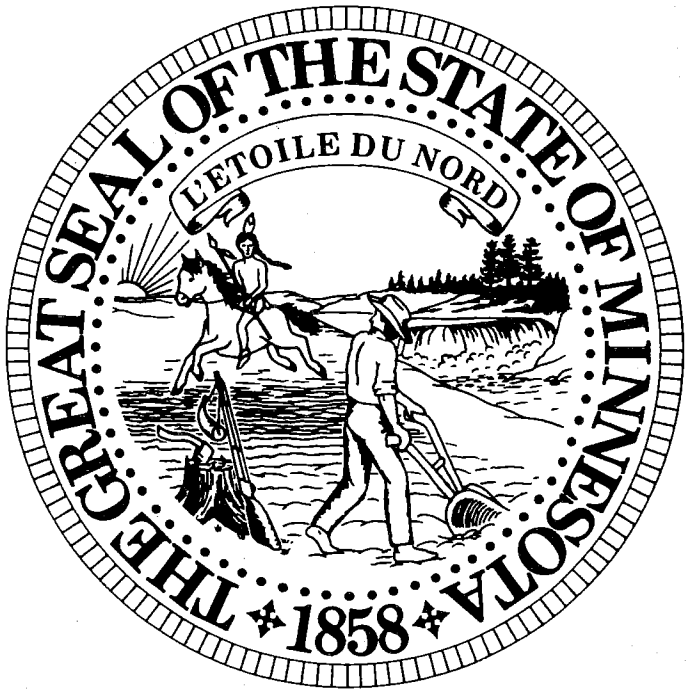
THE
STATE OF MINNESOTA

OFFICE OF
ADMINISTRATIVE HEARINGS



1975 — 1985

A REPORT ON THE FIRST DECADE

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PREFACE

On December 31, 1985, the Minnesota Office of Administrative Hearings completed its tenth full year of operation. Those ten years followed five months of organizational preparation during 1975.

The office, independent from any other state agency and charged with the task of conducting fair and impartial hearings for a multiplicity of agencies, was one of the first of its kind to be created across the country, preceded only by California (1946), Massachusetts (1974), Tennessee (1974) and Florida (1974). There are now five more states which have what has come to be known as a central panel system for administrative hearings: Colorado, New Jersey, Washington, Missouri and, effective January 1, 1986, North Carolina. Sixteen other states and the federal government are in various stages of consideration of the establishment of a similar agency.

During the past ten years, there have been many changes in the field of administrative practice and procedures. These changes have occurred due to judicial decisions and legislative changes across the country and in Minnesota. As an example, the Minnesota Legislature has amended the Administrative Procedure Act (Minn. Stat. Ch. 14) every year since 1974, the only exception being 1978. As this report was being prepared, several Minnesota legislative committees were considering further amendments for enactment during the 1986 Legislative Session.

The purposes of this report are to provide a history of the Minnesota Administrative Procedure Act and its various amendments, to provide information on how the Minnesota office was initially organized and how it has operated, and to provide some perspective for the future, including recommendations for changes. It is the hope of this writer that this report will provide information and assistance not only to the Minnesota Legislature in its review of the present law, but to other jurisdictions which may be considering adoption of a similar agency.

It may appear to the reader that this report is a bit of "horn blowing" by the office. That perception is probably accurate as it is also intended to be a tribute to the many dedicated and professional employees of the office who have worked very hard under severe deadlines and tight fiscal constraints to achieve the successes chronicled in this report.

Chapter 1

Introduction and Historical Perspective

A. Introduction.

During the 1975 Legislative Session, the Minnesota Legislature passed major amendments to the Minnesota Administrative Procedure Act (APA) which included the creation of an independent agency which has, as its sole function, the conduct of administrative hearings. The agency, first called the Office of Hearing Examiners and now called the Office of Administrative Hearings (OAH), became effective on January 1, 1976.[1] It is the intent of this report to briefly review the history of the Minnesota APA prior to the 1975 changes, the legislative concerns which led to the 1975 APA amendments, the 1975 amendments themselves, the initial steps taken to implement the amendments and organize the OAH, legislative amendments to the APA since 1975, a review of the operation of the OAH over the past decade and a view to the future for both the OAH and the APA.

B. Historical Perspective

The current APA can trace its origin to 1941 when the Legislature passed what came to be codified as Minnesota Statutes 15.06(5) (1941). At that time, the law allowed the commissioner or head of any agency to prescribe rules and regulations for the conduct of the agency unless expressly forbidden by law. The only statutory requirement applicable to all rules was that they be "not inconsistent with law". The only uniform statutory command in the rule promulgation process was that any rules affecting persons other than the agency "be filed with the Secretary of State".[2]

During the Fifty-Third Session of the Minnesota Legislature in 1945, the first APA, as such, was passed into law.[3] Under the terms of that act, in order to promulgate rules or regulations agencies were required to hold a public hearing after first giving thirty days notice to interested persons who registered with the Secretary of State; the agencies were required to submit the rules to the Attorney General, with reasons for the rules; the Attorney General was required to approve or disapprove the rules based on a form and legality review; and the approved rules became effective thirty days after filing with the Secretary of State.[4] During the same Legislative Session, requirements for the publication and distribution of all administrative rules and regulations were also passed.[5]

The 1945 Act was substantially amended in 1957.[6] The 1957 Act was the first comprehensive APA in Minnesota which also added a requirement that adopted rules and regulations "be based upon a showing of need for the rule".[7] Another significant change, and major difference between the 1945 and 1957 acts involved the latter's attention to "contested cases", i.e., matters relating to the quasi-judicial functions of administrative agencies.[8]

Subsequent to 1957 and prior to 1975, the APA was amended several times. The Commissioner of Insurance, historically exempted from the rulemaking provisions of the APA, was placed under its requirements in 1961.[9] All of the health related professional and regulatory examining and licensing boards were placed under the APA rulemaking requirements in 1963.[10] In that same year, rules were required to be filed with the Commissioner of Administration as well as with the Secretary of State; rules established by state agencies

not defined as within the APA's coverage would be without the force and effect of law unless filed in accordance with the APA; and the Commissioner of Administration was required to annually publish all administrative rules and regulations.[11] The Workmen's Compensation Commission was exempted from the APA in 1969.[12] In 1974, the State Register was established with the requirement that all notices of intended action, hearing notices and approved rules were to be published in it.[13]

During the period from the mid-sixties to the mid-seventies, the Legislature was also passing laws creating the right to an administrative hearing in many more areas of the law which required compliance with the contested case provisions of the APA. At the same time, the Legislature began to recognize the need for agency heads to be able to delegate the responsibility for conducting the hearings to other agency personnel by creating and specifically authorizing the use of hearing examiners within the agencies. In some instances, agencies were required to use hearing examiners to conduct the hearing with the added requirement that the hearing examiners could not be employees of the agency. Examples of legislation discussed above include:

1. The Public Service Commission was authorized to "hire employees as may be necessary" including hearing officers and court reporters in 1967.[14]

2. The Minnesota Department of Commerce was first authorized to hire hearing examiners in 1969 and to utilize them "where an appointive authority directs that the matter be heard by a hearing examiner."[15]

3. The Commissioner of the Minnesota Department of Human Rights was authorized to hire hearing examiners from outside of the agency and was required to assign discrimination hearings to them, for final determination, in 1967.[16]

4. In 1973, the authority for enforcement of certain nursing home safety and health laws and rules was transferred from the Commissioner of Public Welfare to the State Board of Health. Hearings on correction orders were required to be conducted by a hearing officer "who shall not be an employee of the state board of health."[17]

5. Also in 1973, the Occupational Safety and Health Review Commission was authorized to conduct hearings on appeals from citations of the Commissioner of Labor and Industry or to appoint hearing examiners to conduct the hearings.[18]

6. Numerous new environmental laws, requiring various hearings, were passed during the 1960's and 1970's, including the creation of the Minnesota Pollution Control agency in 1967.[19]

Thus, in the area of contested cases, the Legislature had been recognizing the need to provide due process rights to the citizens of the state together with the need to allow agencies to operate more efficiently and expeditiously when adjudicating these cases. Finally, the necessity of a totally impartial fact-finder and decisionmaker was recognized where an agency was viewed as being both the strict enforcer and prosecutor under certain areas of the law.

With this background, the Minnesota Legislature began its comprehensive review of the APA which led to the 1975 amendments.

Chapter 2

The 1974-1975 Amendments

During the 1974 Legislative Session, Representative William "Bill" Quirin, Chairman of the House Governmental Operations Committee and his counterpart, Senator Edward Gearty, Chairman of the Senate Governmental Operations Committee, agreed that a joint House/Senate review of the APA would be appropriate.[20] A draft of proposed changes was prepared for dissemination and comment and was sent especially to all state agencies.[21] The Administrative Law Section of the Minnesota Bar Association was also requested to participate in the review and comment through its then-chairman William Brooks. Mr. Brooks had been pursuing the concept of a separate and independent agency of hearing examiners since approximately 1964 when he was a member of the Attorney General's staff.[22] Other very active, supportive participants in the process included representatives of Governor Wendell Anderson's staff, the Minnesota Association of Commerce and Industry through its representative James "Ted" Shields, Attorney General Warren Spannus' office through his representative Assistant Attorney General J. Michael Miles, and former legislator (who had authored APA legislation during the 1950's) Peter S. Popovich.[23] The unenvious task of preparing the many drafts of the proposed changes, soliciting and reviewing written comments, scheduling of hearings and responding to innumerable requests for information during this period fell on the shoulders of James Nobles[24], from the House Research staff and Thomas J. Triplett[25] of the Senate Counsel's staff.[26]

Upon receipt of the draft of proposed changes, which included the removal of all exemptions from the APA, the state agencies were requested to submit samples of their agency guidelines, interpretive opinions and policy statements. They were also required to come forward with any and all reasons why their agency, or specific programs within their agency should be exempted from the APA. These written responses were compiled by Messrs. Nobles and Triplett and presented to the members of the joint committee. Agencies also presented oral testimony at the hearings.[27]

The major impetus to changing the APA was what was perceived to be violations of the rulemaking provisions of the APA. The joint committee discovered numerous instances of the issuance of agency guidelines or policy statements which had been issued by agencies without any public participation in the process. These guidelines and policy statements were then being enforced by the agency as though they were properly adopted rules having the force and effect of law. Examples included:

1. On May 17, 1971, the Department of Public Welfare adopted a statement of "official policy" on the performance of prefrontal lobotomies on patients in state hospitals.

2. In November 1973, the Board of Education published its "Guidelines for the Collection, Maintenance and Release of Pupil Records" which defined limitations on the accessibility of certain personal student files.

3. On November 20, 1973, the State College Board issued its "Operating Procedure 19" which permitted the consumption of alcoholic beverages in residence halls and in other academic buildings for "special occasions".

4. On June 7, 1974, the Department of Revenue, Income Tax Division, issued a memo to its tax examiners relating to rent credits specifying that tenants who rent from relatives must have entered into the lease arrangement at arms length in order to be eligible for the credit.[28]

As a result of the hearings, major changes were made to the APA by the 1974 and 1975 Legislatures. Among the more significant changes were the following:

1. A Legislative Commission to Review Administrative Rules (LCRAR), to be comprised of five members of the Senate and five members of the House was created in 1974. The LCRAR was given authority to review agency rules and to suspend the rules if the LCRAR found it appropriate to do so. Thereafter, the rules were to remain suspended until the next regular legislative session where a bill permanently repealing the rules was required to be passed by both bodies and signed by the Governor or the suspended rules would become effective again.[29] (This provision remains in effect today with very minor changes having been made.[30])

2. The definition of rule was changed by deleting the word "regulation", which was a redundancy and confusing, and by broadening the definition to ensure that it included "every agency statement of general applicability and future effect", which was intended to include all agency guidelines and policy statements.[31]

3. The Office of Hearing Examiners was created as an independent agency within the executive branch of government to be headed by a chief hearing examiner (now called the chief administrative law judge).[32]

4. The chief hearing examiner was given authority to adopt procedural rules for both rulemaking and contested case hearings which rules were to supersede all other agencies' rules which may be in conflict.[33]

5. All rulemaking hearings were required to be conducted by a hearing examiner (now called an administrative law judge) who could, subject to review by the chief hearing examiner, effectively stop rules from being adopted under certain circumstances. All rules were required to be adopted only after a hearing was conducted.[34]

6. All hearings falling within the APA definition of "contested case" were required to be conducted by a hearing examiner who was to prepare a recommended action to the agency, except where other laws required the hearing examiner's report to have finality.[35]

7. Exemptions from the rulemaking provisions of the APA were provided for rules relating solely to the internal management of an agency, rules of the game and fish division of the Department of Natural Resources, rules relating to weight limitations on the use of highways, and opinions of the Attorney General.[36]

8. While there was only one specific exemption from the definition of "contested case" in the APA, several exemptions from the APA itself were maintained. These included any agency having less than statewide jurisdiction (i.e. the Metropolitan Council), agencies in the legislative or judicial branches, certain emergency powers of the Governor, the Minnesota Corrections Authority and Pardon Board, the Department of

Chapter 3

The Office of Administrative Hearings

As briefly stated in Chapter 2, the 1975 amendments to the APA created the Office of Hearing Examiners. It was established as an independent agency within the executive branch of government and charged with the responsibility of the conduct of all administrative hearings required to be conducted pursuant to the APA.[38]

In a further effort to ensure the independence of the office and to remove it, as much as possible, from any political pressures, two significant sections were included. First, at a time when the Legislature had been reducing agency head terms of office from six to four years to be coterminous with that of the Governor, the position of the chief hearing examiner was created to be appointed by the Governor, with the advice and consent of the Senate, for a six-year term ending on June 30th of the sixth calendar year following the appointment. Second, all persons appointed as hearing examiners were to be in the classified or civil service system, were required to be free of any political or economic association which would impair their ability to function in a fair and impartial manner and were required to be "learned in the law" if conducting contested case hearings.[39] These provisions remain in the law today.

