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COMMENT

NOTE

FINDING MIDDLE GROUND: OREGON EXPERIMENTS WITH A CENTRAL HEARING PANEL FOR CONTESTED CASE PROCEEDINGS

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I. INTRODUCTION

After twenty years of rejecting similar proposals, the 1997 Oregon Legislative Assembly passed a bill that would have created an independent central hearing panel for contested case hearings conducted by state agencies.[1] Because of concerns expressed by state agencies and the Attorney General's office, the Governor vetoed the 1997 bill but pledged to work on a consensus bill for the next legislative session.[2] After extensive efforts by a work group appointed by the Governor, this consensus was achieved. House Bill (H.B.) 2525 was introduced during the 1999 legislative session to implement the proposed compromise. Both chambers of the Legislative Assembly eventually passed H.B. 2525, and the Governor signed it into law.[3] Although it reflects many significant changes from the 1997 proposal, H.B. 2525 nevertheless contains the two principal elements of a strong central hearing panel: (1) all state agencies will be required to use hearing officers from the panel unless specifically exempted by law,[4] and (2) protections are afforded to factual determina-

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1. H.B. 2948, 69th Leg. (Or. 1997). Because it was vetoed, H.B. 2948 was not assigned a chapter number in the 1997 Oregon Laws.

2. *See* Governor John Kitzhaber, Veto Message, H.B. 2948, 69th Leg. (Or. Aug. 15, 1997) [hereinafter H.B. 2948 Veto Message].

3. Governor Kitzhaber signed into law H.B. 2525 on July 22, 1999. *See id.* Because a sunset clause made the law temporary, *see* 1999 Or. Laws ch. 849, § 214, the law was inserted in the 1999 edition of Oregon Revised Statutes (ORS) as a note, and the new sections created by the law were not codified. *See* Thomas G. Clifford, *Preface to* OR. REV. STAT. (1997) (explaining the reasoning for laws not codified in Oregon Revised Statutes).

4. *See* 1999 Or. Laws ch. 849, § 9.

tions made by hearing officers from the panel.[5]

House Bill 2525 is probably the most significant modification to Oregon's Administrative Procedures Act (APA) that has been made since the law was adopted in 1957.[6] State agencies that are required to use hearing officers from the panel will be subject to requirements and limitations that substantially impact the manner in which agency orders are made. The decisions of hearing officers, which agencies previously could reject almost without reason, receive new weight. Winning factual disputes at the hearing level will become crucial to both the agency and the parties to the hearing.[7] New rules relating to *ex parte* contacts will govern hearings conducted by panel hearing officers, and casual communications between hearing officers and agency staff relating to pending proceedings will become a thing of the past.[8]

In recognition of the magnitude of the changes H.B. 2525 makes to the APA, the legislature attached a sunset clause to the bill that repeals the law in 2004.[9] However, based on strong legislative support for the bill[10] and other states' experiences with central hearing panels, agencies and practitioners likely will be dealing with a central hearing panel long after 2004.

Part II of this Article looks at the role of the hearing officer in contested case hearings under federal and state APAs. Part III considers some of the arguments made for and against the use of central hearing panels. Part IV briefly reviews the experience of other states with central hearing panels and examines the two proposed model acts for central hearing panels. Part V gives a short history of the many legislative proposals the Oregon Legislative Assembly considered before 1999. Part VI discusses the process by which H.B. 2525 came into being. Part VII con-

5. *See id.* § 12.

6. *See* OR. REV. STAT. §§ 183.310- 550 (1999).

7. This Article preserves the distinction found in Oregon's APA between "agencies" and "parties." Agencies are not "parties" in contested case proceedings. *See* OR. REV. STAT. § 183.310(6). House Bill 2525, while significantly changing the role of the hearing officer, does not turn a contested case proceeding into a trial. *See* 1999 Or. Laws ch. 849, § 3. Hearing officers still conduct proceedings on behalf of agencies; agencies are not "parties" to the proceeding; and agencies may not appeal the hearing officer's decision. *See id.* § 12.

8. *See* 1999 Or. Laws ch. 849, § 20.

9. *See* 1999 Or. Laws ch. 849, § 214.

10. *See infra* Part IVB (discussing support for the bill).

tains a discussion of the more significant provisions of that bill. Part VIII considers possible future developments for the central hearing panel in Oregon. Part IX contains some brief concluding remarks.

House Bill 2525 was not an "average" bill, nor was the process by which it became law typical of the procedure by which most bills become law. But the history of H.B. 2525 could serve as a model for the process by which proposals for major changes in basic laws should be considered. Dedicated and knowledgeable people carefully scrutinized the bill's language. The participants worked in good faith to formulate policies that best advanced the interests of the people of the State of Oregon, as each of those participants perceived those interests. They identified points of significant dispute early, and their discussions focused on those points. They compromised. The process resulted in a product that all of the participants supported.[11]

II. THE ROLE OF THE HEARING OFFICER UNDER THE APA

The role assigned to the hearing officer under the APA has been in dispute since federal and state APAs were first enacted.[12] In the 1958 Edition of his *Administrative Law Treatise*,[13] Professor Kenneth Culp Davis devoted a long section to "the status of examiners" (as hearing officers were then commonly known). He posed the following question:

> Should the examiner have a position approaching in prestige that of a federal district judge, with life tenure, appointment by the President with the consent of the Senate, independence from the agency, a more dignified title such as "administrative judge," and a salary comparable to or above that of agency heads? Or should the examiner in some or all of these respects be treated as a subordinate of the agency?[14]

The answer to this question in 1958 seemed clear:

> The groups that advocate an independence of examiners resembling that of judges seem to give inadequate weight to the

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11 This does not mean, of course, the bill was universally loved. *See infra* Part V (discussing opposition to the bill).

12. The federal APA is codified at 5 U.S.C. §§ 500-596. Oregon's APA is found at ORS sections 183.310 to 183.550.

13. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958) § 10.05, at 26.

14. *Id.*

> continued responsibility of the agencies for carrying out the programs assigned to them by Congress. . . . To exalt the examiner to a position equal to or above that of the agency and to make him altogether independent of the agency would be clearly incompatible with the examiners' necessarily subordinate functions and with the agency's continued responsibility.[15]

When Oregon adopted its version of the APA in 1957, the law lacked any significant reference to the hearing officers who would conduct contested case hearings on behalf of the agencies.[16] The law unambiguously gave the agency full authority to make the final decision in contested case proceedings.[17] Some agency heads, boards, and commissions personally conducted the hearing.[18] More often, agencies designated an employee to act as hearing officer to gather the facts and to prepare a proposed order for the agency. Agencies that conducted a large number of hearings employed people whose primary job duties consisted of preparing for and presiding over contested case proceedings. These employees sometimes were referred to as "examiners,"[19] "referees,"[20] or "hearing officers."[21] There was little doubt about their role. They gathered information on behalf of the agency and made proposals based on the facts and the law. When issuing the final order, the agency was free to disregard the hearing officer's proposal altogether as long as the final order met the APA's standard for judicial review.[22]

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15. *Id.* § 10.06, at 35.

16. *See generally* 1957 Or. Laws ch. 717.

17. *See id.* § 10 (indicating that the agency must give the party an opportunity to file exceptions and present arguments "to the officials who are to render the decision" if a majority of those officers have not heard or read the evidence).

18. This is still the practice of the Real Estate Commissioner. *See Hearing on H.B. 2525 Before the House Judiciary Comm. on Civil Law*, 70th Legis. (Or. 1999) (statement of Genoa Ingram, Oregon Association of Realtors).

19. *See, e.g.*, OR. REV. STAT. § 466.185(3) (1997) (concerning the Department of Environmental Quality).

20. *See, e.g., id.* § 657.270 (1997) (concerning the Employment Department).

21. *See, e.g., id.* § 527.662(15) (1997) (concerning the Department of Forestry).

22. The APA standard of review for factual determinations is the substantial evidence test. OR. REV. STAT. § 183.482. When Oregon adopted its APA in 1957, the law allowed a court to overturn the agency's order if the court found the order to be "erroneous." 1957 Or. Laws ch. 717, § 12(7). The Oregon Supreme Court interpreted the 1957 law as being the equivalent to the substantial evidence test. *Application of Bay*, 233 Or. 601, 378 P.2d 558 (1963). Later amendments to the APA codified this holding. 1971 Or. Laws ch. 734, § 18; 1975 Or. Laws ch. 759, § 14.

In Oregon, the debate over the establishment of a central hearing panel has returned repeatedly to the issues identified by Professor Davis in his 1958 treatise. Proponents of the concept have argued that hearing officers should perform a role in the process that resembles the judge's role in a trial, a role that is fundamentally inconsistent with employment of the hearing officer by the agency conducting the hearing.[23] Opponents have argued that, consistent with Professor Davis' conclusions, such a role undermines the agency's policy-making function.[24] But the trend since 1958 clearly has been toward an increased "judicialization" of the administrative hearing process.[25] House Bill 2525, as enacted, represents a compromise designed to give the hearing officer more independence than is currently available, while preserving the agency's role in establishing policy for the implementation of the laws administered by the agency.

III. ARGUMENTS FOR AND AGAINST CENTRAL HEARING PANELS

A. Arguments in Favor of Central Hearing Panels

A review of the extensive literature on central hearing panels highlights certain arguments that reappear repeatedly in discussions relating to their use.[26] A brief synopsis of these argu-

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23. John L. Kane, Jr., *Public Perceptions of Justice: Judicial Independence and Accountability*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 203, 207 (1997)

> In the briefest and perhaps most indelicate way of expressing my view, I think that having the agency or department that litigates before an administrative law judge exercise the power to appoint, promote or assign is the same as having the fox guard the hen house. Even the most benign fox can be expected to make supper every now and then

Id.

24. *See* DAVIS, *supra* note 13, at 35; *see also infra* Part II.B (outlining arguments relating to an agency's policy-making function).

25. *See generally* Frederick Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389 (1977).

26. The Journal of the National Association of Administrative Law Judges has printed many articles over the years relating to central hearings panels. As might be expected, proponents of such panels contribute most of the articles. *See, e.g.*, Gerald E. Roth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase "Judicialization" in Pennsylvania*, 16 J. NAT'L ASS'N ADMIN. L. JUDGES 221 (1996) (advocating a central panel system for Pennsylvania); Edwin L. Felter, Jr., *The Hidden Executive Branch Judiciary: Colorado's Central Panel Experience—Lessons for the Feds*, 14 J. NAT'L ASS'N ADMIN. L. JUDGES 99 (1994). The as-

ments is helpful in discussing the provisions of H.B. 2525.

