STATE OF FLORIDA

Department of Administration

Division of Administrative Hearings

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TALLAHASSEE

32304

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January 23, 1976

SECOND ANNUAL REPORT

This report is submitted to the Administration Commission and the Administrative Procedures Committee in compliance with the requirement of Section 120.70, F.S., which states:

> "Not later than February 1 of each year, the Division shall issue a written report to the Administrative Procedures Committee and the Administration Commission, including at least the following information:
>
> "(1) A summary of the extent and effect of agencies' utilization of hearing officers, court reporters and other personnel and proceedings under this act.
>
> "(2) Recommendations for change or improvement in the Administrative Procedure Act or any agency's practice or policy with respect thereto."

The first report of the Division of Administrative Hearings was submitted on January 23, 1975, and was prepared at a time when the Division had barely been in existence. At that time, the Division had three hearing officers on its staff, including the Director, and had received no more than five requests for hearings. It was located in temporary quarters in the Carlton Building until June 1975. The Division is presently in its permanent quarters in Room 101, Collins Building, Tallahassee, Florida.

During the year that has elapsed since the first annual report was written, the Division has become fully staffed with ten hearing officers, five secretaries and an administrative assistant. During the calendar year of 1975, the Division received cases from a multitude of agencies and assumed the responsibility to preside over hearings involving administrative and legal questions. During 1975, the Division received over 2,000 requests from agencies for the assignment of hearing officers to preside over administrative hearings. These requests included such diverse proceedings as all competency hearings under the Baker Act; all licensing penalties, suspensions and other similar questions for professional boards under the Department of Professional and Occupational Regulation; hearings for the Department of Environmental Regulation; the Trustees of the Internal Improvement Trust Fund; the Department of Transportation, etc. A complete list of requests for hearing officers is included in this report.

Another great responsibility the Division has accepted is to hold hearings for the Public Employees Relations Commission under Chapter 74-100, F.S. These hearings involve questions related to public employee representation and collective bargaining, charges of unfair labor practice, petitions for determination of managerial status and other associated questions in this new area of public administrative law.

Cases that are submitted to the Division of Administrative Hearings are docketed and files are opened on each matter as they are received. This is done under the auspices of the Administrative Assistant of the Division. A rather elaborate filing system is maintained to insure that pleadings on

pending or closed matters as they are received can be properly filed. As cases arrive, they are from time to time assigned to individual hearing officers. This is generally accomplished by the Director. A great majority of the hearings held by this Division involve travel outside the immediate Leon County vicinity. An attempt is made by the Division to hold as many hearings as possible in the offices of the Division, but most often the doctrines of fairness and forum non conveniens require out of town travel on the part of the individual hearing officers to conduct the proceeding where the dispute arose and where the witnesses reside. Generally, as might be expected, the more populous areas of the state generate the most requests for hearings. This requires considerable travel on the part of each hearing officer, particularly to south Florida. Since travel expenses can build up rapidly, and since the extremely high case load of the Division requires extensive travel, a great effort is made to insure each hearing officer utilizes travel time in the most efficient way possible. Cases are assigned to individual hearing officers on a geographic basis where practical, so that hearing officers' travel to any particular area of the state may permit the holding of a variety of hearings while in that area.

Presently the Division has been running with a fairly constant average of 1200 active cases at one time. Of those, approximately 700 are active Baker Act cases. Since we have tried to specialize the assignment of all Baker Act cases to three hearing officers, this results in a greater than average case assignment to each of the other hearing officers to compensate for this specialization. This is an extremely heavy case load. The magnitude

of this workload is even more demanding than it may appear since approximately 80 percent of the hearings held by this office require out of town travel. This causes hearing officers to spend nonproductive time in transit and increases demands upon them when in the office.

It would be impossible to completely describe all the different issues of law and fact considered by this Division in the various hearings it has conducted. They have included almost every aspect of state regulation and administration. The variety of this workload does not usually require hearing officers develop expertise in any particular area so that they can be specialized in their assignments. Although agencies often request hearing officers be assigned to permit specialization, this has not been demonstrated to be warranted or necessary.

It is difficult to generalize how much of a hearing officer's time is taken up by an individual proceeding. Due to the great variety of matters that come before this Division, it is not uncommon to find that some proceedings require less than one hour to complete, while others have required in excess of one full month of an individual hearing officer's time. An excellent example of this is the proceeding conducted by Chris Bentley, Assistant Director, regarding the proposed nuclear generating facility of Florida Power and Light at St. Lucie, Florida. This hearing was conducted under the authority of the Power Plant Siting Act. It has already taken over one month's time and is not yet completed. On the average, administrative hearings conducted by this Division consume approximately one day for the actual proceeeding.