In response to the critics who feared that there would be a loss of expertise and thus the creation of delays in the process, the legislation included a "grandfather clause" which mandated that all persons then serving as hearing examiners in state agencies and who were otherwise eligible for appointment were transferred to the office if their agency was not exempt.[40] Additionally, a requirement was added which directs the chief hearing examiner, when making case assignments, to assign persons with expertise in the subject matter of the hearing whenever possible.[41]

Because costs of the administrative process were of concern, the office was given an initial appropriation of only $167,000 to be used during the organizational phase of its operation and as "start-up" funds once the effective date occurred.[42] Thereafter, all funding is to be from a direct charge to the agency for which a hearing is being conducted.[43] A further cost-related provision allows the chief hearing examiner to contract with qualified persons to serve as hearing examiners when regularly appointed hearing examiners are not available.[44] This latter provision was to enable the office to hire full-time staff to cover the normal hearing schedule rather than hiring staff to cover the peak periods and having less than a full caseload at other times.

Prior to 1975, all agencies had their own procedural rules, most of which were similar to model rules proposed by the Attorney General, but all having their own unique sections. The 1975 Act required the chief hearing examiner to adopt procedural rules for both rulemaking and contested case hearings.[45] Once adopted, these rules superseded any other agency's rules which were in conflict. This provision was a response to the complaints that a multiplicity of procedural rules existed which required parties to purchase and be familiar with different procedural rules for each agency.

The act also provided specific authority to the chief hearing examiner to utilize court reporters to keep the record at all hearings or to use audio magnetic recording devices if deemed appropriate. Discretion was given to the chief hearing examiner to maintain a staff of court reporters.[46]

Finally, the act, passed in the late spring of 1975, required the Governor to appoint the chief hearing examiner by July 31, 1975. The rest of the Act's requirements became effective on January 1, 1976.[47] This was to provide sufficient time for the appointee to organize the office, adopt the procedural rules and to give the various state agencies time to prepare for the required changes. Governor Wendell Anderson appointed this writer as acting chief hearing examiner on July 25, 1975.

As will be discussed in Chapter 6, the title of the office was changed to the Office of Administrative Hearings by the enactment of 1980 Minn. Laws, Ch. 615. While the "official" reasons for the title change was that it would be much more descriptive of the work actually performed by the office, other reasons were also given. The primary reason for the change, at least from the perspective of the personnel of the office, was the fact that the public many times assumed that our office had something to do with impairments in hearing or that we regulated hearing aid dealers. Adding to the confusion was the fact that two of the three floors of the building housing our office were occupied by Minnesota Services for the Blind. The change in title effectively solved this misconception problem.

Chapter 4

Organizing the Office

Although the official appointment to the position of chief hearing examiner was made on July 25, 1975, on the previous day the Governor had informed persons of his selection and had requested the Commissioner of Administration to assist the new appointee in the organization of the office. That Commissioner, Richard Brubacher, arranged a meeting for the chief hearing examiner with the directors of several divisions at the Department of Administration. That meeting was held on the day before the official appointment by the Governor. The purpose of the meeting was to introduce the appointee to the various division directors and to provide immediate assistance in a number of areas. The most obvious and pressing needs were to find office space for the appointee, office furniture, and to have telephone equipment installed. While under normal circumstances such tasks would take anywhere from two to three weeks, within 24 hours the Commissioner of Administration had found space for the chief hearing examiner to sublease from the Minnesota County Attorney's Council, which was located one block from the State Capitol. At the same time, arrangements were made to temporarily rent furniture from the same council and the normal "red tape" was cut so that at 8:00 a.m. on July 25, 1975, the telephone lines at the new Office of Hearing Examiners were installed and working. At the same time, the Commissioner provided direct assistance so that the chief hearing examiner could obtain immediate office supplies.

Besides enlisting the aid of the Commissioner of Administration, the Governor also requested the Commissioner of Personnel to provide immediate assistance to the chief hearing examiner in any and all personnel related matters. Michael C. O'Donnell, then acting commissioner of personnel, directed his staff to provide whatever assistance was necessary and to do so in an expedited fashion. He, like Commissioner Brubacher, set up an immediate meeting with the directors of the various divisions at the department who then proceeded to assist the chief hearing examiner in the preparation and completion of all paper work necessary to the establishment of the position and continued this assistance on an "as needed" basis.

There can be no doubt that without the cooperation of Commissioners Brubacher and O'Donnell, the directives to their staffs to provide immediate assistance, and the able assistance of those staff persons too numerous to mention, the implementation of the 1975 APA amendments, by January 1, 1976, would not have occurred.

One of the initial tasks in organizing any new agency is to determine the number of personnel which will be required to carry out and implement the provisions of the enabling legislation. In order to accomplish this task, it was necessary to obtain information and data from every agency of state government as it related to the conduct of administrative hearings which had been conducted in the past, along with estimates for the number and length of hearings which were anticipated to be conducted after January 1, 1976. In order to ascertain these numbers, each agency was contacted by telephone to set up an appointment for the chief hearing examiner to meet with the department head or designee and appropriate staff persons who could provide answers to the questions relating to hearings. Because the Governor had issued a directive relating to full cooperation in the establishment of the new office, all state agencies were well prepared for these meetings and

provided what information they had available. At the same time, to verify the information which was being obtained from the agencies, the Attorney General's office was asked to survey all of its personnel, who were requested to go back through their records to determine the number of hearings they had been involved with for all of the agencies. The numbers obtained from the agencies were very close to the numbers obtained from the Attorney General's office.

After approximately two months of meetings, during which time the first draft of procedural rules were also being prepared and published, it was determined that the office could anticipate approximately 2,000 hearings each year. After attempting to analyze the length of the hearings involved, the California Office of Administrative Hearings, an office similar in scope, was consulted to compare the caseload numbers, anticipated hours per hearing, and an organizational structure. Upon obtaining information from that office, the Department of Personnel was consulted and it was determined that the office should be initially staffed with a total complement of 35 positions, which was to include the chief hearing examiner, a deputy chief hearing examiner, 15 hearing examiners, 10 court reporters, an administrative assistant, and seven additional support staff positions to provide typing support for the hearing examiners, receptionist responsibilities, a financial clerk to be responsible for the billing of agencies, and typists to provide transcriptions of tape recorded hearings. Once these numbers had been established and approved by the Department of Personnel, it was necessary to draft position descriptions for each of the proposed positions. Again, the staff of the Department of Personnel provided not only input for the position descriptions but assisted in the actual drafting of the position descriptions in order to expedite the process. Once the position descriptions were completed and approved, it was necessary to publish the vacant positions in the bulletin in order that persons could submit applications for consideration for hire.

As indicated earlier, the 1975 legislation provided for an automatic transfer to the office of those persons presently serving in the position of hearing examiner in other state agencies. The Commissioner of Personnel assisted in locating these persons. Meetings were held with these individuals shortly after the appointment of the chief hearing examiner and continued until the transfer. It was established that five persons from the Public Service Commission and one from the Minnesota Department of Commerce were eligible for transfer. At the same time, as the office was intending to maintain a court reporter system, persons presently serving as court reporters in state service were not automatically transferred by the law but, rather, were eligible for appointment to the positions if they applied. Therefore, meetings were also held with these individuals in order to inform them of the intended policies of the newly created agency so they might be able to make their decision on applying for positions.

The hiring of court reporters led to some controversy . In the past, court reporters at the Public Service Commission had been allowed to keep the proceeds from the sale of all transcripts they had prepared and which had been sold to the public. As the newly-created agency's enabling legislation provided that the fees for all services were to go to the office revolving account, it was the established policy of the agency that any fees for the transcription of the record of any hearing would go to the revolving account in the state treasury and not to the individual court reporters, who were classified employees of the state. As a result of this provision, several of the court reporters at the Public Service Commission chose to seek other

non-state employment or to transfer to the Department of Labor and Industry, Workers' Compensation Division, where the court reporters were allowed to keep the proceeds from the sale of transcripts from those hearings.

Enabling legislation specifically authorized the chief hearing examiner to utilize audio magnetic recording devices for hearings where it was deemed appropriate. During 1975, the first four-track audio magnetic hearing recorders were available on the market. Because it was assumed that the majority of the hearings would utilize court reporters and because the four-track systems were untested in terms of reliability, a limited number of the four-track systems were purchased. Again, the staff of the Department of Administration provided able assistance in preparing and expediting the necessary documents which allowed the office to obtain equipment prior to January 1, 1976.

One of the factors that most people fail to think about when a new agency is created is the cost of the purchase of desks, chairs, typewriters and other necessary reusable office equipment, as well as office supplies. The purchase of office equipment was expedited through the Procurement Division of the Department of Administration. A more difficult task was trying to determine the amount of office supplies which would be necessary. It did not appear that anyone within state government had any usable data on exactly how many paper clips, pens, pencils, legal pads, rulers, scissors, staples, etc., are used by an employee in a specific position in state government. Therefore, the ordering of such mundane yet absolutely necessary supplies became a real guessing game. At the same time, having a legally trained person trying to figure out exactly what type of pencils, pens, and other secretarial supplies were most appropriate became almost humorous. Luckily, the first employee hired by the chief hearing examiner was an administrative secretary who had previously served in the same position at the Department of Commerce and who had much experience in not only dealing with the necessity for support staff supplies but in providing secretarial services directly to the new appointee. Sandra Haven had previously worked as a secretary to the newly-appointed chief hearing examiner while he worked at the Department of Commerce, and also had experience as the administrative secretary to the Chairman of the Minnesota Department of Commerce prior to her transfer to the Office of Hearing Examiners. Her experience, and thereafter advice and assistance, in the organization of the newly-created office proved to be invaluable.

One would think that obtaining office space for a newly-created state agency would be an easy task given the usual "glut" of office space available and the desirability of a state agency as a tenant. However, given only five months to have the facilities available and the number of private offices necessary, finding and designing office space was one of the more difficult tasks in the organization of the office. It was assumed that finding office space would be much easier but we had begun looking for the space immediately. Several locations were found and designs were drawn for the office. However, for one reason or another, the proposed lessors dropped from consideration when faced with a January 1, 1976, deadline. Once again, the Department of Administration, Real Estate Management Division, provided able assistance and, eventually, adequate space at a very nominal charge was located within the city of St. Paul. However, it was not until November 11, 1975, that the space was found. Leases had to be prepared and signed before any work could be accomplished.

Once the office space had been located, equipment and supplies ordered and procedural rules adopted, the task of filling vacant positions commenced. Interviews were held during the month of November of 1975. When hiring the first hearing examiners, an attempt was made to find persons with expertise in different areas of the law so that the office could commence its operation with a wide variety of expertise. This proved to be a difficult task in one area but the office was able to find an individual with an excellent background in environmental law to assist in establishing an environmental unit within the office. Probably due to the minimal salaries which were available at the time, the number of applicants for the positions was considerably less than had been anticipated. However, the quality of the applicants was at an extremely high level and gave the chief hearing examiner a sufficient number of persons to choose from.

While it was the intent to organize the office into units for the purpose of supervision and for the purpose of maintaining or establishing expertise in certain subject matters, it was determined that with the exception of the environmental law area, the chief hearing examiner would personally supervise all individuals until such time as appointments to the supervisory positions could be determined. Therefore, the initial organizational structure was not implemented until sometime after the office had gained some experience.

In hiring individuals to the hearing examiner positions, it was anticipated that the number of hearings forecasted by the agencies was correct. Unfortunately, when providing data on the anticipated hearings, the numbers which had been provided by the agencies were somewhat inflated which created immediate problems. Using the usual 20-20 hindsight, where the office hired 14 full-time and one part-time hearing examiner, no more than ten hearing examiners should have been initially hired, leaving the balance of the positions vacant to be filled as the need would arise. As an example, the position of assistant chief hearing examiner was not initially filled and eventually that position was cancelled. Three court reporter positions were not initially filled and, as will be seen later, were never filled once a time/cost study had been accomplished.

The office began receiving its first requests for the assignment of hearing examiners during the month of December of 1975. Because there were six hearing examiners who were to be transferred to the office who had experience, the office was able to accommodate these requests as they were made. Likewise, we were able to project into the future and assign hearings to persons who were to be newly-hired on January 1, anticipating that they would be fully trained by the time their hearings were to be conducted. Thus, the actual receipt of requests for hearings, assignment of hearing examiners, and calendaring and docketing procedures were implemented prior to the effective date of the office. Fortunately, prior to the requests being received, an office policy and procedures manual had been prepared which established both a billing system and a calendaring procedure.