1. The Fairness Argument

The principal argument advanced by proponents of central hearing panels relates to fairness. Proponents find a fundamental lack of justice in a system in which the hearing officer in a contested case proceeding is an agency employee. They argue that the agency is allowed to act as police officer, prosecutor, and judge, with the hearing process a mere rubber stamp for the agency staff's decisions.[27] Because a court will overturn the decision of the agency only upon a showing that there was no substantial evidence in the record to support the agency's decision, the proponents argue that allowing the agency to control the fact-finding portion of the proceedings gives the agency an unbeatable hand and leads to abuses of the agency's power over regulated individuals and businesses.[28]

Opponents respond that this analysis reflects a fundamental misunderstanding of the functions of the agency and of the hearing officer. As reflected in the excerpts from Professor Davis in the previous section, hearing officers were never intended to be independent adjudicators under the APA. Under the APA, in both its federal and state incarnations, the agency *alone* was granted the authority to make the decisions on the law and the facts of a dispute before the agency.[29] A court that is asked to review the agency's final order would give the agency only limited deference with respect to the agency's findings of law, thereby preserving the court's traditional role in determin-

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sociation has called for the creation of a central hearing panel for federal agencies. *See Statement of the Association of Administrative Law Judges, Inc.*, 14 J NAT'L ASS'N ADMIN. L. JUDGES 137, 151-52 (1994).

27. State Representative Lane Shetterly used the "police officer, prosecutor and judge" argument in his floor speech in favor of the passage of H.B. 2525. *See Debate on House Bill 2525 Before the Oregon House of Representatives*, 70th Leg. (June 16, 1999) (statement of Representative Lane Shetterly), audio recording *available at* <http://www.leg.state.or.us/lstn/>

28. *See, e.g., Hearing on H.B. 2948 Before the Subcomm. on Civil Law of the House Judiciary Comm.*, 69th Legis. (Or. Mar. 19, 1997) [hereinafter *Hearing*] (testimony of John DiLorenzo, Jr., Oregon Litigation Reform Coalition) (speaking in support of H.B. 2948 by arguing that there will almost always be some substantial evidence in the record to support the order issued by the agency, and that limiting the ability of the agency to modify the hearing officer's findings of fact would merely give the losing party a "fighting chance")

29. *See generally* 5 U.S.C. §§ 500-596; OR. REV. STAT. §§ 185.310-.550

ing the meaning of the law. With respect to the facts, the reviewing court would overturn the agency determination only if it found no substantial evidence to support the agency's determination.[30] In most cases, the substantial evidence rule operated as the only limit on the agency's authority to determine the facts in the matter.[31]

The same arguments apply to *ex parte* contacts. Proponents of central hearing panels argue that there should be strict separation between the staff of an agency and the hearing officers. Opponents argue that limiting contacts between staff and the hearing officer makes no sense in light of the hearing officer's role.[32]

The argument relating to fairness of the current arrangement focuses on the hearing officer's proper role. Proponents of central hearing panels believe that the hearing officer *should* be more like a judge.[33] They argue that an agency's ability to make the factual determinations, coupled with the substantial evidence standard of review, gives the agency the power to make those decisions without fear of being reversed by the appellate courts. With an independent hearing officer, and some protection for the hearing officer's determinations, the proponents foresee a situation in which the agency cannot manipulate the fact-finding process to reach a desired outcome.[34]

2. *The Appearance of Fairness Argument*

Proponents of central hearing panels argue that even if the use of agency employees as hearing officers does not result in actual unfairness, the use of those employees results in apparent unfairness with consequent loss of public trust in the process.[35]

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30. *See* OR. REV. STAT. § 183.482(8)(c) (1999).

31. *See, e.g.*, Dach v. Employment Div., 574 P.2d 684, 686 (1978) (noting that in the context of agency orders, "[w]e only review for errors of law and substantial evidence. In that capacity, it is sufficient to say that we do not weigh the evidence.").

32. *See* discussion *infra* Part VII.

33. For a discussion of the differences between hearing officers and judges, see Thomas G. Welshko, *Judges in the Executive Branch and Judges in the Judicial Branch: Similar, Yet Distinct*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 73 (1998).

34. *See, e.g.*, Christopher B. McNeil, *Due Process and the Ohio Administrative Procedure Act: The Central Panel Proposal*, 23 OHIO N.U. L. REV. 783, 812-13 (1997).

35. In his veto message for H.B. 2948, Governor Kitzhaber stated: "Proponents of this measure have raised some criticisms of state administrative proceedings. This includes a perception that hearing officers, if employed by agencies, have a built-in bias

Under this argument, a member of the public who appears before a hearing officer is presumed to anticipate receiving something akin to a trial conducted by a judicial branch judge. Upon discovering that the hearing officer is an agency employee, the person instinctively assumes that a fair hearing will not be forthcoming.[36]

Opponents of central hearing panels argue that any problem of perception should be addressed through additional information to the party about the purpose of the hearing and the role of the hearing officer.[37] In essence, the opponents' argument is that the solution to the misperception is to educate the parties about the true function of the hearing, and that the misperception is not grounds for converting the proceeding to match a party's mistaken belief that the purpose of the hearing is an independent determination of the correctness of the agency's action.[38] In Oregon, this argument may be undercut by the fact that Oregon law already mandates education about the true function of the hearing in the notice that must be given to the parties to a contested case: This notice requires a statement of:

> The title and function of the person presiding at the hearing with respect to the decision process, including, but not limited to, the manner in which the testimony and evidence taken by the person presiding at the hearing are reviewed, the effect of that person's determination, who makes the final determina-

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and cannot be fair. I do not believe that this accusation is true across the board or in most circumstances." H.B. 2948 Veto Message, *supra* note 2.

36. *See, e.g., Hearing, supra* note 28 (testimony of W. Michael Gillette, Associate Justice of the Oregon Supreme Court) (testifying in support of H.B. 2948). While Justice Gillette was reluctant to become involved in the political arguments surrounding the central hearing panel proposals, he did indicate that H.B. 2948 was needed "by definition" if a person believed that the appearance of fairness in administrative hearings would be enhanced by facts found by someone who is not tied by affiliation or employment to the agency. *See id.*

37. *See id.* (testimony of Henry "Chip" Lazenby, Governor's Legal Counsel) (speaking in opposition to H.B. 2948). Lazenby argued that many of the problems perceived by the proponents of central hearing panels arose out of a "misperception" of the hearing officers' roles. He argued that H.B. 2948 would turn the hearing officer into the decision maker for the agency, thereby usurping the role of the agency head.

38. Any misperception that a contested case hearing is an independent determination of the correctness of an agency's action will continue after the implementation of H.B. 2525. Except in those few cases where the hearing officer issues the final order on behalf of the agency, the proposed order of a hearing officer from the central hearing panel still will be only a proposed order, with some protection for the findings of historical fact made by the hearing officer. *See infra* Part VII.

> tion on behalf of the agency, whether the person presiding at the hearing is or is not an employee, officer or other representative of the agency and whether that person has the authority to make a final independent determination.[39]

Other commentators have argued that the problem of perceived unfairness can be addressed without the creation of a central hearing panel by requiring a strict separation of the investigatory, advocacy, and adjudication functions of the agency.[40]

3. The Efficiency Argument

Proponents of a central hearing panel argue that the panel would produce efficiency in the use of hearing officers. Mid-sized agencies that employ a few hearing officers on a full-time basis may experience slow periods during which the hearing officers are not fully utilized. The central hearing panel should be able to make maximum use of the hearing officers employed by the panel because the large number of cases the panel handles should allow for better planning. In addition, the central hearing panel will allow for standardization of services and quality control features that would be difficult to implement in an agency with one or two hearing officers.[41]

While some observers believe that central hearing panels result in increased efficiency and in expediting the hearing process,[42] that conclusion is questionable.[43] Further, the additional cost of setting up a new bureaucracy must be offset against any savings attributed to efficiency realized by the panel.

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39. OR. REV. STAT. § 183.413(2)(e)

40. *See, e.g.*, John Aycock McLendon, Jr., *Contested Case Hearings Under the North Carolina Administrative Procedure Act: 1985 Rewrite Contains Dual System of Administrative Adjudication*, 64 N.C. L. REV. 852 (1986).

41. *See* L. Felton, Jr., *Administrative Adjudication Total Quality Management: The Only Way to Reduce Costs and Delays Without Sacrificing Due Process*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 5, 6 (1995) ("A central hearing panel that functions like a successful private business, employing a total quality approach, offers the most viable pathway to reducing costs and delays in an adjudication system")

42. *See* Julian Mann, III, *Striving for Efficiency in Administrative Litigation: North Carolina's Office of Administrative Hearings*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 151 (1995)

43. *See* Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1186-87 (1992) ("On the whole, the case for an administrative judge corps, based on efficiency grounds, seems unpersuasive . . . In my opinion, an expanded central panel would entail significant delays, extra costs, loss of experienced judges, and other practical difficulties.)"

4. The Uniform Procedures and Standards Argument

Proponents argue that a central hearing panel will produce more uniform procedures and standards for hearings. This is particularly true in those states in which the central hearing panel has authority to adopt rules for the conduct of hearings.[44] As noted above, hearings are sometimes conducted by employees as an add-on to their "real" jobs. Some department heads, boards, and commissions perform this function, in addition to establishing policy and supervising administration of the agency. Proponents of central hearing panels argue that the panels allow better supervision of the performance of the hearing officers and thereby produce more professional and efficient hearing officers.[45]

5. The Professionalism Argument

Many central hearing panels have adopted a code of ethics for the hearing officers on the panel.[46] Proponents of central hearing panels argue that, given the haphazard manner in which some agencies select individuals to conduct case hearings, panel hearing officers will provide fairer and more consistent adjudication if they are subject to a code of ethics.[47] Some states that have adopted central hearing panels use performance evaluations in an attempt to improve the services of panel hearing officers.[48] The proponents of central hearing panels observe that these types of programs are difficult to implement when hearing

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44. *See* CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 5.24, at 68-69 (2d. ed., 1997).

45. *See* Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589, 609-11 (1993) (discussing the state central hearing panels' use of performance evaluations).

46. *See* Alan Hoberg, *Administrative Hearings: State Central Hearing Panels in the 1990s*, 46 ADMIN. L. REV. 75 (1994).

47. *See, e.g.*, Marvin F. Kittrell, *ALJs in South Carolina*, S.C. L. REV., June 1996, at 42, 43 (noting that under the South Carolina central hearing panel, "ALJs are also subject to the Code of Judicial Conduct, which mandates complete impartiality in the decision-making process and provides a further advantage over the former system in which hearing officers were employees of or were hired by the agency"). *See also* Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929 (1990) (discussing the role of central hearing panels in establishing codes of conduct for administrative law judges).

48. *See* Malcolm Rich, *Adopting the Central Panel System: A Study of Seven States*, 65 JUDICATURE 246, 265 (1981).

officers are employed by the state agencies they serve.

B. Arguments in Opposition to Central Hearing Panels

State agencies frequently oppose the use of central hearing panels. To a degree, this can be attributed to comfort with the status quo. But agencies also advance more substantive arguments against the use of central hearing panels.

1. The Agency's Policymaking Role

One argument made in opposition relates to an agency's obligation to establish policy for the implementation of laws. Under well-established law, the legislature may delegate power to state agencies to make rules for the implementation of laws.[49] The policies adopted under this delegation of power often affect matters of statewide concern, and the laws governing the appointment of the people making these decisions, including laws requiring Senate confirmation of the appointees, are designed largely to provide for political accountability for the decisions.