Every matter, though, about which a file is opened requires some time and labor on the part of the clerical staff and for the hearing officer to review the file, even if that proceeding eventually is resolved without going to a hearing. Furthermore, it often requires more time to prepare a recommended order than to conduct the proceeding.

This Division has not yet experienced a great deal of difficulty in undertaking the role of holding administrative hearings throughout the state. Agencies and the professional bar have been, on the whole, cooperative and understanding of the function of a hearing officer. Agencies also appear to be very much in favor of the concept of having a staff of full-time, professional hearing officers to take over this function they previously handled on their own. After a year's experience in this area, it has become evident to all the hearing officers that there is a great advantage to having administrative hearings conducted by a full-time staff. This is largely because of the fact that experience is a great asset to a hearing officer. There are techniques which can only be learned through experience, which greatly facilitate the presiding over administrative hearings and insure that the whole proceeding is conducted in a reasonable manner, that all parties have an opportunity to be heard and that the proceeding be concluded without any unnecessary delay.

It is also particularly apparent that both agencies and private parties feel more comfortable about being engaged in an administrative hearing where the hearing officer is not also an employee of the agency involved.

The Division has compiled a comprehensive list of all the requests for hearings it has received during the calendar year 1975. That list appears on the following pages, as an Appendix to this report.

Chapter 120 requires each agency that is a party to a hearing to transcribe and preserve the testimony. Many agencies have carried out this responsibility by the use of court reporters. It has become apparent to several agencies that the use of court reporters is a great expense which can often be avoided. This has been accomplished in many cases by the use of tape recorders and other recording devices. If this Division can offer any observation, it would be that agencies should be more circumspect in having verbatim transcripts prepared in many hearings, and that often the use of a tape recording device is satisfactory, particularly in smaller and relatively uncomplicated proceedings.

SUGGESTIONS FOR AMENDMENTS TO CHAPTER 120

In this Division's previous report, no suggestions for amendments to Chapter 120 were made as it was felt that more experience was needed in order to evaluate the procedures required by the new act. In the year that has passed, it has been gratifying to see that the transition from the old Administrative Procedure Act to the new has been accomplished without major difficulties. There are several areas, however, where it is felt that improvements can be made in this statute and the following is a brief summary of this Division's recommendations for amendments.

EXEMPTIONS FROM THE ADMINISTRATIVE PROCEDURE ACT

Chapter 120.63 authorizes the Administration Commission to exempt an agency from any process or proceeding governed by the act under certain numerated examples. Definite standards and guidelines are set out in this section as to under what circumstances the Administration Commission should grant an exemption. This section was put in the Administrative Procedure Act to permit the operation of a safety valve if an agency found itself in a particular bind with regard to complying with the act and fulfilling other legislative responsibilities. However, when the next session of the legislature convenes, two years will have elapsed since the passage of the Administrative Procedure Act. It is submitted that most of the problems should have been worked out by now and that the exemption process should be further restricted. It is, therefore, recommended that the exemption process be eliminated except where the Administration Commission finds that a conflict with federal law or rules exists or that federal benefits may not be forthcoming to the state without an exemption from certain parts of the act.

Should the legislature keep this exemption provision intact, it is then recommended that further guidelines be enacted. This is because since the Administration Commission has a very definite legislative power in passing on exemptions, there needs to be a repository where the general public can determine which agencies have been exempted from particular sections of the Administrative Procedure Act. Considering that administrative rules

are indexed and compiled in the Administrative Code, it would at least appear that exemptions from the Administrative Procedure Act should be given that same dignity. Presently, after the Administration Commission grants an exemption, there is no further administrative process required. Exemptions are not filed in any listing generally available to the public and it is only possible to know of the existence of an exemption by learning of it by accident. Decisions of this magnitude should be made available in a more organized way. It is, therefore, suggested that the Secretary of State's Office be given the responsibility of compiling exemptions which have been granted by date and period of duration in an appropriate section of the Administrative Code.

ASSESSMENT OF COSTS

It is well known that when the new Administrative Procedure Act was passed, many agencies criticized the requirements of Sections 120.57 and 120.58, which dealt with the right of individuals to petition for administrative hearings in areas where they were substantially affected. The critics claimed this would lead to "government by hearing officer" and remove many discretionary decisions from agency heads. Experience has shown that this was an unwarranted fear. Most agencies would now agree that these statutory requirements have neither impeded or restricted the decision-making process. However, the potential for abuse does exist, both on the part of agencies and the general public to use the hearing process in a way so as to delay or impede its normal functioning.