The adoption of the procedural rules was accomplished through the assistance of George Beck, a hearing examiner at the Department of Commerce who was to be transferred to the office; Howard L. Kaibel, Jr., the first hearing examiner to be hired by the office; J. Michael Miles, Assistant Attorney General assigned to the Office of Hearing Examiners; Ted Shields of the Minnesota Association of Commerce and Industry; and William Brooks, Chairman of the Administrative Law Section of the Minnesota Bar Association as well as other members of that association. These persons provided assistance in discussions of what the rules should contain, what they should look like,

and how they should be proposed, as well as providing valuable comments on the various drafts. The first hearing was held in the late fall, which led to changes in the rules. The comments received at the hearing also led to the office proposing more substantial amendments to the rules at a second rulemaking proceeding conducted in December.

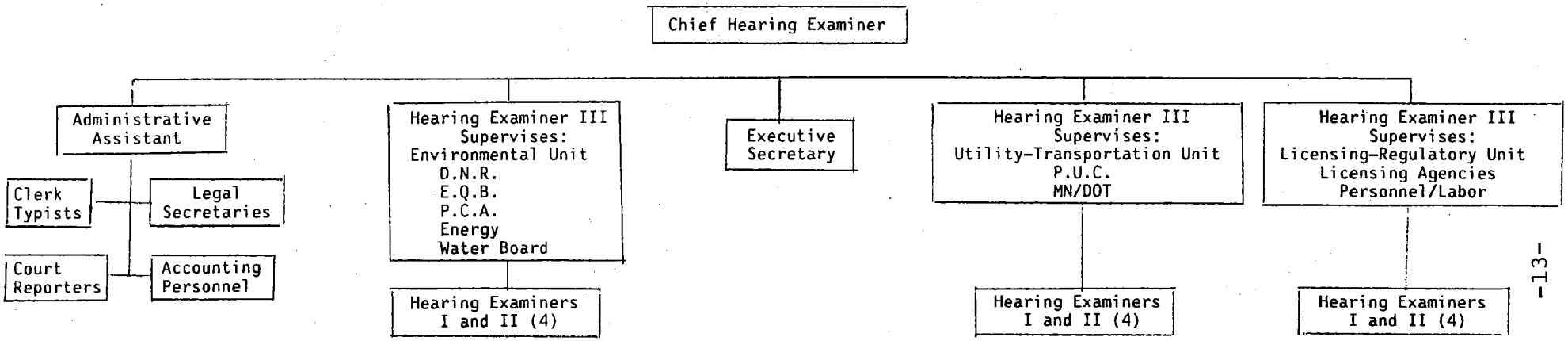
The first rulemaking hearing was attended by a large number of persons interested in the administrative process. The largest number of persons in attendance represented agencies. The other persons in attendance were members of the Administrative Law Section of the Bar Association and other representatives of associations with a high degree of interest in the administrative process. At the second rulemaking hearing where amendments to the initial rules were proposed, a much smaller number of persons attended due to the limited scope of the proposed amendments. In both proceedings, all participants came prepared to suggest modifications or other changes to the rules to make them more workable and easier to understand. The initial rules were adopted and effective prior to January 1, 1976.

The initial organizational structure of the Office of Hearing Examiners was as indicated in the chart at the end of this chapter.

From the initial appropriation of $167,000, $86,134.56 was expended prior to January 1, 1976, during the organizational phase of the office. This left $80,865.44 to begin operations on January 1. The breakdown of the organizational costs is as follows:

A. Furniture		
1. Desks	$11,472.92	
2. Chairs	7,382.28	
3. Filing Cabinets, Shelving, Bookcases	3,821.00	
4. Credenzas and Tables	3,350.02	
5. Miscellaneous	1,946.45	
6. (Less Transfer at Later Date)	(492.45)	
		$27,480.22
B. Equipment		
1. Typewriters	$ 5,008.50	
2. Dictation Equipment	6,472.50	
3. Hearing Recorders	14,583.15	
4. Office Machines	338.92	
5. (Less Later Transfer)	(1,000.00)	
		$25,403.07
C. Office Set-Up Supply Expenditure		
1. General Supplies	$ 2,542.00	
2. Law Books	7,497.00	
3. Telephone Installation	848.00	
		$10,887.00
D. Operational Costs - July to December 1985		
1. Salaries	$19,197.27	
2. Miscellaneous Operational Expenses (Rent, supplies, telephones, etc.)	3,167.00	
		$22,364.27
GRAND TOTAL		$86,134.56

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
ORGANIZATION STRUCTURE
AS OF JANUARY 1, 1976



Chapter 5

The First Year

On January 2, 1976, the office opened its doors for business. The first weeks, as was anticipated, were a bit chaotic. On January 2, only two telephone lines had been installed because our telephone "order" had somehow gotten delayed in processing. This problem was quickly solved after the Chairman of the Public Service Commission, Karl Rolvaag, found it impossible to get through to our office to schedule hearings. One call from the PSC led Northwestern Bell Telephone Company to authorize overtime to employees for the first time in eighteen months. By the evening of January 4, all phone lines were in and working.

Another problem was furniture. It was not fully delivered until after the first week. In the interim, the employees shared what desks we had available, everyone taking the initial "glitches" in good stride.

On January 2 and 3, the office held orientation sessions for the employees. These sessions included going through the office policy and procedures manual and the newly adopted procedural rules. We invited representatives of the Department of Personnel to participate. They went through, in great detail, the personnel laws and rules which proved to be invaluable to our employees. Another very valuable part of the initial orientation was given by a representative of the insurance agency which was responsible for all employee insurance. A representative of the State Capitol Credit Union participated by explaining the operation of the credit union and answering any and all questions. All of these persons provided valuable information to the employees and responded to questions which the office administration would otherwise have had to answer on a case-by-case basis.

For the purpose of training newly hired hearing examiners with little or no experience, we assigned one experienced hearing examiner to two with less experience. The "rookie" examiners attended hearings conducted by the "veteran" examiner, thereafter asking any questions about the proceedings and discussing the case itself to gain a better understanding of the law which was the subject of the hearing. When the "rookie" examiners conducted their first hearings, the "veteran" sat in on the hearing, took notes, and later prepared a written critique of the proceedings, providing a copy to the chief hearing examiner.

In order to insure uniformity in format and a grammatically correct and understandable work product, prior to the issuance of any hearing examiner's report, it was reviewed by the chief hearing examiner. This review was primarily for the purpose of insuring readability, correct spelling and grammar, and uniformity of format but also was for the purpose of insuring that all reports contained the conclusions of law necessary to reach a decision and that each conclusion was supported by one or more findings of fact. (This pre-issuance review has continued to the present time and is now accomplished by the ALJ supervisors or the Chief ALJ in their absence. It has proven to be a very effective quality control procedure.)

One problem which was evident very early was the misconception, by some, of what constituted a true finding of fact. We found that some training in this regard was necessary and attempted to provide it through this review. Another problem which emerged was the propensity of some examiners to use language in their reports which could be and was viewed by some as demeaning

to one party or another. This led to the establishment of a written policy of the office which prohibits the use of language in a report which could be viewed as a "cheap shot" at a party. While some examiners expressed initial concern over the policy, compliance was obtained and the policy remains in effect at this time.

As alluded to in the previous chapter, when providing data on the number of anticipated hearings, agencies had inflated their numbers somewhat. Additionally, the Department of Public Welfare refused to refer its recipient cases to the office because it took the position that their law superseded the APA amendments and later because of the claim that there would be a loss of federal funds if someone else conducted these hearings. The department subsequently obtained a letter from the regional office of the U. S. Department of Health, Education and Welfare threatening the loss of federal funding unless an exemption was granted. The letter came to light very late in the 1976 Legislative Session and resulted in the passage of a bill exempting the federally funded assistance programs from the APA.[48] This resulted in the loss of approximately 500 contested case hearings annually.

A second loss of approximately 600 anticipated hearings was the result of the Department of Corrections seeking and obtaining an exemption for its hearings "involving the discipline or transfer of inmates or other hearings relating solely to inmate management".[49] This exemption, as well as the DPW exemption, remains in the law as of this date.

Two other agencies did not refer cases to the office as had been anticipated. The Department of Revenue simply put a number of its hearings "on hold" until it could seek legislative clarification. This clarification did not occur until the 1977 Legislative Session when it was determined that a few of its "contested cases", primarily in the area of iron ore and petroleum taxes, would be exempted but that the rest of its hearings were to be APA hearings.[50] The other agency not referring all of its cases to the office was, and remains, the Department of Public Safety. That agency has taken the position that because the commissioner has authority to summarily revoke or suspend a person's drivers license upon a finding that the driver is an unsafe driver, the right of the driver to a subsequent hearing is not a contested case under the APA.[51]

Another source of anticipated hearings which failed to materialize were those involving the implied consent law. As initially proposed by its author, Senator Alec Olson, the bill was to provide the right to an administrative hearing upon request. While the legislation was pending very late during the 1976 Legislative Session, Senator Olson had a meeting with the chief hearing examiner, a representative of the Department of Public Safety Drivers License Division, and the Special Assistant Attorney General assigned to that division. The purpose of the meeting was to discuss an appropriation for the hearings. The department, not very happy with the thought of another agency conducting its hearings, prepared a fiscal note wherein it projected an extremely high number of hearings and a cost for those hearings of two million dollars. As a result of those numbers, which later proved to be extremely inflated, Senator Olson amended his bill to require the implied consent hearings to be conducted by the municipal and county courts where they continue to be heard as of this date.[52]

Because the office was initially staffed in anticipation of a level of hearings which failed to materialize and an hourly charge established based upon a presumed number of billable hours, the office ran into a severe

financial crisis within the first six months. Several steps had to be taken immediately. First, two hearing examiners were transferred to vacant attorney positions at the Department of Labor and Industry. A third examiner originally scheduled for the same transfer chose to return to the private practice of law. As we were preparing a similar reduction in support staff, two of the legal secretaries chose to transfer to other agencies. Second, a restructuring of the billing rate was implemented in order to bring solvency to the office's revolving account and to insure its stability at least through fiscal year 1977. These steps proved to be sufficient to resolve both the immediate and long-term problem.

As a result of the financial problems discussed above, the office began an in-depth look at all of its expenditures, hearing procedures and every other aspect of its operation. Two items of expense which were very large were court reporters and travel. The study of these two expense items resulted in cost saving proposals in both areas.

First, a time and cost study of the use of court reporters who were employees of the office versus the use of audio-magnetic recording devices and court reporters from the private sector was completed. It was found that the cost of the "in-house" court reporters' work product, one page of transcript, was in excess of $5.00 per page. Because of the lower costs charged by the private sector with whom we were in competition, we were unable to bill for 100% of our costs. Thus, the hourly billing rate for hearing examiner services was actually subsidizing the costs of maintaining an "in-house" court reporter system. We were only recouping $2.40 per page of typed transcript or a loss of in excess of $2.60 per page. To alleviate this problem, we initiated a written lay-off notice to all of our employee court reporters. All but two were able to secure other employment. Because these two had many years of governmental service and were experienced in utility rate hearings (where we came the closest to recouping our costs), we withdrew the lay-off notice to them. (These reporters remained on our staff until 1982 when they, along with reporters who had been transferred to the office in 1981 in the workers' compensation reform bill, were laid off due to abolishment of their positions as part of the budget reductions during the 1981 Third Special Session.)

The second action taken was a study of the nature and type of hearings we were conducting, especially those requiring any travel. We found several things which led to subsequent changes, some requiring legislative action and the other requiring better prehearing techniques by the examiners. The first thing we discovered is that we were traveling all over the state to conduct hearings where there were no adversarial parties. The second discovery was that a high number of cases were settled just prior to our starting the hearing.

In the first instance, our study showed that while we were supposedly conducting "contested" hearings, in many instances there was no opposing party and the hearing was nothing more than an oral repetition of information already contained in a written application required to be filed with an agency, which was then required to conduct an administrative hearing prior to acting on the application. We found these types of provisions in a number of agencies' statutes when the agency was requested to issue some type of license, permit or certificate of authority. After identifying the laws and the agencies involved, we met with the agencies to discuss a proposal to eliminate the need for these hearings except where necessary. After securing their agreement, an omnibus bill was drafted and passed by the 1977

Legislature which deleted the necessity for hearings in these cases except when there was opposition to the application or when the agency denied the application based on its written contents. The agencies were given discretion to initiate a contested case where deemed appropriate. This became known as the "uncontested-contested case" procedure.[53] This same procedure has been introduced into other statutes in subsequent legislative sessions.

In order to alleviate the problem of parties waiting until the hearing to discuss settlement of their differences, the office began to pursue various methods of getting the adversaries to discuss the case earlier. In many instances we had found that parties were unaware that an administrative hearing could be settled or that they could even talk to the agency representative prior to the hearing. There was also the fear that if one side initiated settlement discussions, it would be perceived as evidencing a weakness in their case. One successful method was to increase the use of prehearing conferences, both in person and by telephone, the latter when one party would have to travel more than 50 miles to attend the conference. Agencies were a little reluctant at first because they believed it would increase costs. After a short time, seeing the success of these conferences in saving both time and money, they actually began requesting us to hold a prehearing conference when they referred a case to us.

