reporters - 480 Hearing Days @ $175. per day			84,000
Support Staff - Legal Secretary 2 - Range 13 Legal Secretary 1 - Range 15 One Secretary for each Hearing Officer Three at Range 13/Three at Range 15**			61,512
	Benefits (28%)		17,223
	TOTAL COST		378,193

Thus, the estimated increase in costs under S-1811 would amount to $136,602.

Again let me express my sincere appreciation for your committee's public inquiry into the effect of legislation which is of such urgent and far-reaching importance to administrative justice in New Jersey.

Sincerely yours,

S. Howard Woodson, Jr.
President
Civil Service Commission

*This figure is arrived at on the theory that 1 hearing day requires 2 days writing in a case of average complexity: 480 hearing days for Fiscal Year '76.

**Represents adequate Staff Support at proper level.

STATEMENT IN SUPPORT OF SENATE BILL NO. 1811

PRESENTED BY: MICHAEL J. MEHR, ESQ., CHIEF HEARING EXAMINER, PUBLIC UTILITIES COMMISSION

On behalf of the Board of Public Utility Commissioners I thank you for this opportunity to present our views.

This is a Bill whose time has come. Since 1972 Hearing Examiners on the federal level have been designated Administrative Law Judges. The leading states are moving toward this concept. I use the term "Administrative Law Judge" because while this Bill retains the title of hearing officer, in intent and substance, it is an Administrative Law Judge Bill. That is, it sets standards to judicialize the hearing process so that all litigants will be treated fairly and contested cases decided on the record facts without fear or favor.

Our Commissioners believe in this concept. This Commission has already taken significant steps to insure

the impartiality and integrity of the administrative process by fighting for and establishing an inhouse corps of hearing examiner who issue written reports and recommendations based on the evidence, made available to all parties; the parties then have an opportunity to file exceptions and the Commission then either accepts, modifies or rejects the hearers recommendation. We see no problem with hearing officers calling the shots as they see them on the basis of the record without command influence. The agency heads have an opportunity, as specified in the Bill as it is now drafted, to accept, modify or reject the Hearing Examiners' findings of fact and conclusions of law.

The PUC is deeply concerned that it be permitted to retain and develop the expertise now available to it. Our Board has the services of 12 attorney hearing examiners

at present and does not want "to trade them in" for any ad hoc designation of hearing officers on a random basis. We believe that the intent of the Bill clearly meets this concern, in that hearing officers will not be rotated among agencies, but assigned according to the required expertise.

Our first specific suggestion then would be that section 5a be strengthened to require assignments according to expertise, except if the director certifies in writing the reasons why the character of the case requires utilization of a different procedure for assigning hearing officers.

Our second suggestion is that the Bill should adopt the title of Administrative Law Judge rather than hearing officer. This is the common federal practice now being adopted at the state level. There does not seem to be any persuasive reason to retain the title of hearing officer.

And since the purpose of this Bill is to establish a fair and impartial administrative judicial system, the title of Administrative Law Judge can only help in fulfilling the Bill's intent.

Our third suggestion would be that we do not see the need for section 9d, which would exempt rate cases from the purview of this Bill. We believe all contested cases should be handled according to the same rules whether they involve rates, service, franchises or penalties. Indeed, it is in the highly complex rate case that the need for an attorney hearing examiner who is independent and impartial becomes even more important.

Our fourth suggestion has to do with section 10c. While a good argument can be made that the hearing officers' initial decision should become final unless otherwise acted upon by the agency within 45 days, we believe the better procedure is that no examiners' determination should become final until acted upon affirmatively by the agency.

The latter provision would strike a more appropriate balance between hearing officer and agency head.

Our fifth comment goes to section 4 1. We strongly urge that the range requirements specified in this section be retained as drafted. Unless the Bill provides the capability to develop a cadre of professionally experienced attorneys at a professional wage, the Bill will not work. With Civil Service ranges specified, (as the Bill does provide) the Director will have the opportunity to develop and retain competent personnel and cut down on the turn-over rate; now the best people must leave to secure a better wage for their family. We believe its certainly within the legislative prerogative to set salaries, and do so by Civil Service range, whether in the classified or unclassified service.

We would also strongly urge that the hearing officer be in the classified, not unclassified, service. The hearing examiners at the P.U.C. already enjoy permanent Civil Service classification and would expect to qualify as hearing officers under this Bill. It is questionable whether their present Civil Service status could be stripped from them for a comparable title; in any event we suggest that it would not be appropriate to do so. An allied question is the three year waiting period before a hearing officer would be entitled to the benefits of Title 11 (Civil Service). Again it would seem more appropriate that those hearing officers retained would continue to enjoy the full benefits they now enjoy under Title 11. However, it may be more appropriate that the Director of the Office of Administrative Law be placed at a fixed salary rather than Civil Service

range which could be geared to the salary of the Public Advocate, since this is at a fixed term position with the advise and consent of the Senate.