Hearing officers under the present law have no power to help alleviate such situations and it is suggested, therefore, that hearing officers be given the power to award costs in certain cases where it appears a party's position has not been based on a bona fide concern regarding the merits of the case, but have been largely motivated for purposes of delay or obstruction. The hearing officer should have the power to impose costs where parties have made claims for the existence of factual disputes which turn out to be grossly unfounded or unsupportable.

LICENSE REVOCATION PROCEEDINGS

An ambiguity appears to exist in Section 120.65(4), which states:

> "No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency has given reasonable notice by certified mail to a licensee of facts or conduct which warrant the intended action and the licensee has been given an opportunity to show that he has complied with all lawful requirements for the retention of a license." [Emphasis added]

The above subsection has generated different interpretations as to exactly what is meant by the phrase "prior to the institution of agency proceedings." An argument has been made that an agency cannot issue an administrative complaint until it first gives notice to the party that it so intends to issue a complaint. Such an interpretation would require a duplication of effort on the part of the agency and is not felt to be an interpretation which reflects legislative intent. However, the ambiguous

wording of this section certainly can lend toward such an interpretation. It is, therefore, suggested that the wording of the above mentioned phrase be changed to read "prior to the entry of a final order."

THE DIVISION OF ADMINISTRATIVE HEARINGS SHOULD NOT BILL AGENCIES FOR ITS SERVICES

Presently, in Section 120.65(6), it states: "Beginning July 1, 1976, all costs of administering the division shall be paid to the division trust fund on a pro rata basis by the agencies using its services. The division shall submit statements to the agencies at least quarterly." This Division would respectfully submit that it would be far less complicated, far less expensive and immeasurably more efficient for the Division to operate out of a general appropriation rather than to operate out of a trust fund, as is now proposed and to have to bill agencies for a pro rata share of the cost of running this Division. It is, therefore, suggested that subsection 6 and subsection 7 of 120.65 be repealed.

The experience this Division has accumulated in its first year of operation has aroused great apprehension that to attempt to comply with these subsections will be exceedingly difficult, expensive and frustrating to both this Division and all agencies who must deal with it. There are several reasons for this conclusion. Perhaps they can be best illustrated by way of a hypothetical example. On a typical trip to Miami, a hearing officer will have had set at least several cases in that area. Typically, three or four days will have been set aside for hearings in one location. Travelling

from Tallahassee to Miami involves at least several hours in transit and, of course, several hours to return. Furthermore, it is not uncommon for a hearing to be settled on the eve of the hearing date or right at the time for the commencement of the hearing. As is well known, attorneys and parties to a dispute find it more compelling to settle a matter as the hour for hearing draws near. In the common event that a hearing officer travels to Miami with six cases set for hearing and have two of those hearings be settled by stipulation, the hearing officer will then preside over those four hearings and then return to Tallahassee. However, the two hearings that eventually settled out were also a cause for the hearing officer's travel to Miami and were cases that the hearing officer must have spent some time in preparation and in transit to the place designated for the hearing. Therefore, upon returning from this hypothetical trip, the hearing officer must pro rate the share of time he spent on the agency's case, compared to the time spent on the cases that went to hearing, adjust equal share of travel time required and submit bills to each agency. This will result in a situation where the agency whose case settled out will still receive a considerable bill for the hearing officer's services. Furthermore, the hearing officer may have spent several hours in preparation for that hearing reading pleadings, examining memorandum and doing independent legal research. That time will also have to be billed for and the agency will have to absorb that cost in addition to the costs above mentioned.

It does not take much imagination to see that the possibility for dispute among the Division and agencies it must bill will be extremely high

and that it is a certainty in many situations agencies will question the amounts of their bill. Furthermore, in these times of tight money, an agency will not be able to predict eventual costs hearings will require; each agency will have to add an item in its budget which will be beyond its control to pay for the cost of these hearings and it is entirely possible in situations of dispute between this Division and an agency's bill that an agency might request a hearing on the fairness of a statement submitted by this Division. This Division feels that this could result in an absurd situation and that the efforts which will be required to bill individual agencies will be unnecessarily complicated. By funding the Division through a regular appropriation, these problems can be avoided and the unnecessary expense of having this Division keep track of its time spent and bill individual agencies will also be eliminated.

The use of a billing system and trust fund to finance the Division of Administrative Hearings would increase the operating costs of the Division. The Division does not now have any personnel to act in the capacity of bookkeeper and billing clerk. Such a person would be necessary in order to properly run a billing system. It would be necessary to add an appropriately classified person to the Division to perform this function. This would increase the operating costs of the Division. Further, the use of a billing system will require that the hearing officers devote a portion of their time to the keeping of time records and compilation of billable hours for the preparation of bills, which time would be better spent in the conduct of hearings and preparation of recommended orders, thus allowing the hearing officer to carry a heavier

annual case load.