Opponents of central hearing panels argue that the use of independent hearing officers would transfer part of this authority to hearing officers who do not have the same level of accountability as the agencies charged with administering the law.[50] Agency heads who testified before the 1989 Commission on Administrative Hearings[51] clearly were concerned about this issue:

> Other witnesses responded that a principal need in the contested case process is for hearing officers to render decisions consistent with legally adopted agency policy. These witnesses, many of them agency heads, expressed concern that hearing officers, free of agency control, would render decisions undercutting their prerogatives to set agency priorities and decide agency policies. Their view was that politically appointed administrators, not hearing officers, are account-

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49. *See, e.g., Oregon Ass'n of Rehabilitation Professionals in Private Sector v. Department of Ins. and Finance*, 99 Or. App. 613, 783 P.2d 1014 (1989) (APA rulemaking procedures were adequate safeguard to sustain the exercise by agency of delegated legislative authority)

50. *See* Christopher B. McNeil, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (1998)

51. *See* discussion *infra* Part V.

the report of the 1989 Commission on Administrative Hearings (discussed in Part V):

> Many of the agency representatives who testified before the commission indicated that their agencies are highly dependent on the specialized knowledge of hearing officers regarding such matters as specific administrative rules and regulations, medical terminology, regulatory schemes and substantive legal knowledge, such as a knowledge of labor law. These agency representatives believe agency hearings would be far less efficient without the benefit of the expertise of the hearing officers employed by each agency.[56]

Proponents of central hearing panels argue that the expertise argument merely highlights the problem with the present system. These proponents suggest that reliance on hearing officers who preside in only one type of case results in the cozy relationship between agency and hearing officer that gives rise to perceptions of unfairness.[57] This problem arises even in states with established central hearing panels because there is a natural tendency to assign the same hearing officers to the same type of case (frequently the same types of cases the hearing officer presided over before the hearing panel came into existence). As one commentator notes: "According to some proponents of central pools, ALJ administrative law judge independence depends upon ensuring the ALJs are capable of hearing all kinds of cases. If the system assigns ALJs exclusively to one agency, it risks a bias among its ALJs that the central panel was devised to eliminate."[58]

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56. COMMISSION REPORT, *supra* note 52, at 6; *see also* Norman Zankel, *A Unified Corps of Federal Administrative Law Judges is not Needed,* 6 W. NEW ENG. L. REV. 723, 736 (1984) (arguing that central panels frustrate the goal of developing and maintaining a high level of expertise in agencies).

57. *See* Duane R. Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 JUDICATURE 257, 261 (1981). Harves argues that a close relationship between the agency and the hearing officer can result in a too-casual approach to preceedings, stating:

> An obvious problem with having the same persons conducting similar type cases is that "familiarity breeds contempt." When the same persons from the same agency appear month after month before the same examiner, the agency may come to rely on the expertise of the examiner and fail to make an adequate case itself, assuming that the examiner will "fill in the gaps" when writing the report.

Id.

58. Rich, *supra* note 48, at 252-53.

able for the direction of the agency.[52]

While there may be good basis for this argument in states that adopted the strongest forms of central hearing panels (i.e., panels with authority to make final orders for agencies),[53] this concern is less justified when only the factual determinations made by a hearing officer are afforded protection. It seems apparent that policies should not be made by manipulating factual findings in individual cases. The 1989 Commission on Administrative Hearings recognized this point, noting as follows:

> Agency heads charged with administering a program or policy are responsible for insuring that the agency's orders correctly implement their policies. On the other hand, an administrative hearing litigant is entitled to a decision in which the facts, established in an unbiased proceeding, are applied to the policy and law in a consistent manner.[54]

The argument relating to the agency's policymaking obligations surfaced on several occasions during the discussions that led to the final language of H.B. 2525. Some of the most intense discussions about the language of that bill centered on the need to preserve an agency's legitimate role in establishing policy for laws subject to its administration.[55]

2. *The Expertise Argument*

Many state agencies oppose central hearing panels because of a fear that the hearing officers assigned from the panel will lack expertise in the subject matter of the laws administered by the agency. This was a principal argument in opposition cited in

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52. REPORT OF THE COMMISSION ON ADMINISTRATIVE HEARINGS TO THE SIXTY-FIFTH LEGISLATIVE ASSEMBLY, THE CHIEF JUSTICE OF THE OREGON SUPREME COURT AND THE GOVERNOR OF THE STATE OF OREGON 7-8 (Apr. 21, 1989) [hereinafter COMMISSION REPORT].

53. *See* discussion *infra* Part IV (relating to hearing panels in other states)

54. COMMISSION REPORT, *supra* note 52, at 6.

55. Most supporters of central hearing panels recognize the need for preserving the agency's role in establishing policy. R. Terrence Harders recently wrote:

> A general disagreement on statutory interpretation between top agency officials and the adjudicators who make decisions for the agency could, if the adjudicators were truly independent, block agency policy-making without review in the judicial branch. The different place and overall role of administrative adjudicators from that of judges in the judicial branch are what make the contemplation of independence and accountability a thornier issue

R. Terrence Harders, *Striking a Balance: Administrative Law Judge Independence and Accountability*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 5 (1999).

Proponents also assert that agency expertise in the regulated area should be introduced through the hearing process, not through reliance on the hearing officer knowing the "right" answer in advance. These proponents see a lack of fairness in a hearing in which the hearing officer brings preconceived notions with respect to technical and scientific issues that are to be decided in the hearing.[59]

3. *Cost*

Any proposal to create an independent central hearing panel will involve substantial expense, even taking into account any savings that might be realized through increased efficiency. In 1997, the Legislative Fiscal Office estimated that it would cost approximately $1.6 million for the Office of Administrative Hearings, proposed by H.B. 2948, to operate for the first two years.[60] The Legislative Assembly's failure to provide funding for that expense was the Governor's principal reason for vetoing the bill.[61] Other states that have rejected proposals for central hearing panels have identified cost as a factor in their decisions.[62]

IV. CENTRAL HEARING PANELS IN OTHER STATES; MODEL ACTS

A. *Central Hearing Panels in Other States*

At least twenty other states have some form of a central

59. *See* John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. NAT'L ASS'N ADMIN. L. JUDGES 5, 67 (1994).

> The most juridically acceptable method of assimilating agency technical or scientific expertise is through the hearing process. While this method will limit the opportunity of the commission or agency head to change the recommended result, it nevertheless will put on the table all factors considered in arriving at a fair and impartial decision. . . . Expertise should come into play through the hearing process; opportunity for rebuttal by the litigants is logically handled through contrary testimony of other experts

60. H.B. 2948, 69th Leg. (1997). House Bill 2948 contained an appropriation from the General Fund for this amount. *See id.* § 14.

61. H.B. 2948 Veto Message, *supra* note 2.

62. A New York Bar Association task force cited the cost of the new bureaucracy as one of the principal reasons for recommending against adoption of a central hearing panel. *See* REPORT OF THE TASK FORCE ON ADMINISTRATIVE ADJUDICATION II (July 14, 1988), *quoted in* KOCH, *supra* note 44, § 5.24, at 67.

hearing panel.[63] California was the first state to provide for a central hearing panel, establishing one in 1945 under the law creating the state's APA.[64] Twenty years elapsed before the next state, Missouri, opted for a central hearing panel. Thereafter, the number of states moving to central hearing panels has increased steadily.[65]

As expected, the states have taken a variety of approaches to establishing central hearing panels. Some states require a greater number of agencies to use hearing officers from the central panel than do other states.[66] The organizational structure of the panel also varies. Some panels are free-standing independent offices. Others panels are located within an existing agency.[67] Some states require hearing officers to be members of the state bar. The central hearing panel may or may not have its own rules of procedure for the conduct of hearings.

Perhaps the most interesting variations between the different state schemes lie in the protections to be given to the decisions of the hearing officers from the panel. In most states, the agency head retains the ability to change the hearing officer's proposed order to the same extent that the agency head could do so before implementation of the central hearing panel.[68] However, in a few states, the laws establishing the central panel impose significant limitations on the agencies' ability to modify the

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63. *See* KOCH, supra *note* 44, § 5 24, at 67 (noting that the following states have some form of central hearing panel: California (1945), Missouri (1965), Massachusetts (1974), Minnesota (1974), Tennessee (1974), Florida (1975), Colorado (1976), Wisconsin (1978), New Jersey (1979), Washington (1982), Iowa (1986), North Carolina (1986), Texas (1992), South Dakota (1993), South Carolina (1994), Hawaii (1994), Georgia (1994)), and Louisiana (1995).

64 For a discussion of California's central panel, see Norman Abrams, *Administrative Law Judge Systems: The California View*, 29 ADMIN. L. REV 487 (1977). Other information relating to the creation of California's central panel can be found in John Clarkson, *The History of the California Administrative Procedure Act*, 15 HASTINGS L.J. 237 (1964)

65. *See* discussion *supra* note 63.

66. For a comparison of the jurisdiction exercised by central hearing panels in different states, see Hoberg, *supra* note 46, at 78-80.

67. It has been noted that there may be protections, both political and budgetary, in housing a central hearing panel within an existing agency. *See id.* at 80.

68. *See, e.g.*, CAL. GOV'T CODE 11517(c)(2)(E) (West 2000) (providing that after receiving the proposed order from the panel hearing officer, the agency may "[r]eject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement if the parties, with or without taking additional evidence")

earing officers' proposed orders.[69] For instance, in North Caro-na the agency may modify the decision of the panel hearing of-cer, but "shall state in its decision or order the specific reasons hy it did not adopt the administrative law judge's recom-ended decision."[70] In Texas, the law that established the cen-al hearing panel initially provided that the agency could reject ne decision of the hearing officer "only for reasons of policy."[71] lot surprisingly, this standard left substantial leeway for dis-utes about the scope of the agency's authority to modify the earing officer's decisions.[72] In 1997, the Texas Legislative As-embly amended the law to allow modifications of conclusions of aw, but not determinations of facts.[73]

Some states have adopted provisions that govern the finality f panel hearing officers based on the nature of the agency. For stance, in South Carolina an agency that is headed by a board r commission has authority to review and modify the decision f the hearing officer.[74] If, however, the agency is headed by a ngle director or administrator, the hearing officer's decision is nal.[75] Occupational licensing boards conduct their own hear-gs, but the board's decision may be appealed to the central

69. For a discussion of some of the different provisions limiting an agency's ability modify an order of a hearing officer from a central hearing panel, see L. Harold evinson, *The Central Panel System: A Framework That Separates ALJs from Admin-rative Agencies*, 65 JUDICATURE 236 (1981).

70. N.C. GEN. STAT. § 150B-36(b) (1999). Since 1993, there have been efforts to nend the North Carolina law to require that agencies accept the central panel's find-gs of fact in an administrative proceeding if the findings of fact are supported by sub-antial evidence in the record. *See* Michael Asimow, *News from the States,* ADMIN. & EG. L. NEWS, Summer 1998, at 8-9

71. 1991 Tex. Gen. Laws ch. 591, § 5.

72. For a discussion of the interpretation of "for reasons of policy" standard in exas, see F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings Conclusions of an Administrative Law Judge?,* 50 BAYLOR L. REV. 63 (1999); F. ott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclu-ons of an Administrative Law Judge?: Part Two,* 51 BAYLOR L. REV. 63 (1999) ereinafter McCown & Leo, *Part Two*].