As a final point, we would urge that the agency head have some say at least initially in the appointment of hearing officers or administrative law judges. We suggest that the language in section 4j, which calls for agreement of the Director and Chief Executive Officer of the affected agency where agency staff members are to act as hearing officers. would also be a preferable way to handle the general appointment of hearing officers. The Bill now provides that the appointment of hearing officers is in the sole discretion of the Director.

In summary, the Public Utilities Commission fully supports this Bill. We believe it important to retain the salary structure in the legislation itself and in the classified, not unclassified, service. We believe the Administrative Law Judge title is important. We believe the ALJ's determinations should not be final until the agency acts. We believe rate cases should not be exempt. We believe the affected agency should have some say in the appointment of hearing officers.

We believe this is a very important Bill which will assure the public and all litigants that they will receive a fair shake in the administrative tribunal, yet will still preserve the final decision-making function of the agency head.

Thank you.

February 24, 1977

STATEMENT REGARDING S-1811

ARTHUR N. MARTIN JR.
GARDEN STATE BAR ASSOCIATION

Senate Bill No. 1811 would create an independent division of hearing examiners who would sit on all state hearings in agencies other than those agencies specified in section 9 of the bill. (Parole, Workers Compensation, Tax Appeals, Civil Service, Public Utilities, Education, Higher Education, Pensions and Treasury would retain their present hearing examiners.) The bill's purpose is stated to be to insure due process and to have competent and independent hearing officers sitting on state agency cases.

The Division on Civil Rights substantially differs from the state agencies which would be covered by the bill, because of the nature of its hearing examiners, the structure of its hearing process and the uniqueness of the law which it must enforce. The hearing examiners are involved in construing the Law Against Discrimination, N.J.S.A. 10:5-1, et seq., which the Legislature has enacted to prohibit discrimination which it found "threatens not only the rights and proper privileges of the inhabitants of the State but menaces the instiutions and foundation of a free democratic State." N.J.S.A. 10:5-3. As the Supreme Court noted in Passaic Daily News v. Blair, 63 N.J. 474, 484 (1973), this "...broadly sympathetic construction of the Law Against Discrimination and the remedial powers of the Division on Civil Rights and the Director thereof...comports with the preeminent social significance of its purposes and objects."

The sensitive and complex nature of appraising, correlating and evaluating the proofs in discrimination cases is also unique and calls for the highest degree of expertise. In Evans v. Ross, 55 N.J.Super. 266, 272 (Cty.Ct. 1959), aff'd. 57 N.J.Super 223 (App.Div. 1959), certif. den. 31 N.J. 292 (1959), the court stated that discrimination is not practiced in the open but by subtle and devious methods, stating:

> One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are de-

> vious, by methods subtle and elusive--for we deal with an area in which "subtleties of conduct ...play no small part"...all of which amply justified the legislature's grant of broad powers to the commission [Division] to appraise, correlate and evaluate the facts uncovered.

The Appellate Division of the Superior Court has recently spoken of the "special expertise, administrative mechanisms and investigative techniques developed by the Division over the years in identifying and dealing with acts of proscribed discrimination." Hinfey v. Matawan Regional Board of Education, __N.J.Super__ (App.Div. 1977)(Docket No. A-1512-75).

Unlike other agencies, the Division's enabling statute provides for the appointment of hearing examiners who must be attorneys of at least five years and the bar and they are appointed by the Attorney General "subject to the approval of the Commission," referring to the Commission on Civil Rights which is appointed by the Governor with the consent of the Senate. N.J.S.A. 10:5-7 and 10:5-10. This "approval" mechanism is unique and does not exist in the case of other agencies.

The Division on Civil Rights hearing examiners conduct probably the most formalized hearings in the State. In David v. Vesta, 45 N.J. at 326, the court commented on the Division's hearings, noting the more formal and the more court-like procedure used in the Division and concluded that as a result it was "less likely that a party will be deprived of property without dueprocess of law."