Another step taken to facilitate settlements has been the issuance of a prehearing order in certain cases which required the applicant for some type of permit to contact the opposing party to discuss settlement no later than ten days prior to the hearing. They then are required to report the results to the examiner. A failure to comply results in the case being continued. This procedure has resulted in an increase in early settlements in transportation cases of approximately 50%. The obvious result is a savings of both time and costs to all concerned.

As the first year drew to a close and the office prepared for the 1977 Legislative Session, which would be the first budgetary session for the office, a detailed report was prepared. The report analyzed not only budgetary information but also included statistical data on the number of cases received and the dispositions, as well as a breakdown of our billings, by agency. From the charts which follow, it can be seen how the workload of the office started out much lower than had been anticipated but slowly increased to the point where the office was operating at nearly full capacity by the end of the year.

CASES OPENED AND CLOSED
CALENDAR YEAR 1976

MONTH	OPENED	CLOSED	PENDING
January	159	14	145
February	57	32	170
March	50	51	169
April	65	47	187
May	67	37	217
June	85	69	233
July	66	61	238
August	85	55	268
September	86	79	275
October	74	43	306
November	60	94	272
December	47	72	247
Total	901	654	

SUMMARY OF BILLABLE HOURS AND TOTAL TRANSCRIPT SALES, BY MONTH

MONTH	BILLABLE HOURS	COURT REPORTER HOURS	TOTAL TRANSCRIPT SALES	TOTAL PAGES SOLD
January	718.1	310.5	$ 748.00	612
February	888.4	241.1	1,687.25	1017
March	1042.5	278.0	2,697.30	4074
April	1420.2	200.4	2,544.85	1273
May	1107.8	133.1	6,285.82	4447
June	1333.3	78.8	9,454.50	4426
July	1398.8	25.2	3,374.15	3020
August	1498.2	66.5	4,225.70	3561
September	1484.7	55.7	2,476.25	2075
October	1299.3	38.6	1,804.25	1541
November	1579.6	47.6	2,503.85	2152
December	1628.5	49.9	2,264.75	1835
Total	15,399.4	1525.4	40,066.67	30,033

AGENCY EXPENDITURES FOR HEARING EXAMINERS AND COURT REPORTER EXPENSES

AGENCY	FILES OPENED	FILES CLOSED	HE BILLED HOURS	HE TOTAL CHARGES	COURT REPORTER AND TRANSCRIPT CHARGES	TOTAL CHARGES
Attorney General	1	1	11.6	$ 464	0	$ 464
Agriculture	14	8	133.5	6,335	$ 168	6,503
Architects, Bd. of	3	3	47.6	1,846	27	2,116
Building Code	6	3	27.9	994	23	1,017
Board of Nursing	8	5	53.7	2,148	140	2,288
Board of Pharmacy	3	3	3.7	123	0	123
Board of Teaching	1	1	15.5	620	125	745
Veterinary Medicine	1	1	11.6	464	0	464
City of St. Paul	1	1	29.0	1,160	0	1,160
Cable Communications	2	2	119.7	3,287	0	3,287
Chiropractic Board	3	3	30.3	1,202	0	1,202
Commerce						
Commerce Commission	13	12	595.8	19,285	4,398	23,683
Banking	7	7	113.4	3,833	68	3,901
Insurance	17	6	262.4	8,890	2,869	11,759
Securities	43	29	316.3	10,606	1,291	11,897
Consumer Services	1	0	18.1	724	173	897
(Total Commerce)	(81)	(54)	(1306.0)	(43,338)	(8,799)	(52,137)
Corrections	1	0	6.1	244	0	244
Dentistry Board	4	4	35.3	1,412	0	1,412
Natural Resources	4	3	172.6	6,419	0	6,419
Public Safety	3	3	77.3	3,092	0	3,092
Transportation	1	0	3.8	152	0	152

Public Welfare	42	26	852.0	33,584	958	34,542
Revenue	9	7	170.1	6,804	212	7,016
Veterans Affairs	9	7	79.5	3,012	75	3,087
Energy Agency	8	2	485.6	19,556	2,099	21,655
Education	4	3	111.7	4,468	141	4,609
Ethical Practices	2	2	67.5	2,658	0	2,658
Environmental Quality	15	10	1034.5	39,099	2,078	41,177
Higher Education	2	2	144.1	5,285	0	5,285
Housing Finance	1	0	.3	12	0	12
Health Department	73	47	628.6	24,195	177	24,372
Human Rights	41	22	267.6	10,139	413	10,552
Highway Department	6	4	170.5	6,281	0	6,281
Labor & Industry	6	3	99.6	3,433	266	3,699
Livestock Sanitary Bd.	2	2	17.5	595	0	595
Metropolitan Council	1	1	122.9	4,916	0	4,916
Mpls. Public Schools	3	3	17.8	712	0	712
Nursing Home Admin.	3	1	30.2	793	0	793
Optometry Board	2	1	8.2	328	0	328
OSHA	134	97	1119.1	38,261	344	38,606
Personnel Board	6	4	80.5	2,902	0	2,902
Pollution Control	10	4	283.5	10,211	148	10,359
PERB	2	2	15.5	620	110	730
State Planning	3	3	132.5	5,394	60	5,454
Peace Officer Training	1	1	19.4	815	0	815
Public Service Comm.	357	290	6796.6	264,297	20,954	285,251
Psychology Board	1	1	5.9	236	15	251
State Register	1	1	79.9	1,838	0	1,838
State Arts Board	1	0	3.5	140	15	155
Cosmetology	9	5	52.5	1,986	150	2,136
Medical Examiners	7	6	289.6	11,086	864	11,950
Designer Selection	1	1	9.3	372	0	372
Secretary of State	1	1	70.9	2,655	0	2,655
State University Bd.	1	1	7.0	280	0	280
Total	901	654	15,359.1	$580,263	$38,604	$618,865

Chapter 6

1977 - 1981

The next five years of operation brought a stabilization to the operation of the office. The following table gives a picture of the office's operation during that time period. (For the purpose of this and subsequent tables, the information is provided on a fiscal year basis, the fiscal year running from July 1 to June 30. Thus, the following table includes date from July 1, 1976, through June 30, 1981.)

Fiscal Year	Billable Hours	Files Opened	Files Closed	Cases Pending	Reports Issued	Cases Settled	Percent Settled
1977	17,880.8	823	772	284	N/A*	N/A	N/A
1978	18,841.5	667	654	297	471	183	28%
1979	15,881.5	782	745	334	520	225	30.2%
1980	18,301.6	670	705	299	473	232	32.9%
1981	18,416.3	616	578	337	327	251	43.4%

*N/A = Not available

From the foregoing it can be seen that the previously discussed legislative changes and increased awareness of settlement procedures had a positive impact. The number of cases referred for hearing was reduced while both the number and percentage of cases settled increased.

From a purely fiscal point of view, the following table, which includes data from fiscal year 1976 (which was for only six months) shows the stabilization which occurred.

Fiscal Year	Authorized Complement	Positions Filled	Income	Expenses	Profit(Loss)	Carry Forward*
1976	35	25.5**	*276,781	341,623	($ 64,842)	$ 16,023
1977	35	21.5	840,067	650,936	189,131	205,154
1978	35	23.5	849,775	775,230	74,545	279,699
1979	35	23.5	844,910	818,411	26,499	306,198
1980	25	23.5	824,324	886,939	(62,615)	243,583
1981	25	24.5	781,206	938,085	(156,880)	86,703

*$80,865 was carried forward from the first half of FY 76.
**Represents positions filled at the close of the fiscal year.

Several things occurred during this five-year span of time. First, the Department of Finance had raised our January 1, 1976, hourly billing rate of $23.00 per hour to $40.00 per hour when the fiscal crisis hit in FY 76. At the same time, we were instructed to maintain that rate until our cash reserves exceeded three months of anticipated expenses. Once that point was reached, the rates were decreased on a temporary basis which was at the start of FY 80. We had also come to feel more comfortable with the caseload statistics and subsequently determined that the three months' cash reserve could be reduced to approximately two months. That reserve actually dropped lower than two months' anticipated expenses as costs increased a little faster than had been projected and we were unable to effectuate a rate increase until the start of FY 82.

Another significant occurrence during this time span was the beginning of a formal training program for our staff. As the law required that only hearing examiners "learned in the law" may conduct contested case hearings,[55] the hearing examiners must maintain licensure as an attorney which means that they must obtain at least 15 credits of continuing legal education each year. Because of the small size of the office and its limited resources, formal training programs within the office were found to be difficult, if not impossible to accomplish due to a lack of educational training expertise, time and cost. After reviewing many available alternatives from a substantive content and cost viewpoint, it was determined that other from outside of Minnesota state government could provide much higher quality training at a lower cost than if we were to try to implement a significant "in-house" program.

Seminars relating to the substantive areas of law directly related to the subject matter of OAH hearings are offered throughout the year by professional legal education associations including the University of Minnesota, William Mitchell College of Law, Hamline University Law School, the Minnesota Bar Association, the National Association of Regulatory Utilities Commissioners, and others. These associations have the ability to gather the leading experts in their respective fields and to provide one, two and three-day structured legal education programs at a nominal cost of approximately $85.00 per day. Given the previously discussed mandate that whenever possible hearing examiners are to be assigned to hearings with expertise in the subject matter of the hearing, these seminars have proven to be the most cost-effective method of both obtaining and maintaining expertise in the various fields of law.

In addition to providing training in specific areas of law, it was also found to be necessary to provide training in the procedural techniques of conducting hearings and writing decisions. By providing training of this type, it was through that we could bring more efficiencies to the administrative hearing process. To find this training, we consulted the Judicial Branch of the state to determine how it trained our state court judges. While our state judges have some minimal training programs within the state, we discovered that they had determined that the best and most cost-effective training programs for judges were conducted by the National Judicial College which has been training judges from all around the country and many foreign counties for more than 20 years. We discovered that the NJC also provides training for administrative hearing officials in a structured, classroom setting. Their courses include training for new judges in how to conduct fair and expeditious hearings, management of complex administrative hearings, decision making and decision writing, advanced evidence, reducing delays, handling of both medical and scientific evidence and only recently alternative methods of dispute resolution. An analysis of the costs of this training versus the benefits to be obtained led us to the utilization of this institution for our office.

The training program of the OAH evolved over the years of operation, the extent of training available each year being dependent on the availability of funds. At present, the training program requires all newly-hired judges to attend the two-week Fair Hearing training course at the NJC. Thereafter, provided that funds are available, all judges are allowed 56 hours of training time and $1,200 of training funds each biennium. Requests for attendance at any specific course is subject to supervisory approval. The benefits of this training program can be seen in the tables included within this report which

related to the efficiencies brought to the administrative process in terms of reducing the time for issuing decisions and processing orders and the ability of the judges to handle more cases in less time.

Another program initiated within the OAH during this time span was the start of a working relationship with William Mitchell College of Law. The college wanted to start an administrative law clinical program for its students. The impetus for the clinic came from Professor Melvin B. Goldberg. The college admits up to 10 students per semester into the clinic, the students receiving two credits per semester for their work within the clinic. The students' names are referred to the OAH. They are assigned to at least two hearings per semester. They meet with the ALJ prior to the hearing, attend the hearing, do all necessary legal research, prepare a first draft of the decision, meet again with the ALJ and complete a final draft. The students meet in a classroom setting three times during the semester with Professor Goldberg and at least one representative of the OAH. Because most of these students have full-time jobs and attend classes at night, much of the time spent with the ALJ is before their normal starting time, during their lunch hours or after their normal work day.

The benefits to the students participating in this program are fairly obvious. What is not as obvious are the benefits to the State of Minnesota. The students perform the same function as a law clerk in conducting the legal research and the drafting of decisions. Their work product is usually at a very high level, thus allowing the ALJ to spend less time on a case than would otherwise be necessary. As the ALJ's time spent on a case is billed to the agency for which the hearing is being conducted, the agency benefits from a reduction in the cost of the hearing process. The OAH benefits by the ALJ's being able to handle more cases thus allowing the office to maintain a smaller full-time staff than would otherwise be necessary. As an example of the time saved for the state, during the fall semester of 1985, the students spent a total of 536.4 hours of legal research and decision writing. Assuming that it would take the students twice as long as an experienced ALJ, the total hours saved for the state agencies would be 268.2. At a current billing rate of $68.00 per hour, this amounts to a cost savings to the state agencies of $18,237.60.

During this same time period, a number of bills were passed by the legislature which had varying impacts on the operation of the office. This legislation also impacted on all other agencies where the amendments were made to the APA. These bills and the impacts are discussed below, by year of passage.

1977

1977 Minn. Laws, Ch. 162. This bill amended Minn. Stat. Ch. 105 to make it clear that hearings conducted for the Department of Natural Resources were contested cases under the APA. The department had taken the position that because their statute contained specific hearing procedures, they were somehow exempt from the APA. This bill brought hearings to the OAH which had been anticipated in the 1975 planning but which had never been referred. The bill was the result of a constituent complaint made to Representative Gene Wenstrum following a Ch. 105 water permit hearing which had been conducted by the same person from DNR who had originally denied the permit application.