73. 1999 TEX. GOV'T CODE ANN. § 2001.058(e). McCown and Leo argue that the alysis is the same, indicating that the new version of the statute "merely clarifies for dministrative practitioners what the legislature meant to convey in the original ver-on: the agency has authority to change incorrect legal decisions, but adjudicative-fact cisions belong to the ALJ." McCown & Leo, *Part Two, supra* note 72, at 78.

74. S.C. CODE ANN. § 1-23-610(A) (Law Co-op. 1999). For a complete review of e provisions of the South Carolina law, see William B. Swent, *South Carolina's ALJ: entral Panel, Administrative Court, or a Little of Both?,* 48 S.C. L. REV. 1 (1996).

75. *See* S.C. CODE ANN. § 1-23-610(B).

hearing panel.[76] In these cases, the panel hearing officer acts as an intermediate appellate body and reviews the record made by the licensing board.[77]

At least one state has taken the final step and made all decisions of panel hearing officers final. In 1995, Louisiana not only adopted a central hearing panel, but provided that "the administrative law judge shall issue the final decision or order . . . and the agency shall have no authority to override such decision or order."[78] Even more remarkable is that an agency is not allowed to appeal the decision of the hearing officer.[79] As one commentator notes, this "extreme decisional independence"[80] means that "one could reasonably conclude that the Legislature has stripped agencies of all policymaking authority through adjudication and transferred it to the state's ALJs, whose judgment must be so valued that the courts must not even see any competing vision offered by the agencies."[81]

In some states, the judicial branch has imposed limits on the agency's discretion to disregard findings based on credibility made by a panel hearing officer. In Maryland, the courts have adopted the federal standard for reviewing agency determinations that conflict with those findings of hearing officers that are based on witness credibility.[82] The federal standard, enunciated in *Universal Camera Corp. v. N.L.R.B.*,[83] preserves the substantial evidence standard for review of an agency's order, but holds that agency findings that conflict with a hearing officer's findings based on witness credibility will be considered less "substantial" for purposes of the substantial evidence standard of review.[84] It has been proposed that this standard be adopted by law for California's APA.[85]

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76. *See* Swent, *supra* note 74, at 13.

77. *Id.* at 13.

78. LA. REV. STAT. ANN. 49:992(B)(2) (West Supp. 2000).

79. *See* Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedures Act*, 59 LA. L. REV. 431 (1999).

80. *Id.* at 431.

81. *Id.* at 433, 459.

82. *See* Anderson v. Department of Pub. Safety and Correctional Serv., 623 A.2d 198 (Md. 1993).

83. 340 U.S. 474 (1951).

84. *See id.* at 496-98.

85. *See* Asimow, *supra* note 43, at 1116-19.

None of the states that have adopted central hearing panels have abandoned them subsequently. In writing about the California experience since 1945, Michael Asimow indicates that "[b]y general consensus, California's central panel system has worked well, as have the systems in other states."[86] In fact, the general tendency in most states with central hearing panels has been to increase the jurisdiction of the panel over time.[87] New literature on central hearing panels suggests that the trend toward adoption of central hearing panels may have reached "critical mass." Professor Asimow indicates in a recent article that he now feels that the extension of the central hearing panel to other states, and eventually to the government, is "almost inevitable."[88]

B. *Model State Administrative Procedure Act (1981)*

The 1961 Revised Model State Administrative Procedure Act,[89] issued by the National Conference of Commissioners on Uniform State Laws, contained no provisions for the creation of a central hearing panel. By 1981, several states had adopted central hearing panels, and the new revision of the Model Act contained an optional provision for the creation of an Office of Administrative Hearings.[90] The 1981 Model Act provided that the office could be either a free-standing entity, with a director appointed by the Governor, or could be established within another department of the executive branch.[91]

The Revised Model State Administrative Procedure Act took a conservative approach to central hearing panels. The Commissioners' Comment on the rule specifically indicates that the use of a hearing officer from the Office of Administrative Hearings does not change the agency head's authority to review

86. *Id.* at 1182.

87. *See* Sheila Bailey Taylor, *The Growth and Development of a Centralized Administrative Hearing Process in Texas*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 113 (1997).

88. Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157 (2000).

89. UNIF. LAW COMM'RS MODEL STATE ADMIN. PROCEDURE ACT (revised 1961), 15 U.L.A. 147 (1990).

90. *See* UNIF. LAW COMM'RS MODEL STATE ADMIN. PROCEDURE ACT § 4-301 (amended 1981), 15 U.L.A. 98 (1990).

91. *Id.*

the hearing officer's order.[92]

C. American Bar Association Model Act for Central Hearing Panels

In 1997, the House of Delegates of the American Bar Association (ABA) unanimously adopted a "Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings)."[93] Under the ABA Model Act, an office of administrative hearings would be created as "an independent agency in the Executive Branch of State Government for the purpose of separating the adjudicatory function from the investigatory, prosecutory and policy-making functions of agencies in the Executive Branch."[94] A Chief Administrative Law Judge would be appointed, who would perform such tasks as establishing standards, providing continuing education programs, and adopting a code of conduct for administrative law judges.[95] The ABA Model Act provides three options for hiring hearing officers: (1) by the Governor, (2) by competitive examination, or (3) by the chief administrative law judge.[96] Hearing officers would have to be admitted to the practice of law.[97] The hearing officer would be given extensive power to control all aspects of the hearing.

With respect to the agency's ability to modify the hearing officer's decision, the ABA Model Act provides that an agency may not "modify, reverse or remand the proposed decision of the administrative law judge except for specified reasons in accordance with law."[98] This provision's meaning is unclear. The drafters attempted to provide statutory protection to the hearing officer's decision, but there is substantial ambiguity in the language prohibiting agency modification of a proposed order

92. "Since the administrative law judges are obviously not the agency head, they come within the requirements of Section 4-215(b), to the effect that a presiding officer who is not the agency head shall render an initial order." *Id.*

93. For a short discussion of the evolution of the ABA Model Act, see Ed Schoenbaum, *A Brief History of the Model Act to Create a State Central Hearing Agency*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 309 (1997).

94. ABA MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY, §§ 1-2 (1997).

95. *Id.* § 1-5.

96. *See id.* § 1-2(a).

97. *See id.* § 1-6

98. *Id.* § 1-11.

except for specified reasons in accordance with law." Must here be a specific law authorizing the modification? Or does he general authority of the agency under the state APA to odify proposed orders suffice? It will be interesting to see how ourts deal with this provision in the event one or more states dopt the ABA Model Act.

V. HISTORY OF LEGISLATIVE PROPOSALS IN OREGON BEFORE 1999

. *Proposals Prior to 1987*

During the 1980s, the Oregon Administrative Law Judges ssociation provided the impetus for the introduction of a series bills proposing the establishment of an "Administrative earings Office."[99] These bills contained substantially identical ovisions and called for a separate, independent office with a rector appointed by the Governor. The director would have ıd authority to establish rules for hearings conducted by hear- g officers from the panel.[100] Hearing officers would have to be embers of the Oregon State Bar or be able to show knowledge administrative law and procedure. The bills contemplated nending the APA to impose strict limits on *ex parte* contacts in ıy contested case proceeding.[101]

The bills introduced in 1983 and 1985 did not include provi- ons relating to agency modification of the hearing officer's ndings. The bill introduced in 1987 contained the first of such ovisions, with language indicating that "the agency shall not odify the hearing officer's findings except to the extent that it nds them not to be supported by evidence in the record."[102]

Because all of the bills introduced in the 1980s carried hefty ice tags, they suffered similar fates. The presiding officer of e chamber in which the bill was introduced referred the bill to e Ways and Means Committee, well-known in the corridors of e Capitol as the "black hole" into which legislation can disap- ear, never to be seen again. The bills received a hearing and

99. *See, e.g.*, H.B. 2544, 62d Leg. (Or. 1983); S.B. 310, 63d Leg. (Or. 1985); S.B. 9, 64th Leg. (Or. 1987).

100. *See* H.B. 2544; S.B. 310; S.B. 309.

101. *See id.*

102. S.B. 309, § 10.

possibly a work session, but none reached a vote on the floor of either chamber.

B. Commission on Administrative Hearings (1987-89)

Although the central hearing panel bill that was introduced in the 1987 legislative session died, the Legislative Assembly did pass a law establishing the Commission on Administrative Hearings.[103] The Legislative Assembly charged the commission with studying "the structures and procedures by which agencies conduct contested case proceedings, including matters relating to centralization."[104] It gave the commission two years to complete its work and submit a report to the 1989 Legislative Assembly.

The commission's report identified the principal arguments in support of and in opposition to a central hearing panel. After considering these arguments, the commission recommended a "go slow" approach with respect to a central hearing panel.[105] However, the commission also recommended many changes to the administrative hearing process; these suggestions eventually appeared in H.B. 2525. The commission proposed the adoption of strict rules barring *ex parte* contacts be adopted.[106] The commission also made a lengthy plea for a code of professional conduct for hearing officers.[107]

The commission's report addressed the issue of protections for the hearing officers' factual determinations. The commission eventually concluded that only credibility findings of hearing of-

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103. *See* H.B. 2304, 64th Leg., 1987 Or. Laws ch. 465. The members of the commission were Thomas Barkin, Representative Judy Bauman, Robert D. Durham, William Gary, Senator Jeannette Hamby, Fred Hansen, Joe Leahy, David G. Marcus, Larry Mylnechuk, Senator Frank Roberts, Cory Streisinger, Representative Tony Van Vliet, and Freddye Webb-Petett.

104. 1987 Or. Laws ch. 465, § 2(1).

105. *See* COMMISSION REPORT, *supra* note 52, at 13. The report provides in part:

> The Commission believes that improvements in the present administrative hearing system should be sought through smaller scale adjustments before more sweeping remedies are considered . . . If the Commission's recommendation for the promotion of impartiality of Oregon's hearing officers fails to have the desired effect, other more comprehensive proposals for change, including the creation of a central panel of hearing officers, should be further evaluated

Id.

106. *Id.* at 15.

107. *Id.* at 19-23.

s should be offered some protection.[108] In the process of hing that conclusion, the commission distinguished between erent types of factual determinations that would eventually n the basis of H.B. 2525's protections for determinations of torical fact" as opposed to "predictive facts." With respect ndings of "historical fact" (i.e., determinations of what did or not occur), the commission concluded that parties to the ing had the right to expect the hearing officer to make a de- n without direction from the agency head.[109] With respect to dictive facts" (i.e., predictions as to what will occur in the fu-), the commission determined that little or no protection was led.

None of the commission's proposals for reform were con- ed to proposed legislation for the 1991 legislative session. reason of this failure, the commission's "incremental" ap- ch was never really tested.

louse Bill 2325[110] *(1995)*

Many of the arguments surrounding central hearing panels raised again in 1995 in the context of a bill that proposed cal changes in the hearing process for orders issued by the artment of Revenue. During the lengthy hearings on H.B. , its opponents alleged a lack of fairness in the proceedings improper interference by the agency head in hearing officer sions. These hearings resulted in the passage of a law creat-

08 The report stated:

The commission believes that agencies should give considerable deference to he hearing officer's findings of fact, especially on credibility issues. If the gency overturns or revises the hearing officer's findings of historical fact, the gency should explain in its order the source of disagreement with the hear- ng officer and should have convincing reasons for rejecting a credibility as- essment.