This Division is aware that a system similar to the one presently in subsections 6 and 7 of Section 120.65 exists in California. This writer has discussed the merits of that system with hearing officers in California and has been given the opinion from some of the most experienced hearing officers in that state that they do not recommend that the State of Florida adopt such a system. It is, therefore, recommended that the above referenced subsections be repealed from Florida Statutes.

PREPARATION OF RECORD ON APPEAL

Section 120.57 sets forth those things which make up the official record of a hearing held pursuant to Chapter 120, Florida Statutes. Should an agency order entered subsequent to a hearing be appealed to the District Courts of Appeal, the appellate record must come from the record of the hearing, which is defined by Section 120.57, Florida Statutes. Therefore, it is imperative that the record of a hearing held under Chapter 120, F.S., be meticulously maintained. In its present form, Chapter 120, F.S., does not direct itself to the responsibility involved in maintaining the record of the hearing. Therefore, it is recommended that Chapter 120, F.S., be amended to direct the agency for which a hearing has been held to carefully maintain the integrity of the record of the hearing until such time as it may no longer be necessary for appellate purposes.

CONCLUSION

It does not appear that the current work load of the Division has reached a plateau. All indications still point to an increase in the number of requests for hearings this Division will receive and to an increase in the number of agencies making such requests.

Respectfully submitted,

KENNETH G. OERTEL
Director

ANALYSIS OF AGENCY REQUESTS FOR HEARING OFFICERS FOR CALENDAR YEAR 1975

AGENCY		NO. OF CASES
Department of Administration		
Administration Commission		1
Career Service Commission		1
Florida Land and Water Adjudicatory Commission		8
Division of Personnel		1
Division of Retirement		29
	TOTAL:	40
Department of Agriculture and Consumer Services	TOTAL:	4
Department of Business Regulation		
Division of Beverage		88
General Regulation		1
Pari-Mutuel Wagering		1
	TOTAL:	90
Department of Commerce		4
Division of Labor		1
Public Employees Relations Commission		229
	TOTAL:	234
Office of the Comptroller		1
Division of Finance		38
Securities Commission		12
	TOTAL:	51
Department of Education		2
Board of Education		1
Brevard County School Board		1
Broward County School Board		2
Clay County School Board		1
Dade County School Board		4
Florida Atlantic University		1
Florida State University		2
Lee County School Board		12
Leon County District School Board		1
Manatee County School Board		1
Monroe County School Board		2
Orange County School Board		1
Osceola County School Board		1
Board of Regents		5

Sante Fe Junior College		2
Sarasota County School Board		1
University of South Florida		9
Vocational, Technical, Trade and Business Schools		1
	TOTAL:	50
Department of Environmental Regulation	TOTAL:	34
Department of General Services	TOTAL:	8
Department of Health and Rehabilitative Services		
Anclote Manor Hospital (Baker Act)		12
Broward County Health Department		1
Division of Corrections		1
Florida State Hospital (Baker Act)		458
Division of Health		23
Highland Park Hospital (Baker Act)		1
Northeast Florida State Hospital (Baker Act)		22
Osceola County Health Department		1
South Florida State Hospital (Baker Act)		456
G. Pierce Wood Memorial Hospital (Baker Act)		12
	TOTAL:	987
Department of Legal Affairs	TOTAL:	7
Department of Natural Resources		
Central and Southern Florida Flood Control District		12
Game and Fresh Water Fish Commission		1
Southwest Florida Water Management District		53
St. Johns Water Management District		1
	TOTAL:	67
Department of Professional and Occupational Regulation		
Board of Accountancy		2
Board of Architecture		2
Barber's Sanitary Commission		6
Board of Chiropractic Examiners		8
Construction Industry Licensing Board		6
Board of Cosmetology		72
Board of Dentistry		17
Board of Dispensing Opticians		1
Florida Electric Construction Industry Licensing Board		1
Florida Real Estate Commission		76
Board of Funeral Directors and Embalmers		8
Board of Massage		4
Board of Medical Examiners		2
Board of Naturopathic Examiners		1
Board of Nursing		16
Board of Osteopathic Medical Examiners		3
Board of Pharmacy		3

Board of Podiatry Examiners		13
Board of Psychology Examiners		2
Board of Veterinary Medicine		2
Board of Watchmakers		3
	TOTAL:	248
Department of Revenue	TOTAL:	72
Department of Transportation	TOTAL:	160
Board of Trustees of the Internal Improvement Trust Fund		
	TOTAL:	33
	GRAND TOTAL:	2085