Minn. Laws 1977, Ch. 323, Secs. 1 and 2. These sections amended the APA to require the Department of Administration to provide one free copy of the State Register to each county library or the library designated by the county board and one copy of the manual of state agency rules to be provided in the same manner. These amendments, which did not contain an appropriation, resulted in an increased cost of publication of both the State Register and the manual of rules. These increased costs were passed along to all state agencies by increasing the charges for publishing rules in both publications. Thus, the bill served to increase costs of rulemaking.

1977 Minn. Laws, Ch. 430, Sec. 7. This bill amended the APA by removing the total exemption from the APA for the Department of Economic Security but maintained its exemption for the unemployment insurance program. The department was thus forced to comply with the APA rulemaking requirements and to refer its non-unemployment contested cases to the OAH. This increased costs for the department in rulemaking but the impact on the OAH was minimal as the number of cases referred to the OAH was quite small and the hearings were all generally very short.

1977 Minn. Laws, Ch. 443. This was the 1977 APA bill. It clarified many sections of the APA which had been adopted in 1975. Section 1 added the Capitol Area Architectural and Planning Board to the definition of "agency" thus bringing them within the APA requirements. Other sections amended the rulemaking sections by clarifying that the APA itself did not grant substantive rulemaking authority to agencies. It also specifically allowed agencies, with the approval of the chief hearing examiner, to incorporate certain materials into their rules by reference rather than repeating the materials in the rules, which was costly. The time for keeping the rulemaking record open for submission of comments following a hearing was increased from five to twenty days. The OAH internal policy of requiring all hearing examiner reports to be issued within 30 days of the close of the record was made mandatory by statute with the proviso that the chief hearing examiner can extend the time for good cause. To further shorten the process, the time for rules becoming effective was shortened from twenty to five days following publication in the State Register. To save costs, agencies were allowed to publish only those parts of the adopted rules which were modified after the first publication. The concept of "emergency" rules was changed to "temporary" rules (a change which subsequently led to problems and the eventual change back to "emergency" rules). Agencies which had adopted or would be adopting rules exempt from the APA were provided a procedure for filing with the Secretary of State. Agencies were given authority to appeal adverse decisions from the district courts to the Minnesota Supreme Court. The chief hearing examiner was given subpoena power which was necessary where hearings were conducted for agencies which did not have subpoena power and to allow the private sector to obtain subpoenas. The emphasis for keeping the record at hearings was changed from court reporters to audio magnetic recording devices. Finally, standing committees of the legislature were directed to study the feasibility or necessity of making the APA applicable to the metropolitan agencies and "encouraged" those agencies to voluntarily contract with the OAH for services. (Only the Metropolitan Waste Control Commission has ever contracted with the OAH.)

1978

There was no significant legislation passed impacting the APA or the OAH, either directly or indirectly.

1979

1979 Minn. Laws, Ch. 332, Art. I., Sec. 8. This amendment to Minn. Stat. § 15.0411, subd. 2, exempted the Public Employment Relations Board (PERB) from the contested case provisions of the APA. PERB serves as an appellate body from decisions of the director of the Bureau of Mediation Services who is also exempt. The purpose of utilizing the OAH for hearings envisions adversarial hearings where evidence is presented. PERB does not conduct evidentiary hearings. The OAH and PERB jointly proposed and supported this amendment.

1979 Minn. Laws, Ch. 336, Sec. 15. This newly added provision of the APA (Minn. Stat. § 15.065) prohibited the departments of Health, Human Services, Economic Security, Corrections and the health related boards from adopting any rule having an annual fiscal impact in excess of $100,000 without first providing the House Appropriations and Senate Finance Committees with a fiscal note. The effect of this amendment, while providing information to the legislature and thus an opportunity for legislative input, has been to increase the cost of adopting certain rules and to increase the time for adoption.

1980

1980 Minn. Laws, Ch. 614, Sec. 70. The Minnesota Personnel Board was abolished. This board determined appeals of state employee disciplinary action when the employees did not use the grievance procedure in the various bargaining agreements. The OAH, which had been conducting the hearings and making recommendations to the board, was given authority for these determinations. As initially adopted, the decisions of the hearing examiners were only recommendations to the agency which had initiated the disciplinary action. Final decisionmaking authority was subsequently given to the OAH (see Minn. Laws 1982, Ch. 560, Secs. 32 and 33).

1980 Minn. Laws, Ch. 615. This was the 1980 revision to the APA. The bill was the result of a task force first formed in 1978 to study the APA. The task force was comprised of a representative from the Office of Senate Counsel, the Office of House Research, the Office of Administrative Hearings, the Office of the Attorney General, and several representatives of state agencies along with an equal number of representatives from the private sector. This task force was initiated by the Senate and House Governmental Operations Committees to review the APA changes since 1975 and to come up with proposed changes. A bill was proposed by the task force in 1979 and passed the House of Representatives in that year. It was held over in the Senate so that additional hearings could be conducted during the summer of 1979 and into the 1980 regular session. The bill finally passed the 1980 Legislature as the second-to-last bill passed for that year. (The only bill passed later than the APA bill was a bill proposing a constitutional amendment to allow initiative and referendum.) The reason that the bill was late in passing had nothing to do with the APA itself but, rather, the bill became a vehicle for other legislation, part of it aimed at deregulation of cable communications and the other at the Metropolitan Council agencies. These latter items were subsequently stripped from the bill in conference committee and the APA bill was passed.

Much of this bill involved clarification of ambiguous language. As an example, there was a question on the extent of the jurisdiction of the LCRAR. This bill clarified that the LCRAR jurisdiction included all rules, not just

those adopted pursuant to the APA. The bill further clarified the language relating to the LCRAR suspension of rules. Section 3 of the bill was the result of a survey completed by the LCRAR relating to variances of rules by the agencies. Many agencies felt that they could not grant variances from rules. This amendment specifically allows agencies to grant variances from their rules provided that they first adopt a rule which establishes procedures for persons to apply to the agency for the variance, and adopt standards and criteria by which the variance will be granted.

A significant change in the APA was the introduction, for the first time, of a notice and comment rulemaking procedure for rules which would be noncontroversial in nature. Prior to this bill, every agency adopting rules was required to conduct a public hearing which was then conducted by the OAH. This amendment allowed agencies to proceed to adoption of rules without a hearing with the provision that if seven or more people objected, the agency was required to go to a public hearing. The OAH would not be involved in the rulemaking proceedings unless the hearing was required. The Attorney General's office continued its role in reviewing these rules. The legislation actually used the term "noncontroversial rules". (This phrase was changed in 1984 legislation to be discussed later.)

Another significant change was the introduction of the revisor of statutes into the rulemaking process. Many agencies had complained that they were unable to get assistance in the drafting of rules from the attorney general's office for one reason or another. After determining that there could be conflicts of interest in having assistance given by the attorney general or the OAH, the Senate decided that the revisor of statutes should be allowed to provide the ruledrafting assistance and, in fact, would then be the office which had final authority over the form of the rules. This change was aimed at providing rules with more clarity and uniformity in form and, where agencies actually had no one on staff to draft rules, to assist them in the drafting and thus speed up the process.

Deadlines were imposed on agencies for the adoption of rules following a hearing. Several instances had been brought to the legislature's attention where agencies had proposed rules but had failed to adopt them following receipt of the hearing examiner's report. This legislation required agencies to do two things within certain deadlines. First of all, when agencies were told to adopt rules, they were to initiate the rulemaking process by publishing proposed rules within six months of the effective date of the legislation or to report to the legislature why they had failed to do so. The second deadline was that agencies were required to either adopt rules within six months of the hearing examiner's report or the rules could not be adopted without starting the process over again. Also, they are required to report to the legislature on this failure to adopt rules.

Other miscellaneous changes included the change of the name of the Office of Hearing Examiners to the Office of Administrative Hearings. The bill also clarified the rulemaking authority of the director of the Bureau of Mediation Services to insure that that agency was subject to the APA. In the past, BMS was exempt because their rules had to be approved by the Public Employees Relations Board. The legislature removed the authority of PERB to approve these rules. Another miscellaneous change was to remove the rulemaking exemption for the Department of Economic Security. Finally, the Revisor of Statutes was given authority and responsibility for the publication of Minnesota Rules which was previously with the Department of Administration, State Register.

1981 (Regular Session)

1981 Minn. Laws, Chapter 109. This bill amended Minn. Stat. § 15.0413 to clarify that every rule, including interpretive rules, is required to go through the Administrative Procedure Act. This amendment was in response to a Supreme Court decision[54] which left in doubt the requirements that interpretive rules were required to go through the APA. In order to further clarify the legislative intent, the amendments gave full force and effect of law to all rules, retroactive to their effective date, provided that those rules were adopted under the APA which was in effect at the time of the adoption, that the rules were approved by Attorney General at the time of adoption, and that the agency had statutory authority to adopt the rules. This amendment answered a lot of questions for agencies which had been a direct result of the Supreme Court decision.

1981 Minn. Laws, Chapter 112. This legislation amended Minn. Stat. § 3.965, subds. 3 and 5, relating to the LCRAR. Under prior law, if the LCRAR required an agency to hold a hearing on a rule, the hearing had to be completed within 60 days. This amendment gave the LCRAR discretion to allow the agencies more than 60 days to conduct the requested hearings. This was necessary because, in many instances, it was impossible for the agencies to draft the rules and give proper notice of the hearing within 60 days.

This amendment also clarified the procedures to be followed when a rule is suspended by the LCRAR. The amendments clarify that the suspension was not to take effect until notice of the suspension had been published in the State Register. It also provided that the LCRAR was responsible, as opposed to the agency, for sending the suspension notice to the State Register for publication.

1981 Minn. Laws, Chapter 131. This bill amended various sections of Minnesota statutes. It requires State agencies to provide interpreters for persons with communication handicaps in many instances, including administrative hearings. The bill also detailed specific prohibitions relating to interpreters divulging confidential information. While there is no question that the provision of interpreters is necessary, the providing of interpreters at administrative hearings is an additional cost to State agencies (however, the increase in cost has been minimal).

1981 Minn. Laws, Chapter 253. This legislation was sponsored by the revisor of statutes. It was a result of the revisor, who first became involved in the rulemaking process in 1980, having an opportunity to review the APA and proposing clarification changes. While the bill as originally proposed was solely for clarification purposes, as finally passed there were some substantive changes, as will be discussed below.

Section 1 of the legislation amended Minn. Stat. § 3.965, subd. 2, in an attempt to clarify the jurisdiction of the LCRAR. In fact, the legislation extended the jurisdiction of the LCRAR to all rules, whether they were exempt from the APA or not, as long as they were rules which were filed with the Secretary of State. Under prior law, it was thought that exempt rules were also exempt from the jurisdiction of the LCRAR. The amendment also clarified the procedures to be followed once the LCRAR had suspended a rule.

One important part of this legislation was the result of the revisor of statutes having searched all of the statutes to find specific exemptions from the APA which were "hidden" in various statutes. This bill brought those

exemptions within the APA sections and then amended the substantive laws to pull the exemptive language out. In this way, an attempt was made to bring uniformity to exemptions from the APA by ensuring that they were found within the APA. This was an excellent amendment in that persons only have to look to the APA to find out which agencies are exempt from which sections of the APA. Another benefit of the revisor's review was the identification, for the first time, of numerous exemptions to the APA as a whole, or to specific exemptions. With respect to specific program exemptions, in the succeeding publication of Minnesota Statutes, the revisor listed all of these program exemptions in a footnote to the particular sections of the APA. This was the first attempt to identify, for the legislature and the public, the various APA exemptions.

Section 5 of the legislation clarified a problem which had existed. Many agencies believed that they were required to go through the APA requirements to repeal rules even though the underlying statute had been repealed. The agencies were probably correct, given the strict interpretation of the APA. In practice, the agencies simply ignored the rules and did not apply them. However, until they were repealed, they were continuously published in all rule publications. Agencies did not want to go through the time and expense of repealing rules. This amendment took care of that problem by providing that the rules adopted under a statute which is subsequently repealed are also repealed, thus relieving the agencies from the requirement of going through the APA.

Other clarifying language was made in the rule adoption sections including the removal of the word "promulgate" and insertion of the word "adopt". The revisor has attempted to utilize the uniform word "adopt" in subsequent sessions and to remove, wherever possible, the archaic word "promulgate" which is a word that left people wondering whether it meant "propose" or whether it related to the final adoption of a rule.

Section 7 of the bill has proven to be an important section in terms of speeding up the rulemaking process and making it easier for the agencies. This section established a statutory list of material or text which may automatically be incorporated into rules by reference. It also changed the authority for approval of incorporations by reference from the chief hearing examiner to the revisor of statutes but provided that the revisor of statutes could only approve incorporations by reference after consultation with the chief hearing examiner. This allowed agencies to speed up the rulemaking process. When taking rules to the Revisor under the prior language, if the revisor spotted an incorporation by reference, the rules had to be referred to the chief hearing examiner for approval. By having the approval accomplished at the same time and and place as rule drafting, considerable time, and thus expense, has been saved.

Section 15 was the result of problems which had arisen under the temporary rulemaking provisions. Agencies previously were allowed to adopt temporary rules which would be in effect for 90 days and could have them effective for an additional 90 days if they published notice. Agencies were routinely extending the time of the effectiveness at a cost of publication in the State Register and cost of mailing. In fact, it was extremely difficult for agencies to propose temporary rules as well as permanent rules at the same time, complete a rulemaking hearing, and have permanent rules in effect within 180 days. Thus, the statute was changed to allow temporary rules to be in effect for 180 days without having to extend the time. Further, it prohibited an extension without specific statutory authority.