The requirements of the Division's Rules and Regulations, the unique nature of the proofs in discrimination cases, and the trial orientation and regular experience of the hearing examiners all require hearings to be conducted in a relatively formal and court-like manner. See Alston v. Ivy Hill Park, __N.J.Super.__(App.Div. 1969)(Docket No. A-201-69), which concluded that the Division's hearing examiners were "independent" and "impartial" and that the Division's hearing process facilitated judicial review and provided the necessary safeguards to insure due process of law. The appellate court held that the Law Against Discrimination and the Division's method of operation provided a "substantial degree" of separation. In Chisolm v. Riverside Estates, __N.J.Super__(App.Div. 1975)(Docket No. A-1381-73) the court again spoke of how the Division hearing is conducted in a "fair and impartial" manner.

The law which is interpreted and enforced by the Division, especially in employment cases, has become increasingly complex over the years to a considerably greater degree than for any other state agency with the possible exception of the Public Utilities Commission and the Division of Worker's Compensation (both of which are excepted from S-1811). The hearing examiners must know by analogy the hundreds of reported discrimination opinions under the Federal Civil Rights Act of 1964 (42 U.S.C.A. 2000e2, et. seq.), the Federal Equal Pay Act of 1963 (29 U.S.C.A. 201, et seq.), the Federal Age Discrimination Act (29 U.S.C.A. 621, et.seq.), and numerous state anti-discrimination laws. As already indicated, hearing examiners must decide difficult legal and factual questions regarding: intent and credibility; practices of employer, real property owners, landlords, realestate agents and brokers and places of public accommodation; back pay, reinstatement, seniority, pensions, hiring, promotions, employment systems and procedures and other areas. The hearing examiner must be familiar with the practices in these fields and must arrive at detailed findings of fact regarding questions of culpability which have traditionally been the province of the courts alone. They must now make determinations regarding the awarding of damages for humiliation, pain and mental suffering--a quasi-medical area dealt with only by the courts, the Division and the Workers Compensation courts. See Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). The Division must sort the emerging and involved law regarding the "effect test" and affirmative action, and must enforce recent amendments to its enabling legislation covering physical handicap discrimination, sex discrimination, credit practices and blockbusting. Recognizing that discrimination law has become so complex, separate courses on this subject are now taught in many law schools and by the Institute for Continuing Education; scores of law review articles have been written on different aspects of it; in fact, some attorneys have now specialized in this area.

Hearings in this area must be presided over by hearing examiners who are expert, experienced, dedicated, respected and fair. Most of the hearing examiners who have been appointed by the Attorney General over the years have had those qualities. Their ranks have recently included highly skilled attorneys such as Judge Sylvia B. Pressler, Prosecutor Burrell Ives Humphreys, former Assistant Attorney General Stephen G. Weiss. Among present active hearing examiners are Julius Wildstein, with over ten years continuous experience in the position, and David H. Ben-Asher, a former deputy attorney general. This reservoir of ex-

pertise and experience would take a great effort and time span to replace. Furthermore, the trial experience of the Division's present hearing examiners brings a more court-like procedure to the Division in practice. These examiners regularly sit on a large number of hearings and are always available when the Division needs to have hearings scheduled.

Since 1962 when the Law Against Discrimination was amended to provide the present structure of hearing examiners and up to the present, no final decision of the Appellate Division or the Supreme Court reversed any recommended findings of fact or conclusions of law of a Division hearing examiner except in two isolated cases. The strength of Division hearings appears to have resulted in part from the knowledge of the courts about the Division hearing examiners and the Division hearing process.

The New Jersey Law Journal, which supported the creation of a panel of full time state hearing officers, has urged legislative exceptions for some agencies including the Division on Civil Rights, noting that "a unique situation exists in the Civil Rights Division." 98 N.J.L.J. 20 (1/9/75). The Division is much more closely akin in operation and subject area to the agencies that are excepted from the bill than it is to the agencies included in the bill. No rational reason appears for treating the Division differently than the related agencies excluded by section 9 of the bill. Inclusion of the Division in the bill's coverage can in no way assist the agency or the public and has only the capacity of causing possible damage to the two.

It is essential for the proper conduct of Division hearings and for the accomplishment of the legilative goals that the Division hearing examiners be expert, competent, experienced, respected men and women, and those requirements can best be met by the continuation of part time hearing examiners in the Division--which can be accomplished by including the Division on Civil Rights among the agencies covered by the exceptios in section 9 of S-1811.

New Jersey Bankers Association

499 North Harrison Street, Post Office Box 575, Princeton, New Jersey 08540 609/924-5550

THOMAS C. JAMIESON, JR.
COUNSEL

Statement of the New Jersey Bankers Association
on Senate No. 1550 and Senate No. 1811 Before
the New Jersey Senate State Government, Federal
& Interstate Relations, and Veterans Affairs Committee
State House, Trenton
February 24, 1977

The New Jersey Bankers Association includes all 194 commercial banks in the State, both nationally and State chartered, and all of the 20 mutual savings banks.