9.

09. Quoting from the report:

The commission is concerned, based on the testimony of several witnesses efore the commission, that several years ago the impartiality of one or more earing officers for a state agency may have been compromised by directives rom agency supervisors. Especially with respect to historical facts, the ommission believes that some adjustments to the present system are appro- riate to ensure that the decision of the hearing officer is free of undue influ- nce and unnecessary pressure by an agency

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10. H.B. 2325, 68th Leg., 1995 Or. Laws ch. 650 (codified at ORS § 305.498)

ing a Tax Magistrate Division within the Oregon Tax Court.[111]

The Tax Magistrate Division is an interesting hybrid. As was the case with the central hearing panel bills, the cost of establishing a separate, independent office was a significant issue. The solution proposed by H.B. 2325 was to create a "Tax Magistrates Division" within the Oregon Tax Court.[112] Under the law as passed, a taxpayer dissatisfied with a decision of the Department of Revenue no longer seeks administrative review from the Department. Instead, the taxpayer appeals to the Tax Court, where a tax magistrate provides a hearing.[113] The Department is a party to the proceeding.[114] If no appeal is taken from the tax magistrate's decision, the decision becomes final and the Tax Court enters a judgment based on the tax magistrate's order.[115] If any party appeals, the Tax Court reviews it *de novo*.[116]

The statute requiring Tax Court *de novo* review predated the creation of the Tax Magistrate Division.[117] Because of this fact, the creation of the Tax Magistrate Division had no substantial impact on judicial resources. This would not be the case if *de novo* judicial review was provided for any significant number of agency orders that are currently subject to the substantial evidence standard of review.

The creation of the Tax Magistrate Division indicated that the Legislative Assembly was willing to consider radical changes to the traditional role of hearing officers. It foreshadowed the legislation that would follow in 1997 and 1999.

D. House Bill 2948 (1997)

While the legislative proposals for central hearing panels made during the 1980s had come from the hearing officers themselves, the proposals that came forward during the 1990s were

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111. *See id.*

112. *Id.*

113. *See* OR. REV. STAT. § 305.501 (1999).

114. The Department of Revenue is also substituted as a party for a county or county assessor if the appeal involves ad valorem taxes. *See id.* § 305.501(1).

115. *See id.* § 305.501(7).

116. *See id.* § 305.425.

117. The Department of Revenue has been exempt from the contested case provisions of the APA since at least 1971. *See* 1971 Or. Laws ch. 734, § 19(1) (codified at OR. REV. STAT. § 183.315(1) (1999)).

ten generated by business interests.[118] Many regulated businesses felt that the contested case hearing process was unfair. ney viewed a central hearing panel as one means of providing a ore level playing field.[119] House Bill 2948, introduced by the 97 House Judiciary Committee, was one of these bills. The ll called for an independent, cabinet-level office for hearing officers, which would be called the "Office of Administrative earings."[120] The Governor would appoint the director of the fice, subject to Senate confirmation. The bill listed the specific gencies required to use hearing officers from the Office.[121] A ngthy provision governing *ex parte* contacts would have established rules for all agencies subject to the APA.[122]

In addressing the agency's ability to modify the hearing officer's order, H.B. 2948 distinguished between the hearing officer's findings of fact and conclusions of law.[123] An agency would e free to change any portion of the proposed order that was not finding of fact, but was required to identify and explain those anges.[124] By comparison, the agency could modify the hearing fficer's finding of fact only "to the extent that the findings of ct are not supported by substantial evidence in the record."[125] ith the substantial evidence standard, an agency seeking to justify a modification of a hearing officer's findings of fact would ce the same burden imposed on a party seeking reversal of an gency order through judicial review.[126]

House Bill 2948 gathered substantial bipartisan support

118. House Bill 3265, 66th Leg. (Or. 1991), for instance, was introduced at the request of the National Federation of Independent Businesses.

119. *See, e.g.*, H.B. 2949, 69th Leg. (Or. 1997) (proposing to include attorney fees the prevailing party in a contested case proceeding); S.B. 750, 70th Leg. (Or. 1999) roposing to abandon the substantial evidence standard for judicial review of orders in ntested case proceedings).

120. The description given here of H.B. 2948 is based on the enrolled bill passed the Legislative Assembly (B-engrossed version). *See* Enrolled H.B. 2948, 69th Leg r. 1997).

121. *See id.* § 2.

122. *See id.* § 19.

123. The distinction between the agency's ability to modify findings of fact and nclusions of law had also appeared in the previous session's proposal. *See* S.B. 854, § , 68th Leg. (Or. 1995).

124. *See id.* § 9(3).

125. H.B. 2948, § 9(2).

126. *See* H.B. 2525, 70th Leg., 1999 Or. Laws ch. 849 (codified at OR. REV. STAT. 83.482(8) (1999)).

The House of Representatives passed the bill by a vote of 39 to 20, and the Senate by a vote of 20 to 3. The proponents had not succeeded, however, in quelling doubts in the agencies, and Governor Kitzhaber vetoed the bill. In his veto message, the Governor expressed concern about the costs of the new independent office and the failure to address those costs within the larger budget.[127] Perhaps in recognition of the bipartisan support shown for the bill, the Governor indicated that he supported the idea of independent hearing officers and pledged to appoint an interim workgroup "to examine the current administrative hearings process and suggest changes."[128]

V. HOUSE BILL 2525[129]—THE PROCESS

A. Central Hearing Panel Workgroup

The core of the workgroup appointed by the Governor for the 1997-99 interim consisted of three people: Representative Lane Shetterly, chair of the Interim House Judiciary Committee; Henry "Chip" Lazenby, legal counsel to the Governor; and David Schuman, Deputy Attorney General.[130] The workgroup began its efforts in early 1998, and by the beginning of 1999 created a draft that all parties supported.

The workgroup first addressed the question of cost. The Governor identified the expense of the independent office contemplated by H.B. 2948 as the principal reason for vetoing the bill.[131] In arriving at a solution to this problem, the workgroup eventually returned to recommendations made by the Commission on Administrative Hearings in 1989.[132] As part of its "go-slow" strategy, the Commission suggested the increased use of the Employment Department as a source of hearing officers for other agencies. The Employment Department was then, and

127. *See* H.B. 2948 Veto Message, *supra* note 2.

128. *Id.*

129. H.B. 2525, 70th Leg. (Or. 1999).

130. The author of this Article provided drafting services for the workgroup. This proved to be an educational and rewarding experience, and the author would like to take this opportunity to thank the three principal members for their good humor, enthusiasm, and attention to detail.

131. *See* H.B. 2948 Veto Message, *supra* note 2.

132. *See* discussion *supra* Part IV.

inues to be, the agency that employs the largest number of time hearing officers. The Commission's report indicated "the sharing can occur without the structural upheaval asso-ed with the creation of a separate agency."[133]

Working from this same premise, the workgroup decided y in the process to locate the new central hearing panel in the loyment Department.[134] By careful selection of the agencies would be required to use the central hearing panel, the cost nplementing the proposal could be offset by transferring s that would be used by other agencies for hearing officer ces to the panel's budget. The hearing officers transferred those agencies would become employees of the panel. It contemplated, however, that the hearing officers would not ically move to a new location, at least during the first bien-. These expedients substantially reduced the fiscal impact e bill.

Soon after the workgroup decided to place the central ing panel within the Employment Department, it became that the Governor would support the bill in this form. In g directions to the agencies relating to preparation of the rnor's budget for the 1999-2001 biennium, the agencies directed to take into account the transfers contemplated by roposed bill. At that point, the bill effectively became part e Governor's agenda. The workgroup limited further input state agency personnel to numerous suggestions for im-ng the implementation of the proposal.[135]

The workgroup's second major decision was to make the emporary. House Bill 2525 includes a sunset provision that natically repeals the provisions of the law on January 1, in the absence of further legislative action.[136] In legislative nce, the proposal had become a "pilot project." The use of t clauses is a long-hallowed practice, frequently employed

3. COMMISSION REPORT, *supra* note 52, at 18.

4. This decision was not without dispute. Representative Shetterly, a strong ter of H.B. 2948 as passed in 1997, argued strongly for a separate office. How-he Committee ultimately agreed upon the Employment Department. *See* 1999 ws ch 849, § 8.

5. At one point there was some discussion within the workgroup about who ntroduce the bill. Eventually the bill would reflect that the measure was intro-y Representative Shetterly at the Governor's request.

6. *See* 1999 Or. Laws ch. 849, § 214.

to collect the last few votes needed to pass a measure. The presence in a law of a sunset clause shifts the burden of keeping the law in effect to the proponents of the law. If problems arise with the operation of the law during the pilot project period, it is less likely that the proponents will be able to gather the votes needed to repeal the sunset. Even if there are enough votes to pass the later law, the Governor still would be able to eliminate the central hearing panel by vetoing the second bill. While the general sense of the workgroup was that the sunset clause probably would not take effect, it was clear that H.B. 2525 would be on probation.[137]

The workgroup made one other decision tied to the decision to make the law temporary. An oversight committee would be appointed, with four legislative members, two gubernatorial appointees, and two people appointed by the Attorney General.[138] The chief hearing officer would provide a tie-breaking vote if needed.[139] This committee would oversee the implementation and continuing operations of the panel and make recommendations for additional legislation.[140]

Other significant workgroup decisions relating to the panel's operation are discussed in Part VII of this Article.

B. House Bill 2525 in the Legislative Assembly

Because the workgroup resolved almost all points of dispute, H.B. 2525 passed through the Legislative Assembly without significant amendments.[141] With the support of the Governor, the Attorney General, and the chair of the committee to which it was assigned,[142] it was apparent that the bill very likely

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137. As both Representative Shetterly and Mr. Lazenby commented to the author of this Article, once H.B. 2525 went into effect, it would be difficult to "unscramble the eggs." However, the mere fact that the sunset clause was attached to the bill indicates that some of the workgroup members had concerns about the implementation and operation of the law.

138. This decision was incorporated into the law. *See* 1999 Or. Laws ch. 849, § 21.

139. *See id.*

140. *See id.*

141. The 25 amendments to H.B. 2525 (dated April 28, 1999) reflect the changes made by the Civil Law Committee, a subdivision of the House Judiciary Committee. While lengthy, the primary effect of these amendments was to clarify the intent of the workgroup's decisions before the introduction of the bill.

142. Representative Shetterly was chair of the House Judiciary Committee—Civil Law.

vould become law. The only remaining battles concerned vhether specific agencies should be exempted from using hear-ng officers from the panel.[143]

As already noted, H.B. 2525 was introduced at the Gover-or's request, virtually ensuring that no state agencies would peak against the bill. However, the same could not be said of nose people and businesses that were regulated by state agen-ies. The primary opponents of the bill were real estate brokers egulated by the Real Estate Agency)[144] and building contrac-ors (regulated by the Construction Contractors Board).[145] Nei-ner group succeeded in amending the bill to acquire an exemp-on, but the final vote in the House of Representatives pparently reflected the opposition of these groups (39 ayes, 21 ays). Having failed in the attempt to stop the bill in the House, pponents abandoned further attempts and the Senate gave the ill a unanimous 30 votes.