Section 20 was adopted as a response to agencies who were concerned about how they could have their rules published even though their rules were exempt from the APA. This section clarified how these exempt agencies, or agencies whose rules were exempt, are to file rules, which included previously unfiled rules. A deadline was established by which the previously unfiled rules had to be filed in order to have the force and effect of law. This was an aid to the revisor who had been given the authority for compilation of the rules. The revisor had found numerous rules which had been adopted but not filed. This section provided the impetus for getting all adopted rules filed and thus eligible for compilation. Those agencies which failed to file their rules within the deadline would face the problem of their rules being automatically repealed by operation of statute.

A very short section of the bill, and a seemingly innocuous section, specifically applied Minn. Stat. Chapter 645, the Cannons of Statutory Construction, to all rules. Prior to this amendment, while the hearing examiners, most agencies, and most courts looked to Chapter 645 for guidance, there was no specific provision allowing its application when problems in construction of the language of rules arose. This amendment clarified the application of Chapter 645 and the result has been entirely favorable.

1981 Minn. Laws, Chapter 357. Sections 25 and 26 of this bill exempted certain rules from the rulemaking provisions of the APA. The rules exempted were those which set fees. These amendments allowed fee setting by rule but prohibited the public hearing provisions of the APA so long as the total fees to be collected were not to exceed 110% of the sum of all appropriations to the particular agency for the program for which the fees were being collected. It required the commissioner of finance to approve all fees prior to the agency proposing the fees. (These amendments proved to be controversial in subsequent sessions as the initial language was ambiguous. In subsequent sessions, the language was clarified but the basic thrust of these amendments has been maintained.) These amendments resulted in a time saving as well as a savings of expense to those agencies which are required to collect fees but only after establishing the fees by rule.

1981 Minn. Laws, Chapter 346. This was the 1981 workers' compensation legislation. The legislation made a number of significant changes to the Workers' Compensation Law (Minn. Stat. Ch. 176). Of significance to the operation of the OAH was the transfer of the workers' compensation judges from the Department of Labor and Industry (DOLI) to the OAH. This bill had a significant impact on the OAH which will be discussed in the succeeding chapter.

Chapter 7

1981 Workers' Compensation Law Changes, Implementation and Recommendations for the Future

As briefly mentioned in the preceding chapter, Minn. Laws 1981, Chapter 346, amended Minn. Stat. Chapter 176 in many significant ways. Of significance to the OAH was the language transferring the workers' compensation judges (WCJ), all court reporters assigned to the judges, and their support staff from DOLI to the OAH. The bill also provided that the transfer, which was effective July 1, 1981, was to include the removal of the WCJs from the same building that housed DOLI by no later than January 1, 1982. In other words, the OAH was prohibited from having any of the WCJs having an office in the same building as DOLI.[56]

While one of the stated reasons for transferring the WCJs was to move them to an independent agency and thus free them from any actual or even the appearance of any lack of independence in decision making, some within the legislature were fearful that the independence and decision making would somehow be impaired by the transfer to the OAH. Thus, another amendment which was placed in the law was to remove any salary setting authority for the WCJs from the appointing authority, the chief hearing examiner, and to set the salaries of the WCJs at 75% of the district court judges.[57] Additionally, because of a fear that somehow the OAH might assign hearing examiners to workers' compensation cases, the legislation specifically provided that only workers' compensation judges were to hear cases arising under Chapter 176, the Workers' Compensation Law.[58]

In the language transferring the WCJs, discretion was impliedly given to the commissioner of finance to transfer the appropriate funding and necessary support staff. While the language of the legislation was specific as it related to the WCJs and court reporters, no specific numbers of support staff to be transferred, nor positions, were included nor was there any specific amount of funding to be transferred delineated.[59] This proved to be troublesome, as could be expected, when the legislature removes part of a program, including personnel, from one agency and transfers it to another. The administration of DOLI viewed the transfer as a "hostile takeover", having opposed the transfer language quite vigorously during the legislative session. This was a natural reaction which is bound to occur any time the legislature reorganizes government, especially when it involves the transfer of personnel where the transferor agency is opposed.

The problems created by the lack of specificity in the bill were subsequently exacerbated when state revenues began to fall short of projections and several special legislative sessions were called to reduce budgets. Because the funding for workers' compensation was from the general fund, the OAH was subsequently asked to reduce costs, as will be discussed in the next chapter. The reason this created additional problems was because the funding transferred to the OAH, at least according to the documentation put together at the time, was insufficient to cover the cost of operation for the first fiscal year. Secondly, it was the opinion of the OAH at the time of the transfer that insufficient support staff positions were being transferred in order to accomplish the reorganization. At first, DOLI transferred one legal secretary and two vacant positions. After the OAH appealed to the commissioners of finance and administration, three additional positions were

to be transferred. However, the OAH requested that three persons be transferred who had expertise in the operation of the workers' compensation section instead of three vacant positions. To do otherwise would have created even more chaos than was created by the transfer itself. Without the transferred expertise, including knowledge of the docketing and filing system within the Workers' Compensation Division at DOLI tremendous delays in the reorganization would have occurred.

Because the legislature required the removal of the WCJs from the same building that housed DOLI, the OAH was required to immediately search for new facilities. DOLI had offices for the WCJs at the Space Center Building in St. Paul. However, it also had a "branch" office in the Summit Bank Building in Minneapolis where it had two attorneys and a hearing reporter serving as a secretary, as well as seven hearing rooms. None of the WCJs were actually officed at the Minneapolis facility. The first thing that had to be accomplished was to determine where the majority of hearings were required to be conducted. A study found that 93% of the workers' compensation hearings requested to be set for hearing within the seven county metropolitan area, were requested to be set within the city of Minneapolis. It was determined that this was a result of several factors. First of all, the vast majority of the injuries were occurring in Hennepin County. Secondly, a much higher number of lawyers practicing in the field of workers' compensation are located in Hennepin County. Finally, the majority of the medical experts used in workers' compensation cases were found within Hennepin County. Based on this study, it was determined that the proper place to move the offices of the WCJs would be to Minneapolis.

Part of the decision to locate the office in Minneapolis was a study of the costs incurred in travel and parking as well as the costs of "down time" of the WCJs. The OAH initially was proposing to have its offices in the midway district of St. Paul, equal distance from the Space Center in St. Paul where two hearing rooms were to be kept, and the Summit Bank Building in Minneapolis. However, once the time and expense study was completed, it was found that by having the judges officing at a facility other than where the hearings were conducted would result in a loss to the State of Minnesota of approximately $167,000 per year. While looking at these cost figures, the OAH also had to look at the costs which might be increased for the conduct of hearings by the APA section and a decision made relative to that section. It was found that 98% of the APA hearings were conducted at a location other than the OAH and thus the specific location of the OAH made no significant difference. Therefore, a decision was made to move the office to the city of Minneapolis, within Hennepin County.

As with the initial organization of the office in 1975, the Real Estate Management Division of the Department of Administration proved to be an invaluable aid in our finding suitable facilities for our offices and hearing rooms. Their expertise in locating available facilities, negotiating with the building owners and real estate agents, and in facilities' design made our task of finding new facilities much easier. In particular, Beverly Kroiss of that agency, who was assigned to work with us, spent many hours assisting in the project. Her personal experience and professionalism were invaluable to the office. She arranged for a review of facilities on a very tight schedule to maximize the use of our time. Just as we were about to make a commitment to locate the offices in a specific facility in downtown Minneapolis, the owners of the Summit Bank Building where DOLI had previously rented a small amount of space, informed Ms. Kroiss that they had additional space available and would like to have us look at their facilities. We immediately reviewed

their submission and subsequently viewed the property. Given the location of the facility (one-and-one-half blocks from the Hennepin County Government Center), its accessibility to the skyway system, its convenience in terms of mass transit, immediately adjacent parking facilities, and the proposed square-footage rate, a decision was made to locate our offices and 13 hearing rooms on two floors of that facility. At the same time, a decision was made to maintain an office in the city of Duluth with one WCJ and one support staff person and at the same time to have two hearing rooms located in the Space Center in St. Paul where the Department of Labor and Industry is located. The Minneapolis facilities were designed with the help of Ms. Kroiss and architects from the Summit Bank, the offices were constructed and the move was completed during the month of December 1981.

At the same time that we were attempting to find adequate facilities for the office, we began a study of the system for adjudication of contested workers' compensation cases. During the course of the 1981 Legislative Session, we had been present during the discussions by the legislative committees and had some idea of the problems which they sought to solve by transferring the WCJs to the OAH. One of the most often-heard complaints, following second only after high insurance premiums and the number of cases resulting in litigation, was the length of time it took to process a case once the litigation had begun. The "benchmark" which everyone looked to when discussing delay was the length of time between the date of the filing of a claim petition to the date of the hearing. The date of filing was considered to be the date on which the claim petition was accepted for filing by DOLI and the date on which the petition was then served on the employer and insurer by DOLI, which was a requirement of the statute at that time. We found that no one was using the date on which a judge's final order was issued as the date on which the case was concluded. Another problem cited by many was the delay in the processing of appeals to the Workers' Compensation Court of Appeals (WCCA). (It should be noted that the delay discussed in regard to the WCCA was not in the processing of the case once at the WCCA but in getting the case to the WCCA.) Another complaint often heard was the delay caused by the loss or "misplacement" of correspondence sent to judges. Finally, it was stated that their was no incentive for parties to resolve their differences by settlement of the issues because of substantial delays in the approval of the settlement and the issuance of an award by a compensation judge. These problems, actions taken to resolve them, and the results are discussed below.

A. Filing and Service of Claim Petitions. While the 1981 legislation was still pending, the then-deputy commissioner of DOLI, R. B. Swanson, and the chief hearing examiner began a study of the existing system whereby claim petitions were served by the department. It was estimated that it required a minimum of one person to process these petitions, at a total estimated cost, including postage, of $35,000 annually. Additionally, parties had complained that substantial delays were occurring by the failure to promptly process the petitions or by rejection of the petitions for various real or perceived defects. As a result of the study, amendments were proposed while the 1981 legislation was still pending, which amendments were included in the legislation. These amendments require petitioners to serve the claims themselves prior to filing with DOLI rather than having DOLI file the petitions.[60] While it is obvious that this amendment corrected a problem, the extent to which it has actually reduced delay cannot be ascertained because no records had been maintained prior to the passage of the 1981 legislation.

B. Conclusions of the Hearing Process. In response to previous complaints that it had been taking too long for a case to be heard once filed, the then-commissioner of DOLI, Harry Peterson, had initiated two new procedures at DOLI. First, he established one of the compensation judges as a settlement judge. Second, he increased the number of cases set for hearing each day. While these steps did result in a reduction in the length of time between the filing of the petition and the initial date scheduled for hearing, in fact, the process was further delayed for many cases. In order to see how this occurred, one must first have an understanding of the prior system.

Prior to the Peterson-initiated changes, a calendar judge conducted scheduling conferences, either in person or by telephone. A hearing date was established at this conference based on the time available for the parties and the length of time the parties indicated they would require to complete the presentation of their evidence. If the case subsequently settled, the compensation judge would have that date available for decision writing. The judge would also be required to review the settlement when the stipulation was received, and issue an award if the judge found the settlement to be reasonable, fair and in accordance with the Workers' Compensation Law. There were no support staff positions assigned to assist the judges in the preparation of their decisions. None of the judges had dictation equipment assigned to them. Only three telephones were available for the 16 trial judges. Therefore, on Mondays when no hearings were scheduled, the judges would have a court reporter assigned to them for the purpose of dictating orders and awards. The reporters would then prepare the orders or awards when they were not in hearings. Orders were sometimes delayed in typing for three to four or more weeks.

Commissioner Peterson determined that parties would be more apt to settle a case sooner if forced to get together before an impartial person solely for the purpose of discussing settlement. He was correct in his thinking as the statistics provided from DOLI have shown. However, for every case settled in this manner, it meant that there would be one less case settled after being set for hearing, which left one less day available for a judge to work on preparing decisions. This resulted in delays in the preparation and issuance of the orders and awards.

Another change initiated by Commissioner Peterson was to increase the number of cases set for hearing each day. Cases not initially assigned to judges when set for hearing are referred to a "back-up" cases. Thus, when a case which had been assigned to a judge was settled, the judge would then be assigned to hear one of the back-up cases. Obviously, this further reduced the time a judge had available to prepare and issue decisions. Finally, in the same category, cases wherein the parties indicated that they would need more than one day of hearing were set for one day only. This allowed more cases to be initially set for hearing in a shorter time but required the parties to either obtain an additional later date to complete the case or to incur the cost of taking depositions of those persons who did not present their testimony at the hearing. In the latter instance, the judge would lose the benefit of personally seeing the witnesses, which is sometimes necessary when judging the credibility of these witnesses. Further, the judge would have to read the testimony when the depositions were received at a later date, plus review all other testimony once again because it would be "stale" by the time the judge had sufficient time to begin work on the decision. The delays caused are obvious.

