

# POINT-COUNTER

Attorneys Debate the Benefits and Drawbacks of Hearing Officers vs. Peer Boards in Deciding Administrative Law Cases

## WHY NEVADA NEEDS A CENTRAL PANEL OF HEARING OFFICERS

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The current hue and cry is to reduce or eliminate government. But those slogans don't consider innovations used to improve the efficiency and effectiveness of agencies.<sup>1</sup> For Nevada, the creation of a central panel of hearing officers

assigned to hear contested cases would efficiently address the public's cry and agencies' needs for professionally trained, independent hearing officers.

Currently in Nevada, some agencies use employees hired and designated as hearing officers; examples of those agencies include the areas of gaming, utilities, insurance, motor vehicle licensure and unemployment. Licensing or regulatory boards and commissions may sit en banc as hearing officers for their contested cases. Appeals officers within the department of administration's hearing division hear other cases by statute or contract. Most agencies, however, simply assign an employee – or another agency's employee – to act as hearing officer on a case-by-case basis.

There is another way to provide hearing officers. Two dozen states have central panels or "offices of administrative hearings (OAH)."<sup>2</sup> In those states, the panel, or OAH, supplies independent and professionally trained hearing officers to agencies to resolve contested cases. Some states exclude from the central panel those officers hearing "high volume" appeals, for example, hearings for unemployment benefits or drivers licenses. All the states with central panels emphasize the training, professionalism and ethics of their hearing officers. The states assure due process for hearings by requiring specific forms for filing appeals, standard hearing procedures, evidentiary standards and formats for the written decisions or findings of fact, conclusions of law and orders issued by the hearing officers. The panel's officers are strictly supervised through review of their performance, demeanor, training, decision-making and writing.

When Oregon switched to a central panel, the chief hearing officer described the transition in articles addressing the pitfalls, advantages

# PRO

and financial savings stemming from the change.<sup>3</sup>

In Nevada, some of the structure necessary for a central panel or OAH already exists. The appeals officers in the department of administration's hearing

division initially heard only workers' compensation appeals. Over time however, the legislature assigned responsibility for disputes regarding awards to victims of crime, purchasing contracts and some disciplinary actions against teachers.<sup>4</sup> Boards and commissions may elect to use appeals officers for contested cases using NRS chapters 622 and 622A. By contract with individual agencies, the appeals officers hear cases for other agencies.<sup>5</sup>

So why would an agency wish to use an independent hearing officer and relinquish its ability to assign an employee as the hearing officer for a contested case? Using a central panel of hearing officers assures the procedures used for each hearing are similar; that the officer is independent of the agency; it eliminates questions about ex parte contacts between agency staff or the agency's chief and the hearing officer; and it ensures that decisions comply with the administrative procedure act and the agency's specific statutes. An agency could retain the right to approve or reject the hearing officer's decision, but for most central panels that option is rarely, if ever, used.

An argument is often made that hearing officers from a central panel lack the special expertise regarding the agency's technical subject matter. That argument has little merit. The independence of the hearing officers and consistency of the due process standards and procedures outweigh any lack of expertise. Some panels resolve this issue by assigning cases to hearing officers based upon their personal expertise, for example, sorting cases into topics such as health and benefits, safety and environmental issues, communications, transportation or utility regulation. Using independent hearing officers ensures the agency's staff presents their case and technical arguments

# POINT

thoroughly. In any case, the argument about expertise lacks merit when petitions for judicial review are considered. The judges reviewing administrative law appeals rarely have such technical expertise. The improvements made through consistent procedures and due process standards using central panels outweigh the argument that a hearing officer possess specific technical expertise.

Finally, using hearing officers from a central panel benefits the courts because the decisions and orders are issued in a clear, consistent format relying on the facts presented and applicable law. The courts will find they can rely upon this consistency and upon the supervision, training and ethics of the hearing officers.

In Nevada, a bill proposing a central panel was rejected by the legislature in the early 1980s, when the personnel director objected to such a panel. With the growth of Nevada's population and government and the sophistication of the issues presented in contested cases, it is time to consolidate, innovate and "reinvent" the quasi-judicial role of agencies in Nevada by creating a central panel of hearing officers. ■

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## AUTHOR'S BIOGRAPHY ON PAGE 29.

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- 1 See: David Osborne and Ted Gaebler. *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*. Addison-Wesley Publishing 1992. Governor Miller relied upon some of the ideas in this book to restructure Nevada's agencies in the early 1990s.
- 2 National Association of Administrative Law Judges, <http://www.naalj.org>.
- 3 Ewing, Thomas E. "Oregon's Hearing Officer Panel," 23 *Journal of the Nat'l Ass'n of Admin. L. Judges* 57, Spring 2003; and with John Hardwicke, "The Central Panel: A Response to Critics", 24 *Journal of the Nat'l Ass'n of Admin. L. Judges* 231, Fall 2004. The Judicial Studies Program at the University of Nevada, Reno has thesis and dissertation documents discussing central panel issues available for review.
- 4 See for example: NRS 217.117, 333.370, 391.3161 and 616D.140.
- 5 Examples include for Medicaid, fair hearing and nursing home disputes; and hearings for the Department of Education, Training and Rehabilitation; the Division of Industrial Relations and other agencies. Chapter 277 of NRS authorizes interagency contracts.