Despite the opposition of a few regulated industries, the uly remarkable characteristic of the progress of H.B. 2525 rough the legislative process was the unanimous support of the ey players. With support from the Governor, the Attorney eneral, the chairs of both judiciary committees (Representa-ve Shetterley and Senator Neil Bryant) and powerful business terests, it was clear that the time had come for a central hear-g panel in Oregon.[146]

VII. HOUSE BILL 2525—AN ANALYSIS OF KEY PROVISIONS

Inclusion of the Panel Within the Employment Department

One of the major concessions made by the proponents of

143. The principal battles over H.B. 2948, 69th Leg. (Or. 1997), also related to ich agencies would be required to use panel hearing officers.

144. *Hearing on H.B. 2525 Before the House Judiciary Comm.—Civil Law*, 70th g. (Or. 1999) (testimony of Genoa Ingram, Oregon Association of Realtors, and n Baker, realtor); *see also* Letter from Oregon Association of Realtors to Oregon use of Representatives (distributed June 10, 1999) (requesting that H.B. 2525 be eated unless amended to delete the Real Estate Agency).

145. *Id.* (testimony of Fred Van Natta, Oregon Building Industry Association)

146. *See id.* (testimony in support provided by Henry Lazenby, legal counsel to the vernor; David Schuman, Deputy Attorney General; Representative Lane Shetterly; John DiLorenzo, Attorney at Law, on behalf of the Oregon Litigation Reform alition).

the panel was to allow placement of the panel within the Employment Department. As discussed in Part VI(A) of this Article, the primary motivation for this placement was the fiscal impact from the creation of a truly independent office.[147] But the proponents of a strong central panel did not surrender this point willingly. A stand-alone department had been the goal of all previous legislative proposals; locating the panel within another department constituted a major deviation from the original goals of the proposed law. Because the hearings conducted by the Employment Department comprise a large percentage of all contested case hearings conducted in Oregon in any year, the fact that department employees would continue to preside at those hearings represented a substantial departure from the proponents' initial principles.

Another problem that arose out of the administrative structure established by H.B. 2525 was the awkward relationship between the chief hearing officer and the administrator of the Employment Department. The department administrator cannot be expected to have much background or interest in the types of problems that the chief hearing officer will experience in organizing and operating the panel. Because the panel will conduct contested case hearings for the great majority of state agencies, it would make far more sense if the chief hearing officer reported directly to the Governor.[148] Barring substantial problems or changes of heart, the proponents of H.B. 2525 probably will seek this arrangement at some point.[149]

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147 *See* discussion *supra* Part VI(1).

148 *See* Duane R. Harves, *The 1981 Model State Administrative Procedure Act: The Impact on Central Panel States*, 6 W. NEW ENG. L. REV. 661, 665 (1984), where it is stated:

> Based on the experience of the central hearing panels to date, the data treating the Office of Administrative Hearings (OAH) as a totally separate agency is the more favorable approach. While none of the semi-independent OAHs have complained of interference with decisional independence, lacking full control of the budget has had an impact on these operations. Therefore, it is recommended that when considering the creation of an OAH, states should legislate independence to their OAH, rather than creating a "division" within an existing agency

149 Representative Lane Shetterly indicated that he would like to see the central hearing panel move out of the Employment Department, but that he would not seek such a change during the four-year period during which the panel will operate as a pilot project. E-Mail from Representative Lane Shetterly to David Heynderickx (on file with author) (Dec. 12, 1999).

Covered Agencies

House Bill 2525 reverses the formula laid out in H.B. 2948 997 for determining which agencies would be required to use ring officers from the panel. House Bill 2948 listed the agen- subject to the requirement.[150] Under H.B. 2525, all agencies required to use panel hearing officers unless specifically ex- pted.[151]

This change greatly increases the total number of agencies uired to use hearing officers from the panel. While H.B. 2525 tains a long list of exempt agencies, there are literally hun- ds of boards, commissions, and departments within the ex- tive branch that will be required to use hearing officers from panel.[152] Many of these agencies never conduct contested e hearings, and many agencies with an occasional need for a ring officer had previously contracted with the Employment partment for a hearing officer when the need arose. For se agencies, the impact of H.B. 2525 will be minimal. But for encies that routinely have used agency employees on a part- e basis to conduct hearings on behalf of the agency, the new will result in a more formal process for the agency's hear- s.

The workgroup spent a great deal of time trying to develop teria for deciding which agencies should be exempted from requirement of using hearing officers from the panel. In the d, the combination of practical[153] and political[154] considerations verned decisions on exemptions. The workgroup decided that encies headed by statewide elected officials other than the overnor would be exempted. Thus, the Secretary of State, the

150. *See* H.B. 2948, § 5, 69th Leg. (Or. 1997).

151. 1999 Or. Laws ch. 849, § 9.

152. A rough list can be found in the cross-references discussed at the beginning ORS Chapter 182.

153. There was no enthusiasm, for instance, for a requirement that hearings for State Board of Parole and Post-Prison Supervision be conducted by panel hearing cers.

154. As an example, consider claim hearings conducted by the Workers' Compen- on Board. Had the workgroup decided to use the "one-party/two-party" distinction discussed in this section, it could have been argued that the hearings conducted by board were two-party hearings that did not need the services of a hearing officer m the panel In reality, the exemption probably reflects the political reality that, in egon, workers' compensation is the political equivalent of the third rail that one s not wish to touch

State Treasurer, the Attorney General, and the Bureau of Labor and Industries were exempted.[155] The Superintendent of Public Instruction and the boards and departments administered by the superintendent also made the exemption list.[156] The State Land Board (the only members are the Governor, the Secretary of State, and the State Treasurer) was exempted.[157] Finally, the Governor was exempted for those few hearings directly conducted by the Governor.[158]

One criterion that the workgroup discussed, but did not adopt, would have distinguished between "one-party" and "two-party" proceedings. Most arguments made for central hearing panels assume that a "one-party" proceeding is involved. A typical example would be a proceeding in which the Oregon Liquor Control Commission is seeking to revoke a tavern's liquor license. The tavern owner is the sole "party" as defined by the APA. As discussed in Part III, proponents of central hearing panels argue that it is fundamentally unfair for an employee of the commission to preside at the hearing.

However, many agencies conduct "two-party" proceedings. For instance, the Construction Contractors Board conducts proceedings to determine the validity of a claim a client makes against a building contractor when the client asserts that the contractor failed to perform work as agreed.[159] In "two-party" proceedings, the agency's duties are much more "judicial" in nature than "administrative." Because the agency seeks only to help two parties resolve a dispute, and not to punish a single party for failure to comply with the law, the arguments relating to the fairness of the proceeding have less bite.

While there were undoubtedly many different reasons for the workgroup to reject the "one-party/two-party" distinction,[160]

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155. *See* H.B. 2525, § 9, 70th Leg. (Or. 1999)

156. *See id.*

157. *See id.*

158. *See id.*

159. *See* OR. REV. STAT. §§ 701.140-.180 (1999). Another example would be the Bureau of Labor and Industries, which conducts hearings to resolve disputes between employers and employees over whether an employer violated civil rights laws. *See id.* § 659.050.

160. Once again, fiscal issues were involved. It had been determined by the Legislative Fiscal Office that a certain number of hearing officers needed to be transferred from the agencies to the central hearing panel in order to keep the total cost of implementation within acceptable limits. If some of the "two-party" proceedings were ex-

one argument for including two-party proceedings stands out. The Construction Contractors Board does more than just impartially resolve disputes between homeowners and contractors. A contractor cannot work without being registered with the board.[161] The board may revoke a contractor's registration for failing to pay a judgment handed down by the board against the contractor.[162] From a contractor's point of view, the fact that the proceedings are nominally two-party may not alter the fact that the decision eventually could lead to the same type of discipline that occurs in a one-party proceeding. When one considers that the hearing officers who decide claims in the two-party proceedings are usually the same agency employees who decide disputes over revocation or denial of a builder's registration, one sees that many arguments in favor of central hearing panels support their use in two-party proceedings with equal force.

C. *The Hearing Officer as a Professional*

From the beginning, the workgroup members agreed that the level of professionalism of hearing officers needed to be increased. Consistent with this goal, H.B. 2525 contained provisions directing the chief hearing officer, working in coordination with the Attorney General, to implement a standards and training program for panel hearing officers.[163] The program was to include a code of ethics for hearing officers and training on identifying cases that are appropriate for alternative dispute resolution. Eventually, the workgroup contemplated that the program would provide wide-ranging training on the laws governing administrative hearings as well as the substantive law governing the different agencies required to use hearing officers from the panel.[164] As with the imposition of the Attorney General's Model Rules of Procedure for Contested Cases, the purpose of

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adopted, the requisite number of hearing officers would have been more difficult to reach

161. *See* OR. REV. STAT. § 701.055(1) (1999).

162. *See id.* § 701.102.

163. *See* H.B. 2525, 70th Leg., 1999 Or. Laws ch. 849, § 19.

164. The Act does not require that the program include training on any subject except identifying cases appropriate for alternative dispute resolution. However, assuming that the program eventually will require such training, the chief hearing officer is charged with ensuring that hearing officers receive all training required by the program. *See id.* § 4(2).

the standards and training program was to impose more uniformity on contested case proceedings.

D. Assignment of Hearing Officers to Agencies

As discussed in Part III(B), a natural tension exists between (1) an agency's desire for a hearing officer who has extensive experience in the subject matter regulated by the agency and (2) the goal of preventing the types of bias that can arise from a close connection between the hearing officer and the agency. While the workgroup was sensitive to the need for expertise in some hearings, it also wished to create an environment in which most hearing officers were more "fungible." Consistent with this goal, the workgroup rejected a requirement that hearing officers demonstrate expertise in the subject matter of the cases they hear. Instead, the bill directed the chief hearing officer to assign hearing officers with expertise in the legal issues or general subject matter of the proceeding whenever possible.[165]

Because the hearing officers transferred to the panel under H.B. 2525 would remain in the office space of the transferring agency for at least the first biennium, the workgroup was aware that the same hearing officers would continue to preside over the hearings of these agencies for some period of time after the law went into effect. Given this reality, the workgroup struggled to develop some mechanism that would allow parties to object to the assignment of a particular hearing officer. The workgroup discussed extensively the laws governing the ability of a party in a court proceeding to "affidavit" a judge.[166] Those laws place a heavy burden on the judge who seeks to avoid removal when a party or attorney "believes that such party or attorney cannot have a fair trial or hearing before such judge."[167] After discussing the fairly complicated statutory process for disqualification of a judge, the workgroup decided to adopt a simpler "one-bite" rule. A party or agency may reject the first hearing officer assigned to the matter without any showing of good cause.[168] Thereafter, the burden is on the party or agency to establish good cause for dis-

165 *See id.*

166. *See* OR. REV. STAT. §§ 14.250-.270 (1999).

167. *Id.* § 14.250. The judge has the burden of proving that the motion is made in bad faith or for the purpose of delay. *See id.* § 14.260(1).