When the 1981 transfer became effective, the transferred judges were asked to prepare a list of all cases which they had heard but which were still waiting for a decision. It was found that on the average there were 15 cases pending per judge. Some had been pending for nearly 24 months, many for more than one year. All of the judges were concerned about this backlog, which they indicated was a direct result of the settlement judge process, the increased number of back-up cases being set, and the "calendar crunching" or setting of cases for hearing for less time that really was necessary to conclude the testimony.

Immediate steps taken to relieve the back-up situation were the reduction of the number of back-up cases set for hearing and removing one or two judges at a time from the responsibility of hearing cases so that they could concentrate on issuing their backlog of decisions. By the end of March 1982, all but two of the transferred judges were virtually current in the issuance of decisions. One of those two judges retired, leaving his cases for other judges to decide, and the other judge was current by the end of June of 1982.

As a part of the reorganization, further steps were taken once the move of the judges was accomplished. Dictation equipment was purchased for all judges. Secretarial support staff utilizing word processing equipment were hired to fill the transferred vacant positions. The secretarial support staff were assigned to specific judges. Court reporters were no longer assigned to the preparation of judges' orders except in emergency situations. As DOLI had received authority in 1981 to increase its settlement judges to three, it was assumed that they would settle nearly three times as many cases as before. (Eventually, DOLI increased the number of settlement judges to five.) The assumptions that more cases would be settled before they were transferred to the OAH has proven to be correct although the settlements did not triple. As a result of this assumption, we reduced the number of back-up cases so that at the present time we set only one back-up case each day for every two-and-one-half judges available for hearing (not on leave or assigned to road trips). Cases were also set for sufficient time to complete all testimony at the hearing. A rule was adopted requiring that in the case of any witness who did not intend to appear at the hearing, their deposition was to be taken prior to the hearing so that the case could be totally submitted to the judge at the time set for hearing. A performance standard was established for the judges which requires all decisions to be issued within 60 days after a case was fully submitted for decision. This performance standard was subsequently adopted into law with the further requirement that in the event a judge failed to issue a decision within 60 days, they would lose their pay while any cases were waiting to be issued within the time period.[61] Judges were also required to submit a "Case Record Report" at the end of each month wherein the status of all cases pending before the judge is detailed. Finally, statistics on each judge and on the office as a whole are maintained and published within the office each month.

In addition to the adoption of procedural rules for the conduct of hearings and internal policies and procedures which accompanied the reorganization, the OAH sought a number of legislative changes to the Workers' Compensation Law during the 1981 Special Legislative Sessions, the 1982 regular session, and the 1983 regular session. The specifics of these legislative changes will be discussed in a later chapter. The changes requested by the OAH were aimed at reducing delays in the system. However, while the OAH was seeking procedural changes to the law, the legislature continued to make substantive changes in the Workers' Compensation Law, not

the least of which have been major amendments to the law during the 1983 Legislative Session.[62] The substantive changes in the law had an immediate positive impact by the reduction of cases certified to the OAH for hearing. However, for a variety of reasons, not the least of which is uncertainty over the interpretation of many sections of the new law, there has now been an increase in the number of claim petitions filed. Because the hearings include many new and complex issues, more expert testimony is required which has the result of requiring more hearing time. Thus, while the OAH had been continuing to work toward reductions in delay, within the past 12 months the trend is slowly reversing as the number of cases filed and the length of the hearings conducted increase.

As a result of the changes discussed above, the following have occurred:

1. Length of Hearings. In April of 1980, 84% of the cases were scheduled for one day or less. This compares to November of 1985 where only 51.7% of the cases are set for one day or less. The following chart on case settings gives a more graphic picture of the change in the length of hearings.

Case Settings

	April 1980	March 1983	Nov. 1984	March 1985	Sept. 1985	Oct. 1985	Nov. 1985
1 Day or Less	84%	68.2%	67.5%	69.6%	63.0%	59.5%	51.7%
1-1/2 Days	9%	14.6%	16.8%	21.8%	23.5%	25.7%	35.5%
2 Days or More	7%	17.2%	8.2%	8.6%	13.5%	14.8%	12.8%

2. Time to Issue Decisions. In December of 1981, the average length of time for decisions to be issued was 101 days following the close of the hearing record. By July of 1982, this had been reduced to an average of 45.6 days. By June 30, 1985, at the conclusions of FY 85, the average time to issue final decisions during FY 85 was 31 days, 52% of the decisions being issued in 30 days of less. For the first six months of FY 86, the time has been further reduced to an average of 27 days.

3. Conclusion of the Hearing Process. Apparently prior to 1981, no records other than the time from the acceptance of a petition for filing to the initial date of hearing were maintained. DOLI had been reducing the length of time from the filing of a petition to hearing prior to the transfer. However, they were not maintaining records on the length of time for the issuance of decisions which, as can be seen from above, was an average of 101 days. Using data from claim petitions filed in December of 1982, it took 13 months to get a hearing date and an additional 66 days for a decision to be rendered. At the present time, after having previously reduced the time between the filing of a claim petition and the first hearing date to ten months, it now takes eleven months to the first available hearing date but the time for issuance of decisions is 27 days. Thus, the total time for disposition of a case is approximately 12-and-one-half months. This is down from 15-1/2 months during the FY 83 time period.

4. Backlog of Pending Decisions. As stated previously, the backlog of pending decisions (cases wherein the hearing had been conducted but no decision having been issued) was an average of 15 cases per judge on July 1, 1981. As of December 31, 1985, the average backlog was 7.2 cases per judge. Of the 136 cases pending as of December 31, 1985, 74 were cases which had bee

heard but wherein the record was still open awaiting additional evidence. This represents 54.4% of the pending cases.

C. Processing of Appeals. Prior to July 1, 1981, court reporters employed or under contract to DOLI were present at all hearings to keep a record of the proceedings. The employee court reporters were also responsible for typing judges' orders. The employee court reporters had been allowed to keep all income derived from the sale of transcripts of hearings with which they had been involved. While they were told that the transcripts were to be prepared on their own time since they received the proceeds, many of the transcripts were prepared during normal working hours. Because of their additional duties, delivery of transcripts took considerable time, in some instances more than one year to complete. Appeals from compensation judge decisions are not sent to the WCCA until the transcripts are completed.

Effective July 1, 1981, a 21-day deadline for the delivery of transcripts was imposed. Additionally, all proceeds from the sale of transcripts were required to be paid to the office revolving fund. The court reporters initiated a lawsuit over the imposition of the foregoing which resulted in a delay in implementation of the new procedures until the lawsuit was resolved by settlement in September of 1981. In addition to the new procedures, the office began tape recording many workers' compensation cases, thus allowing court reporters more time to prepare transcripts. At the same time, more contracts were entered into with court reporters from the private sector so that when the employee court reporters were required to prepare a transcript of a hearing, they could spend all of their time preparing the transcript in order to meet the 21-day deadline.

During the 1981 Third Special Session, one of the the "budget cutting" sessions, the legislature required that the OAH discontinue the use of court reporters who were state employees as soon as existing labor agreements permitted.[63] Because of the settlement of the 1981 lawsuit, this could not occur until September 30 of 1982. In the same session, the legislature mandated the use of audio magnetic recording devices to keep the record in all two-party cases but did allow parties to bring in their own court reporters at their own expense so long as the reporters were from a list approved by the chief hearing examiner. It also, by implication, mandated that the OAH utilize court reporters for multi-party cases.[64] Prior to September 30, 1982, the office began preparation for the layoff and expanded the contracts with the private sector for both court reporting services and for the transcription of the tapes of those hearings wherein an audio magnetic recording device had been utilized. Once the layoff had occurred and all severance and unemployment compensation payments had been made, the office was able to calculate the total savings to the state as a result of the layoff. When taking into consideration the salaries of the court reporters at the time of the layoff, inflated for normal cost of living increases which have occurred for all state employees since that time, and deducting the present costs of maintaining the record at the hearings, it is estimated that this provision has resulted in a cost savings of approximately $450,000 during fiscal year 1985.

At the present time, the office has contracts with court reporters in the private sector to provide both the court reporting and transcription services. These contracts require that transcripts be furnished within 21 days. In fact, several of the transcription services are now providing the transcripts in less than seven days. Thus, the delay in the processing of

appeals has been greatly reduced. No comment can be made in this report on the time of completing an appeal once it is sent to the WCCA as the OAH keeps no records on that issue. However, it must be assumed that a large part of the reason for previously heard complaints arose from the delay in getting the cases to the WCCA.

D. Delivery of Correspondence. For whatever reason, mail sent to compensation judges was not reaching the judges. When mail was received at DOLI, if the file could not be found, the mail was placed in a box for later review. At times, this mail never reached the files or the judges. As a result, it had become common practice for lawyers to send mail to the judges marked "personal and confidential" or to actually send the mail to the judges' homes. The defects in such a system are obvious. Additionally, it was discovered that lawyers routinely copied the judges on all correspondence between themselves and the insurance companies and routinely filed everything with the judges, even though there was no law nor rule requiring such filing.

Changes were made effective January 1, 1982, when the move into separate offices was concluded, including notification to all attorneys that mail was no longer to be sent "personal and confidential" and that no mail was to be sent to judges at their homes. Additionally, in order to reduce the volume of mail and thus reduce the size of the file requirements, all attorneys were notified that their "junk" mail was not to be sent to the judges and that only those matters required to be filed by law, rule or order of the judge were to be filed.

These changes have dramatically reduced the volume of mail and thus has assisted in speeding up the delivery of the mail to the judges. Further, the office established a priority system whereby most mail is delivered to the judge by staff, allowing the judge the opportunity to determine whether the correspondence is necessary for filing, should be discarded, or that the file is needed. Mail is delivered to the judges in this fashion within 24 hours of its receipt, most on the day that it is received. Priorities by subject matter have also been established for all items received in order that the mail will be handled as expeditiously as possible. One very important aspect of the mail handling procedures involves Stipulations for Settlement, which will be discussed below.

E. Settlements. The Workers' Compensation Law has long recognized that cases do not always require a full hearing and that parties may desire to resolve their differences through a settlement process. Minn. Stat. § 176.521 has provided the statutory framework for such settlements since 1953. However, due to a variety of reasons, not the least of which has been the Worker' Compensation Law as a whole and the procedures required to be followed in settlements, the percentage of contested matters settled in workers' compensation has been, and continues to be, considerably less than found in civil cases in the district courts. In the court system, 95% to 98% of all cases are settled without a hearing. It was found that in FY 81, only 63.1% of the total contested workers' compensation matters were resolved through settlement.

One of the reasons most commonly expressed for the low percentage of settlements had been the delay in obtaining the approval of a compensation judge and the uncertainty of the settlement being approved. Prior to February of 1982, if a settlement was agreed upon by all parties, a Stipulation for Settlement was prepared, signed by all parties, and submitted to the

commissioner or a compensation judge for approval. The standard for approval was that the terms of the settlement must be "reasonable, fair and in conformity with" Chapter 176. No rules have ever been adopted to define what is reasonable or fair, thus leaving discretion in the compensation judges. In fact, what was reasonable and fair to the parties and some judges would not be considered reasonable and fair by other judges. Some judges had applied standards which they termed "unwritten rules" or "long-standing policies" when reviewing cases submitted for settlement approval. One judge expressed an opinion of the role of a compensation judge in this regard as being "responsible for protecting injured employees from their own folly". This issue was addressed in the 1981 Third Extra Session of the legislature. Prior to that time, Minn. Stat. § 176.521 provided that if all parties were represented by attorneys, the submitted settlement was "presumed" to be reasonable, fair and in accordance with the Workers' Compensation Law. That section was amended to provide that where all parties to a case are represented by attorneys, the settlement is conclusively presumed to be reasonable, fair and in conformity with the Workers' Compensation Law.[65] This provision was limited in 1983 by providing that the "conclusive presumption" only applied where the settlement did not purport to be a full, final and complete settlement of an employee's right to medical compensation or rehabilitation under Chapter 176.[66] At the same time as these amendments were being made, top priority was being given to settlements received in the office, both in mail distribution and in the establishment of a performance standard for the judges. The performance standard is that all awards are to be issued within ten calendar days of receipt of the Stipulation in the office. The results of these changes are as follows:

1. Length of Time to Issue Awards. Immediately following the transfer in 1981, it was determined that the average length of time to issue an Award on Stipulation was 51 days. By January of 1982, Awards on Stipulation were issued in an average of 43.47 days. By December of 1982, following the effectiveness of the "conclusive presumption", the average time had been reduced to six days. By March of 1983, the average time to issue Awards on Stipulations had been reduced to four calendar days. Since that time, even following the limitations imposed during the 1983 Session, the average time to issue these awards has consistently remained four calendar days for FY 84, FY 85 and for the first six months of FY 86. During December of 1982, 86% of the Awards on Stipulation were issued in less than ten days. By July of 1982, 57.6% of the awards were being issued in ten days or less. This number was then increased to 84% for the entire 1983 fiscal year, 93% for FY 84 and 96% for FY 85.

2. Number of Settlements. The increases in the number of cases settled can be seen in the chart below. In reviewing the chart, it should be remembered that the amendment to the law was effective starting in February of FY 82.