The New Jersey Bankers Association is opposed to Senate No. 1550 and Senate No. 1811, insofar as the administrative law judges or hearing officers provided for in those bills would have jurisdiction over matters now handled by the New Jersey Department of Banking and the Commissioner of Banking.

While we recognize that it may be appropriate to create an independent administrative law office with respect to administrative rule-making and decision-making for other agencies of State government, we believe that the Department of Banking now functions in an exemplary fashion in this respect and that the public would not be well served by a modification of the procedures now followed by the Department of Banking and the Commissioner.

S-1550, creating an Office of Administrative Law Judges, provides that administrative law judges will supervise the conduct of hearings on rules and regulations of all State agencies and would also conduct hearings on contested cases. As applied to banking functions, this would mean that all contested matters involving bank charters, mergers, and branch applications, as well as rules and regulations governing State-chartered banks, would henceforth be determined exclusively by an administrative law judge.

The right of the Commissioner of Banking to review the findings of fact and conclusions of the hearing officer in a contested case is removed. Even the complex rules governing the conduct of business of banks are adopted, not by the Commissioner of Banking, but by the Administrative Law judge under Section 7 of S-1550.

S-1811 is a considerably improved approach to the problem. Nevertheless, this bill would require a hearing officer to be appointed by the Office of Administrative Law unless the Commissioner of Banking, under Section 9, determines to conduct the hearing in a contested matter individually.

Ever since the Department of Banking was created as a separate Department of State government in 1970, it has been developing personnel with particular expertise and knowledge of the interaction of federal and state law and regulation, economic and banking trends, and marketing techniques which are peculiar to the banking community. The Commissioner of Banking has been a full time commissioner with financial expertise. To remove important rule-making and contested decision-making matters from the jurisdiction of the Department of Banking, as required by S-1550, or to require outside hearing officers as mandated by S-1811, will deny to the public and to the banking community the benefit of this expertise.

Similarly, the Department of Banking has an enviable record in giving prompt and full consideration to applications submitted to it. Delays caused in determinations in other State agencies by part-time hearing officers have not been a problem in the Department of Banking.

The American financial structure has traditionally been based upon what is known as the dual banking system. There are to kinds of commercial banks: national banks, chartered by the Federal government through the Comptroller of the Currency, and state banks, chartered by the 50 states, in our case, by the Commissioner of Banking. In New Jersey, 50.4% of our banks are national banks, and another 49.6% are state-chartered commercial and savings banks. But the national banks average larger in size, with 54% of the assets compred to 46% for the state-chartered institutions. For commercial banks only, state banks have only 33% of the assets. It is vitally important that the handling of contested matters and rules and regulations remain within the province of the Commissioner of Banking, because any lack of expertise or administrative delays in the handling of such matters can prompt a conversion by the state bank to a national bank, which conversion involves no prior approval by the State Department of Banking. We believe that the maintenance of this dual banking system is a major reason for the strong and viable banking system in New Jersey, and any step which would jeopardize that system should be rejected.

We would point out that the Department of Banking is named after the most important segment of its duties - but it also is responsible for supervising and enforcing laws on many aspects of financing and consumer protection in New Jersey. It supervises, in addition to banks, savings banks,

foreign banks, business development corporations, savings and loan associations, building and loan associations, check cashers, check sellers, credit unions, foregin money remitters, insurance premium finance companies, pawnbrokers, provident loan associations, secondary mortgage loan licensees, small loan licensees, home repair contractors, home repair salesmen and home financing agencies, motor vehicle installment sellers, sales finance companies and cemetery associations.

We recognize that under the proposed legislation there is a capability of the Administrative Law Office to appoint judges or hearing officers who have or may develop particular expertise in the many fields now within the jurisdiction of the Department of Banking. We submit that the capability is not an argument in favor of the legislation, but rather establishes that it would take unnecessary time and expenditures to develop that degree of experience and expertise which already exists in the Department of Banking.

We further recognize that there may be other agencies of State government which have developed particular expertise in their respective areas of concern and that if exceptions are made for all such agencies the basis for the creation of the Administrative Law Office may be eroded. However, the rules and regulations promulgated by the Commissioner of Banking, and the decisions in contested matters with respect to bank charters and similar questions are all principally designed to insure the financial stability and solvency of either existing or proposed banks. For example, a new bank charter application is approved or rejected based upon the evidence presented as to whether the proposed new bank will be financially successful and whether its banking operations will adversely affect an existing financial institution, to the detriment of the depositors of such existing financial institution. Thus, unlike many State agencies charged with resolving disputes between a single entity and the administrative agency, the Department of Banking plays a somewhat unique role, ensuring the viability of financial institutions for the protection of the bank depositors. That role can only be satisfactorily accomplished through the particular expertise and expeditious procedures of the Department.