168. *See* 1999 Or. Laws ch. 849, § 11.

fication of the hearing officer assigned to the proceeding.[169] Because of the possibilities of delay created by the "one-rule established by H.B. 2525, many agencies expressed ern about the practical impact of the rule.[170] In recognition is concern, the bill contained a provision that allows the hearing officer to exempt an agency or particular catego- f hearings from the application of the rule.[171] However, this rity terminates as of December 31, 2001.[172] Agencies op- to the "one-bite" rule will have the burden of convincing 001 Legislative Assembly that the rule should be changed t the exemption should be made permanent.[173]

thority of Hearing Officer to Conduct Hearing

Throughout H.B. 2525, the job of a hearing officer assigned the panel is: "[T]o conduct hearings on behalf of agen-[174] This simple phrase created problems for both the work- and the subsequent implementation of the law.

Within the workgroup, discussions of the hearing offi- uthority to conduct hearings centered on the application of ttorney General's Model Rules for Procedures for Con- Cases.[175] The Attorney General's office argued that any ation creating a hearing officer panel should standardize rocedures used in contested case proceedings. Under the on APA, agencies are free to reject, in whole or in part, the

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See id.

The Employment Department in particular was concerned about federal laws ndated timelines for unemployment compensation determinations. Employees Employment Department appeared at meetings of the workgroup to raise this

See 1999 Or. Laws ch. 849, § 213(3).

See id.

In discussing possible adoption of a central hearing panel for Ohio, one ntator noted the importance of being able to disqualify a hearing officer from el, stating:

> rely separating the adjudicators from the agency will not alone guarantee air and impartial hearing. It may prevent the appearance of bias or impar- ity and remove the adjudicator from the subtle or perhaps not so subtle in- ence of the agency. A clear procedure for disqualification, nonetheless, is l required.

K. Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Adminis- Proceedings*, 36 S.D. L. REV. 551, 572 (1991) (footnote omitted).

See, e.g., 1999 Or. Laws ch. 849, § 5.

OR. ADMIN. R. 137-003-0001 to 137-003-0092 (2000).

model rules adopted by the Attorney General.[176] House Bill 2525 provides that hearings conducted by hearing officers from the panel "must be conducted pursuant to the model rules of procedure prepared by the Attorney General."[177] The bill then authorizes the Attorney General to exempt agencies or categories of cases from this requirement.[178]

While these provisions of the bill increase standardization of hearing procedures, a review of the existing model rules reveals certain assumptions that were made in the development of the rules that may conflict with the directive that hearing officers "conduct hearings on behalf of agencies." The Attorney General, recognizing the need to make adjustments to the model rules to accommodate the operation of H.B. 2525, has adopted rules for the implementation of the new law.[179] The hearing panel model rules largely mirror the model rules in effect before the passage of H.B. 2525, and raise significant questions about the authority of panel hearing officers. For instance, consistent with existing law relating to the authority of agencies in conducting contested case hearings, the model rules provided that agencies would control determinations relating to who may be granted party status[180] and the scope of discovery in the proceeding.[181] The rules adopted for the implementation of H.B. 2525 have similar provisions for hearings conducted by panel hearing officers, suggesting that determinations of party status and control of discovery will not be regarded as part of the hearing officer's duties in the conduct of hearings on behalf of agencies.[182] These provisions may prove to be a source of conflict between hearing officers and agencies with respect to the relative authority of each in controlling the scope and character of contested case proceedings.

F. Ex Parte Contacts

Under the Oregon APA, a hearing officer is required to

176. *See* OR. REV. STAT. § 183.341(1) (1999).
177. 1999 Or. Laws ch. 849, § 8(1).
178. *See id.*
179. *See* OR. ADMIN. R. 137-003-0501 to 137-003-700 (adopted Jan. 1, 2000).
180. *See* OR. ADMIN. R. 137-003-0005.
181. OR. ADMIN. R. 137-003-0025.
182. OR. ADMIN. R. 137-003-0535, 137-003-0570.

ace on the record a statement of the substance of any written oral *ex parte* communications on a fact in issue made to the cer during the pendency of the proceeding and notify the par- of the communication and of their right to rebut such com- nications."[183] Because a hearing officer acts on behalf of the ncy under the APA, and the agency cannot make an *ex parte* mmunication to itself, the model rule in effect before the ption of H.B. 2525 indicated that *ex parte* contacts do not in- le "communication [to a hearing officer] from agency staff or nsel about facts in the record."[184]

Proponents of the central hearing panel concept view the ity of agency staff and counsel to communicate directly with hearing officer, without notification to the parties in the pro- ding, as fundamentally unfair.[185] While the principle under- g the rule is easily understood—an agency cannot make an *ex e* communication to itself—a person who is threatened with ense revocation cannot help but feel that there is a basic un- ness in allowing agency staff to communicate directly with hearing officer about the facts in the case, giving the person pportunity to deny, explain, or qualify the staff's assertions. y agencies, recognizing the problem with this rule, have aterally adopted requirements that all communications to hearing officer relating to the matter under consideration be ed on the record.[186]

House Bill 2525 specifically addresses communications to hearing officer that are made by "any officer, employee or t of the agency that is using the hearing officer to conduct hearing."[187] The workgroup discussed the possibility of a flat ibition on this type of *ex parte* contact, but was unable to e up with a satisfactory means of enforcing such a prohibi- In the end, it opted for a simple requirement of disclosure

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3. OR. REV. STAT. § 183.415(9) (1999).

4. OR. ADMIN. R. § 137-003-0055(1) (2000).

5. *See, e.g.*, Michael Asimow, *Speed Bumps on the Road to Administrative Law n in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 272 (1998) (discus- e prospects for a central hearing panel in Pennsylvania, and arguing that in the e of such a panel, Pennsylvania should amend its APA "to provide, insofar as e, for full-time (administrative law) judges who are protected from influence or l by prosecutors and other adversaries").

6. *See, e.g.*, OR. ADMIN. R. 839-050-0310 (20008) (Bureau of Labor of Indus-

7. 1999 Or. Laws ch. 849, § 20(4)(e).

and opportunity to rebut.[188]

The workgroup addressed the perplexing problem of how the Attorney General's office could provide advice to hearing officers. The Attorney General wished to preserve the ability to answer questions from hearing officers on a confidential basis. However, because the Attorney General is almost always the attorney for the agency, a party to the proceeding could only view as unfair the agency attorney's ability to communicate directly with the hearing officer without notice or opportunity to respond. House Bill 2525 adopted a compromise solution. An Assistant Attorney General may communicate on a confidential basis with a panel hearing officer, but only if the hearing officer initiates the conversation and the assistant attorney general who communicates with the hearing officer is not advising the agency that is conducting the hearing.[189]

G. The Agency's Ability to Modify the Hearing Officer's Proposed Order

The heart of H.B. 2525 is the section of the law addressing the agency's ability to modify the hearing officer's determinations. The other provisions of the bill would not improve the public perception of the fairness of the hearing if the agency were able to totally disregard the hearing officer's findings.[190] In fact, a member of the public might look with some bitterness on all the trappings of fairness added to the process if, at the end of that process, the agency could simply dismiss the product.

House Bill 2525 tracks the other bills introduced in the 1990s, and distinguishes between findings of fact and conclusions of law.[191] In doing so, the bill attempts to assign to the agency what is properly the agency's responsibility: the implementation and administration of the policies enunciated in the laws passed by the Legislative Assembly. However, the bill takes away from the agency the ability to modify one particular category of fac-

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188. The workgroup anticipated that any ethical code adopted for panel hearing officers would prohibit the hearing officer from initiating *ex parte* contacts.

189. 1999 Or. Laws ch. 849, § 20(5)(c).

190. *See* Levinson, *supra* note 69, at 236. "[O]rganizational separation can accomplish little if the agency is free to ignore the ALJ's (Administrative Law Judge's) initial or proposed orders." Levinson, *supra* note 69, at 236.

191. *See* 1999 Or. Laws ch. 849, § 12(1).

l determinations made by the panel hearing officer ("histo-
al facts"). The workgroup discussed at length both the man-
in which factual determinations would be protected and the
cific types of facts subject to protection.

As passed in 1997, H.B. 2948 would have prohibited an
ncy from modifying any finding of fact—not only findings of
torical fact—made by an assigned hearing officer unless the
ncy found that substantial evidence in the record did not
port the finding of fact.[192] This provision greatly concerned
representatives of the Governor and of the Attorney Gen-
l, and H.B. 2525 contains provisions that give the agency
re power to modify factual determinations than contemplated
H.B. 2948. The first major change is in the standard to be
d in determining when an agency can modify a hearing offi-
's factual determinations. House Bill 2525 authorizes an
ncy to change a panel hearing officer's finding of fact only if
reponderance of the evidence in the record does not support
finding of fact. This standard allows an agency to modify
tual findings more easily than did the substantial evidence
ndard contemplated by H.B. 2948.

House Bill 2525's new standard for agency modification of a
ring officer's factual determinations raises issues about the
nner in which an appellate court would review the agency's
ision to modify an order. Under H.B. 2948, the court's role
fairly simple: determining whether there was substantial
dence in the record to support the hearing officer's finding of
. The preponderance standard increases the complexity of
appellate courts' role.[193] It quickly became apparent that the
ponderance standard could work only if an appellate court
ewing an agency modification engaged in a *de novo* review
he evidence relating to the specific finding.[194] In reviewing

92. *See* H.B. 4928, § 9, 69th Leg. (Or. 1997).

93. It would have been confusing indeed if the law indicated that an agency could
fy a finding of fact if a preponderance of the evidence did not support the finding,
hat a court reviewing the agency's decision would use the standard scope of review
ded by ORS 183.482. Under that standard, the court would reverse the agency's
ion only if there were no substantial evidence in the record to support the
cy's decision (i.e., the decision that there was not a preponderance of evidence
orting the fact determination). Not even the most malicious of drafters would ask
he courts address that conundrum.

94. *De novo* review is, of course, the standard for review appellate courts use in
wing the trial court decisions in suits in equity. *See* OR. REV. STAT. § 19.415(3)

the agency's determination, the appellate court could freely disregard the agency's decision on the adequacy of the evidence supporting the decision. Consequently, the job of weighing the evidence would fall in the final instance to the courts instead of to the agency.[195]

The use of the *de novo* review standard was controversial because laws requiring the appellate courts to engage in this type of review involve an increased use of judicial resources. It is difficult for an appellate court to review all of the record of a contested case proceeding to determine whether the weight of the evidence supports a specific finding of fact.[196] However, the use of the preponderance standard seemed to represent the best compromise between the various viewpoints on this contentious issue. The workgroup concluded that the instances in which the appellate courts would be called on to undertake this type of review should be rare. It decided that the resolution of a thorny problem outweighed the small additional workload imposed on the courts.

The second major change from the H.B. 2948 model pertains to the nature of factual determinations that are subject to modification by an agency. As already noted, H.B. 2948 contemplated restrictions on an agency's modification of any finding of fact made by an assigned hearing officer.[197] House Bill 2525 narrows this restriction to findings of historical fact.[198] The concerns surrounding the H.B. 2948 model, as expressed by the representatives of the Governor and Attorney General, related to the common understanding of the term "findings of fact." One example frequently discussed within the workgroup was a hypothetical determination made by a hearing officer that air would be unsafe for humans if it contained more than *X* parts per mil-

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999).

195. Because of H.B. 2525's approach, the agency's determination that a finding of historical fact is not supported by a preponderance of evidence should function only to get the question before the courts (assuming, of course, that a party disagrees with the agency's weighing of the evidence). It is difficult to see why any court would give any deference to the agency's determination of the weight of the evidence.

196. Over the years, the Judicial Department has introduced bills that would eliminate *de novo* review for some of the larger categories of cases in which that standard is still used. *See, e.g.*, H.B. 2380, 66th Leg. (Or. 1991) (providing for the scope of review for divorce proceedings to be the same *as* an action at law).

197. *See* H.B. 2948, § 9(2), 69th Leg. (Or. 1997).

198. *See* 1999 Or. Laws ch. 849, § 12(3).

n of a particulate matter. Under the common division made the courts between findings of facts and conclusions of law, s type of determination almost certainly would be considered inding of fact.[199] But it is also clear that this type of decision is actly the type of policy decision that the Legislative Assembly s delegated to a specific state agency, and it properly should within the control of the agency and not the hearing officer.[200] e problem the workgroup faced was to distinguish between s type of factual determination, referred to by the workgroup a "predictive" fact determination, and those other factual de- minations that should be protected from agency modifica- n.[201]

One of the first drafts considered by the workgroup simply licated that the limitation on agency modification applied to a aring officer's finding of "historical fact." Realizing that the m "historical fact" gave the courts little guidance with respect the intent of the language, the workgroup added the following finition: "[A] hearing officer makes a finding of historical fact he hearing officer determines that an event did or did not oc- in the past or that a circumstance or status did or did not ex- either before the hearing or at the time of the hearing."[202]

The definition illustrates that the essential characteristic of

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199 *See* OR. R. CIV. P. 61(B) (providing for special verdicts with "special written ing upon each issue of fact").

200. *See* OR. REV. STAT. § 19.415(3) (1999) (providing for a broad grant of nority to the Environmental Quality Commission to prescribe by rule the degree of ollution or contamination permitted in different areas of the state)

201. As already mentioned, the 1989 Commission on Administrative Hearings ggled with the same issues. With respect to predictive facts in the context of credi- y determinations, the report states:

> The importance of directly observing the witness is far less important for *predictive* evidence. For example, in a rate case before the Public Utility Commission, credibility of an expert witness predicting future weather patterns is rarely an issue. Here, the agency can certainly reverse the hearing officer's view into the crystal ball with little adverse impact on the perception of fairness of the proceeding. Even here, the agency should not dictate to the hearing officer issuing a recommendation the contents of the proposed order. But the agency need not explain its disagreement with a hearing officer's findings of predictive facts.

MMISSION REPORT, *supra* note 52, at 10-11. For an extensive discussion of the dis- tions made between "adjudicative facts," "premise facts," "legislative facts," and difficulty in working with those distinctions, see the two articles by McGowan & , *supra* note 72.

202 H.B. 2525, 70th Leg., 1999 Or. Laws ch. 849, § 12(3).

a historical fact is chronological in nature. If the factual determination relates to an event that did or did not occur in the past, it is historical in nature and protected under the bill. The same criteria applies to determinations of a "circumstance or status." While none of the workgroup members was necessarily satisfied that the definition's language reflected the nuances of the intended distinctions between different types of factual determinations, the workgroup eventually agreed that the language as printed in the bill represented the group's best effort at enunciating those distinctions.[203]

Historical fact determinations protected under H.B. 2525 usually include determinations made by a hearing officer based on evaluations of witness credibility. Credibility comes into issue in hearings because of conflicts in testimony about "what happened," not about what might happen in the future.[204] While the preponderance standard adopted by H.B. 2525 will give an agency a fair shot at challenging many factual determinations made by panel hearing officers, it is unlikely that an agency will win on those factual determinations that are based on a hearing officer's evaluation of witness credibility.

House Bill 2525 does not restrict an agency's ability to modify a hearing officer's conclusions of law. However, the bill does require that the agency identify and explain all substantial modifications to the form of order submitted by the hearing officer, including modifications made to conclusions of law.[205] Under current law, parties to a contested case proceeding may not be aware that an agency has substantially modified the hearing officer's initial determinations.[206] In hearings conducted by panel

203 Bill drafters soon learn that not all terminology in a bill or other measure can always be clear enough to prevent any possible deviance from some Platonic ideal of the proposed law. While clarity will always remain the first priority on the drafter's list, the cruel reality is that language is inherently ambiguous. And beyond the ambiguity of language itself are the political realities of legislation. "Compromise" language is frequently adopted that is satisfactory to all the immediate participants simply because the language is vague enough that all interested parties can read the proposal in an agreeable, albeit contradictory, manner. The definition of "historical fact" proposed by H.B. 2525 certainly does not fit into this last category, but does constitute one of those instances in which the drafters recognized that the courts probably would need to fill in some detail as individual cases arose. As a former Oregon Supreme Court justice once remarked to the author, "That's why we elect judges."

204 *See* 1999 Or. Laws ch. 849, § 12(3).

205 *See id.* § 12(2).

206 At first glance, it might seem that this could not be the case because ORS

hearing officers, the parties will at least be aware of the hearing officer's opinion relating to the governing law in the matter under consideration.

As enacted, the provisions of H.B. 2525 relating to agency modification of a hearing officer's determinations represent a closely considered and carefully drafted roadmap of the specific types of findings afforded protection from agency modification. It will be interesting to follow the actual experience under this language to see how many findings are in fact modified by the agencies, and the result of any judicial challenges to those modifications.

VIII. THE FUTURE OF HOUSE BILL 2525

A. Surviving the Sunset Clause

House Bill 2525 will be repealed on January 1, 2004, unless another law is passed to keep the law in operation beyond that date.[207] The effect of the sunset clause is to shift to the proponents of the bill the burden of keeping the law in effect. However, it is unclear if a four-year period will be adequate to evaluate whether the bill has achieved the positive effects contemplated by the proponents of the measure.

Many of the benefits of a central hearing panel that this Article addresses are either difficult to measure in an objective manner, e.g., appearance of fairness, or can be achieved only on a long-term basis, e.g., increased professionalism of hearing officers. It is unlikely that within the first two years of the panel's operation the new chief hearing officer will be able to accomplish much more than the daunting administrative task of setting up the separate division within the Employment Department.[208]

183.464(1) establishes as a general rule that "the hearings officer shall prepare and serve on the agency and all parties to a contested case hearing a proposed order, including recommended findings of fact and conclusions of law." However, ORS 183.464(5) creates the exception that swallows the rule, allowing the Governor by executive order to exempt any agency from the requirements of the statute. The Governor has done this for all state agencies except certain hearings conducted by the Department of Transportation. *See* Exec. Order No. 80-9 (June 3, 1980).

207. *See* 1999 Or. Laws ch. 849, § 214.

208. Tom Ewing, attorney at law, has been hired by the Employment Department as the first chief hearing officer for the panel. He fully appreciates the magnitude of the task he has taken on and anticipates that practical realities will mean delay in imple-

Given these practical realities, the continued existence of the central hearing panel after the four-year trial period probably will hinge more on a showing of progress in the direction of the anticipated benefits than on an actual track record of accomplishing those benefits.[209] And, assuming there is substantial concern about the operation of the panel, the Legislative Assembly might simply extend the sunset to a later date.

B. Future Evolution of the Central Hearing Panel

Assuming that the central hearing panel is a success, it is probable that two proposals will be forthcoming for changes in the operation of the panel. First, there will be an attempt to convert the panel into the independent, department-level agency contemplated by H.B. 2948 in 1997. Second, there will be proposals to require some of the exempted agencies to use hearing officers from the panel.[210]

Conversion of the panel to a truly independent body probably will be the more pressing of these two proposals. The organizational structure established by H.B. 2525 was driven by fiscal considerations and convenience. The resulting arrangement produces more than just a confusing organizational chart for state government. If the panel is to improve the appearance of fairness in the hearings conducted by the board, some change will have to be made to the arrangement under which the chief hearing officer for the panel reports directly to the director of the department that makes the largest use of panel hearing officers.

Some of the provisions of H.B. 2525 probably will be extended to state agencies that are currently exempted from use of the panel.[211] For instance, there is no logical reason for a separate rule governing *ex parte* contacts for hearings conducted by panel hearing officers and hearings conducted by agency em-

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nentation of some of the measures contemplated by H.B. 2525. Interview with Tom Ewing, in Salem, Oregon (Nov. 8, 1999).

209. For instance, it is unlikely that any efficiencies in conducting contested case hearings would show up as savings in the 2001-03 budget.

210. The list of exempted agencies is provided in 1999 Or. Laws ch. 849, § 9.

211. *See* Hoberg, *supra* note 46, at 83 ("Even in states in which a central panel system has already been established, turf battles continue, usually each legislative session, over expansion of the central panel's jurisdiction"). Hoberg, *supra* note 46, at 93.

ployees.[212] Also, the code of ethics adopted for panel hearing officers may eventually cover all hearing officers because it would be hard to argue that only panel hearing officers need to be concerned with ethics. Finally, the requirement that agencies using panel hearing officers comply with the model rules adopted by the Attorney General probably will give impetus to a requirement that exempt agencies also use those rules.[213]

IX. CONCLUSION

House Bill 2525 is the product of twenty years of proposals, studies, commissions, and workgroups. Unlike many bills that pass through the legislative process, almost every aspect of H.B. 2525 was analyzed and discussed, dissected, and debated. Some of the debates over specific provisions in the bill can be traced back ten years to the 1989 Commission on Administrative Hearings. Other questions, such as the proper role of hearing officers, have been in play since Oregon adopted an APA in 1957.

Looking back at the many proposals that Oregon's Legislative Assembly has considered, and considering the slow but steady increase in the number of states using central hearing panels, it might seem inevitable that Oregon eventually would experiment with a panel. But it took a very unusual set of circumstances for the law to come into being. It took (1) a group of legislators who were convinced that a central hearing panel would promote fairness in administrative hearings; (2) a Governor who was willing to consider administrative law reforms if those reforms served to improve the public's perception of fairness in the process; and (3) an Attorney General who was willing to go along with the changes despite the concerns of many of the agencies that the Attorney General represents.

While the central hearing panel established by H.B. 2525 may expire in 2004, it is unlikely. Barring significant problems with implementation of the law's provisions, the central hearing

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212 As passed in 1997, H.B. 2948 would have applied the new *ex parte* contact rules to all state agencies conducting contested case hearings under the APA.

213 As discussed, previously state agencies have been able to accept or reject any part of the Attorney General's model rules. The extension of the principle enunciated in H.B. 2525 to exempt agencies would require that these agencies use the model rules, but would allow each agency to seek exemption from specific rules. *See* 1999 Or. Laws ch. 849, § 8(2).

panel probably will be around well into the millennium. Agencies, practitioners, regulated industries, and the general public all have an interest in the experiment's success.