Therefore, on behalf of the New Jersey Bankers Association, I would respectfully request that the legislative proposals which are the subject of this hearing be modified so as to exclude from the jurisdiction of the Administrative Law Office contemplated in both bills the rule-making and the decision-making functions of the Department of Banking.

Respectfully submitted,

TCJ:fp

THOMAS C. JAMIESON, JR.
Counsel, New Jersey Bankers Association

STATE OF NEW JERSEY
DEPARTMENT OF HIGHER EDUCATION
TRENTON, NEW JERSEY 08625

OFFICE OF THE CHANCELLOR

Senator Raymond Garramone
Chairman, State Government, Federal
and Interstate Relations, and
Veterans Affairs Committee
New Jersey Senate
State House
Trenton, New Jersey 08625

February 24, 1977

Dear Mr. Chairman:

While time constraints do not permit me to be present to testify before your committee today, my long time interest in the subject of an independent corps of hearing examiners leads me to offer these written comments.

I would first like to commend the sponsor for the introduction of the bills under consideration. Senate Bill 1550 and Senate Bill 1811 attempt to provide a comprehensive approach to this difficult subject. As Senate Bill 1811 presents a technically more refined approach, I will direct my comments to it.

I think that it is clear that the concept of an independent corps of hearing officers is a good one. The availability of trained hearing officers to handle administrative appeals probably will go far toward improving the quality and speed of administrative decisions. Lately, with the plethora of Civil Rights, Civil Service, and Departmental Appeals, the need for professional and neutral examiners has become very apparent.

Present legislation has created processes of conflict resolution which are alternative to the courts. The obvious intent of the Legislature in establishing alternate processes is to allow citizens an inexpensive and expeditious avenue for resolving controversies, and where appropriate, bring to bear the expertise of an administrative agency. If the concept of administrative appeals is to become acceptable to the general population, decisions must be fair, reasonable, and timely.

This legislation creates an independent body of officers and an independent director but does not provide for any accountability. My feeling is that the Director and hearing officers should be accountable to a citizen committee of from three to five members

(with the Attorney General serving ex officio). The committee would provide general guidance to the Director and would provide annual evaluations of performance both of the program and the employees. The committee would make public reports on the effectiveness of the program and make recommendations for improvement.

It probably would be desirable for the hearing officers to be independent of any public employee union. Since such employees may not automatically be excluded from a bargaining unit, I suggest that the legislation be amended to include a provision that hearing officers are not eligible to become a part of a bargaining unit.

The legislation should specifically acknowledge that the hearing officers would not replace the hearing officers who hear agency level appeals taken through a union contract grievance procedure. Such an acknowledgment would help to avoid costly litigation at a later date.

Mandating the time period within which the hearing officer must report his findings after a hearing is an excellent idea. I personally believe, however, that this does not go far enough. It has been the experience of our Department that the longest delay in any administrative action is the pre-hearing period. I would suggest that the bill be amended to make it the policy of the Division to hold a hearing in any matter within 45 days of the filing of the complaint. This is not to require that the hearing be so held, but rather to encourage the timely handling of such matters.

Current practice in the Department of Higher Education is to make an electronic record of administrative hearings. If either litigant requires a stenographic transcript, it is available only at the expense of that party. This procedure does not interfere with the rights of litigants and does contain the cost of these proceedings. I believe that a similar provision should be incorporated in this legislation.

While the quality of hearing officers' reports are bound to improve, the costs of hearings probably would be greater under the system proposed in this legislation. Presumably, the various agencies would terminate their existing hearing officers (many of whom are paid small salaries) and they would be replaced by highly paid employees of the Office of Administrative Procedure. In addition, there would have to be retained a number of court reporters (or contract out the jobs) and clerical people to handle the preparation of reports. Presumably too, a high level clerk would have to be hired to keep track of the heavy case load of the office.

There still would need to be people existing at the departments to review exceptions and objections to the reports of the hearing officer and to prepare the decision of the department head. There-

fore, in departments such as the Department of Higher Education (where there are no persons specifically serving as hearing officers), there would be few manpower savings.

I believe the merits of this proposal far outweigh the relatively minimal cost increases, however, and strongly support its implementation through the passage of this legislation.

If you desire any further information on my views regarding this legislation, please do not hesitate to contact me.

Sincerely yours,

Ralph A. Dungan
Chancellor

JUN 27 1985

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