Awards on Stipulation

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	215	171	358	361	450	418
August	188	290	393	459	417	451
September	163	288	341	406	324	367
October	174	325	371	363	429	528
November	179	198	372	295	375	377
December	291	308	412	400	390	387
January	232	249	407	432	429	
February	298	388	427	364	442	
March	273	450	510	374	313	
April	230	386	367	340	452	
May	308	400	426	468	492	
June	287	396	459	487	336	
Total	2838	3849	4843	4749	4849	

3. Percentage of Settlements. As previously stated, during FY 81, 63.1% of the total dispositions were by settlement. For FY 85, 78.9% of the total dispositions were the result of settlements. This figure is still well below those of the district courts in civil cases.

F. Other Matters. The OAH discovered many other areas of the Workers' Compensation Law wherein ambiguities in the law were resulting in litigation. It worked with DOLI in finding these ambiguities and coming up with language to amend the statutes to remove the ambiguities. Additionally, many other areas of the Workers' Compensation Law were reviewed by OAH and DOLI resulting in various amendments to the Workers' Compensation Law. While DOLI has been more concerned over the substantive provisions of the law, the OAH has attempted to keep its review to the procedural aspects of the law. At the present time, there is continued concern over delays in the workers' compensation system. As stated above, while the delays were being reduced, albeit slowly, changes made by the legislature in 1983 have resulted in an increase in the number of claim petitions being filed, and an increase in the length of time to hear cases. While the 1983 changes were an attempt to reduce "litigation", until such time as the WCCA and the Minnesota Supreme Court have had an opportunity to interpret the 1983 law changes, it is anticipated that there will continue to be an increased number of claim petitions filed. Additionally, further changes were made to Chapter 176 in both 1984 and 1985. It is anticipated that additional changes to the Workers' Compensation Law will be made by the 1986 Legislature. Each time the legislature makes changes in the law, it will result in uncertainty in the interpretation of the laws which leads to an increase in litigation. Litigation, for the purpose of this report, is defined as any administrative proceeding wherein the legal rights, duties or privileges of specific parties are required by law or constitutional right to be determined. Thus, when one includes the administrative conferences conducted at DOLI with the increase in the number of claim petitions filed and the slowly increasing number of objections to discontinuances or petitions for discontinuance filed, litigation has increased dramatically. The following charts show, by fiscal year, the number of claim petitions filed each month during the fiscal year, the number of petitions for or objections to discontinuances filed (which are referred to the OAH) and the number of notice of intention to discontinue ((NOID) received at DOLI and the number of discontinuance conferences held at DOLI since the implementation of the 1983 changes.

Claim Petitions

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	384	266	393	379	406	451
August	358	412	419	404	405	420
September	372	400	387	392	309	398
October	378	392	400	412	409	459
November	377	345	398	371	378	404
December	419	405	408	401	351	427
January	383	343	438	382	379	
February	386	325	414	395	402	
March	403	409	462	456	389	
April	397	400	402	408	433	
May	369	346	360	407	441	
June	401	385	377	401	378	
Total	4627	4428	4858	4808	4680	

Discontinuances

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	101	106	78	73	27	60
August	78	104	74	61	43	57
September	64	80	109	46	20	56
October	78	65	102	37	58	55
November	59	55	86	49	39	38
December	83	73	87	38	54	43
January	95	85	90	50	48	
February	90	95	77	52	41	
March	82	87	101	33	48	
April	75	83	72	33	43	
May	71	80	86	49	49	
June	115	74	67	46	49	
Total	991	987	1029	566	519	

		NOIDs Received	Discontinuance Conferences Held
December	1983	214	96
January	1984	186	100
February	1984	247	107
March	1984	240	131
April	1984	251	109
May	1984	218	99
June	1984	305	97
July	1984	337	115
August	1984	331	117
September	1984	339	100
October	1984	371	148
November	1984	375	141
December	1984	347	87
January	1985	363	120
February	1985	415	107
March	1985	493	124
April	1985	425	124
May	1985	464	161
June	1985	399	146
Total		6320	2229

Another fact we must review in determining the overall disposition level of workers' compensation cases is the number of decisions issued by the compensation judges. If there is, as stated previously, an increase in the length of time to hear a case, fewer cases can be heard each month. The following chart can be used to verify that previous assumption.

Workers' Compensation Judge Decisions

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	97	50	62	89	59	65
August	86	80	74	92	78	74
September	70	89	59	77	67	60
October	94	99	59	72	76	60
November	80	65	78	73	75	62
December	93	69	78	78	70	71
January	80	77	93	68	86	
February	90	67	70	64	68	
March	99	115	94	65	68	
April	86	72	74	69	79	
May	95	58	92	81	73	
June	98	88	91	63	72	
Total	1068	929	924	891	871	

Even though there appears to have been a recent trend of an increase in filings, it is too early to determine FY 86 statistics. The following chart shows a five-year statistical comparison to show the number of contested matters filed for hearing which are referred to the OAH versus the number of dispositions. When looking at dispositions, it should be remembered that dismissals and awards on stipulation include those issued by DOLI. In short, this is a "system-wide" chart. It shows that in FY 81 there were 1,448 more cases filed than were disposed of versus FY 85 where there were 807 more cases disposed of than had been filed. Given the first half of FY 86 statistics, we are anticipating that even though there will be an increased number of cases filed for hearing, there will still be more cases disposed of than are filed.

Minnesota Workers' Compensation
Five-Year Statistical Comparison

	FY 81	FY 82	FY 83	FY 84	FY 85
Claim Petitions	4627	4428	4858	4808	4680
Objections to Discontinuance	942	959	1020	463	425
Petition for Reimbursement	56	117	144	111	137
Retraining/Rehabilitation	225	137	105	160	N/A
Change of M.D.	38	54	64	15	N/A
Petitions to Discontinue	49	28	9	103	94
TOTAL	5937	5723	6200	5660	5336
Dismissals	456	488	527	523	423
Findings	1068	929	924	912	871
Awards on Stipulation	2838	3849	4843	4749	4849
Others	127	148	35	0	0
TOTAL	4498	5414	6329	6184	6143
Difference	(-1448)	(-309)	+129	+524	+807

In order to more efficiently process the caseload, the OAH has set goals and established programs to increase both efficiency and productivity. Use of a computer to keep track of cases, issue pretrial orders and hearing notices and to actually assign and set cases for hearing allows our support staff to handle more work with fewer mistakes or oversights. It also will allow us to schedule our judges more fully and, additionally, will give us the availability of at least half the time of our calendar judge to hear cases.

The OAH has now implemented monthly staff meetings for all WCJs to discuss case law developments and any problems or issues which may be common to all of them. This allows the OAH to have some degree of uniformity in its approach to common problems or issues. It is believed that these monthly meetings have achieved greater communication among the judges and greater productivity. Additionally, the training program discussed in a previous chapter has proven to be most effective as we discovered that prior to the transfer to the OAH, none of the WCJs had ever been allowed time off to attend training programs nor given any specific training in the conduct of hearings or the writing of decisions. We have seen a noticeable difference and improvement in the quality of both the conduct of hearings and the issuance of written decisions since implementing the training program.

G. A look to the future. At the time of the preparation of this report, the 1986 Legislative Session had not yet commenced. However, from conversations with the commissioner of DOLI, several Senators and Representatives, and others actively involved in the field of workers' compensation, it is anticipated that the legislature will make additional changes to the law. However, it is questionable whether the legislature can make any changes to the substantive structure of the benefits portions of the law because apparently no accurate data exists to determine whether the changes made in 1983 will have any impact on the reduction of workers' compensation insurance rates to Minnesota employers. Testimony at legislative hearings held during 1985 and January of 1986 have indicated that over the past year or so, Minnesota employers have received an average of 35% to 45% increase in workers' compensation insurance premiums and in some instances increases of more than 100%.

Thus, it has become apparent that changes are necessary. Where those changes will occur remains to be seen. However, one area which continues to be a problem is the delay in the disposition of contested workers' compensation claims. Several proposals have been put forth. It is believed that the OAH has done everything it can do by rule or internal policy to reduce delay and thus any further reductions in delay must be the result of legislative changes. Absent such changes, the only way to have an immediate impact on the delay in the system is to hire more compensation judges. While this will resolve the problems on a short-term basis, additional changes in the law must be made if the delays are to be prevented, on a long-term basis. Proposals for amendments to existing law which would assist in delay reduction could include the following;

1. The notice required by Minn. Stat. § 176.271 be amended to mandate that the notice must include all medical reports not previously submitted to the employer and that the notice and the reports be sufficient to establish the claim.

2. Amend Minn. Stat. § 176.305 by removing the settlement judge provisions, requiring the claim petitions to be referred to the OAH within ten days following their filing, allowing DOLI to reject any claim petitions which are incomplete or which fail to include all necessary documentation.

3. Amend Minn. Stat. § 176.306 to require all hearings to be held within six months of the filing of a claim petition, continuances to be granted only upon a showing of good cause and to be granted only by the chief ALJ or designee. The same section might include a requirement that not only attorneys but their clients must sign all requests for a continuance.

4. Minn. Stat. § 176.312 be amended to differentiate between a petition for removal or automatic reassignment of a judge and an affidavit of prejudice for cause.

5. Any case referred to the OAH wherein an answer has not been filed nor an extension (of not more than 30 days) granted by the commissioner or agreed upon, in writing, by the petitioner, shall be set for hearing at the first available date on the OAH calendar.

6. Amend Minn. Stat. § 176.341 to require all cases to be heard within six months of the filing of the claim petition, including the provision that no continuance may be granted which would not allow the case to be heard within the six months, giving discretion to the chief ALJ to schedule settlement or prehearing conferences as may be appropriate.

7. Add a provision mandating that all evidence must be presented at the hearing and that only in cases of surprise or other exceptional cause will any evidence not submitted at the hearing be considered. This should include all evidence relating to taxable costs and attorney fees.

8. Amend Minn. Stat. § 176.411 to require that all depositions and other discovery must be completed within 90 days of the filing of a claim petition.

9. Require all adverse medical examinations to be completed within 45 days of the filing of the claim petition and the report of the exam to be served and filed 15 days thereafter.

10. Amend Minn. Stat. § 176.155, subd. 5, to allow full testimony of a health care provider only with the approval of the chief ALJ or designee. Delete the provisions allowing full testimony after the hearing except in cases of surprise or other statutorily-stated good cause.

Chapter 8

1982-1985

As can be seen from the preceding chapter discussing the changes involving workers' compensation, legislation passed by the 1981 regular session of the Minnesota Legislature brought major changes to the OAH. While in the process of the reorganization, the state of Minnesota, as was the case with the rest of the states in the nation, faced an economic recession. This resulted in numerous special legislative sessions wherein many changes were made in an effort to reduce the overall costs of the operation of state government.

At the start of FY 82 on July 1, 1981, the office had reorganized itself as is shown on the organizational structure at the end of this chapter.

As can be seen from that structure, upon transfer of the workers' compensation cases to the OAH, the chief hearing examiner personally supervised all of the WCJs. The responsibility for supervision of the court reporters in the workers' compensation section was the responsibility of the docket administrator for workers' compensation, while the supervision of the court reporters for the APA section of the office remained the responsibility of the administrative assistant. When the legislature met to consider reductions in the cost of operation of government, as discussed in the preceding chapter, the office was faced with the problem of reducing expenditures in workers' compensation where the funding for the office came from the state general fund. As a result, several vacant support staff positions remained unfilled and all court reporters were laid off. While it was initially thought that the APA section would be effectively immune from any budget reductions, we saw an impact due to reductions in the budgets of other agencies. As the budgets of the other state agencies were reduced, these agencies began to find other ways of resolving disputes which otherwise would have led to administrative hearings. This resulted in a reduction in the requests for services of the OAH.

At the same time as the results of the budget reductions were being felt, the office was also seeing the results of the 1980 amendments to the APA which allowed agencies to adopt rules without the necessity of a public hearing unless seven or more people objected to the rules and requested a hearing. While rulemaking had never comprised more than 20% of the total number of hearings conducted by the office, because of their complexity the billable hours produced by those hearings were higher, on the average, than contested cases. The following chart, beginning with FY 78, shows the impact of the implementation of the "noncontroversial rulemaking" provisions.

Rulemaking Hearings as a Percentage of Total Reports Issued

Fiscal Year	Total Reports Issued	Rulemaking Reports Issued	Percentage of Reports Which Involved Rulemaking
78	471	92	19.53%
79	520	71	13.65%
80	473	69	14.59%
81	327	32	9.79%
82	345	24	6.96%
83	391	18	4.6%
84	352	13	3.7%
85	331	21	6.3%

While the requests for OAH services for rulemaking hearings was diminishing, agencies also began their own cost-saving techniques which resulted in a decrease in requests for services following the 1982 legislative sessions. At the same time, as discussed in prior chapters, the office was implementing new settlement techniques, increasing the training and thus efficiency of its staff, and utilizing law students from the William Mitchell College of Law. The following table, which is a continuation of the table produced at the beginning of Chapter 6, gives a picture of the office's operation from July 1, 1981, through June 30, 1985.

Fiscal Year	Billable Hours	Files Opened	Files Closed	Cases Pending	Reports Issued	Cases Settled	Percent Settled
1982	20,210.0	542	557	322	345	212	38.1%
1983	15,637.2	625	633	314	403	230	36.3%
1984	13,462.5	557	604	267	353	251	41.6%
1985	12,090.2	651	620	298	331	289	46.6%

As can be seen from the foregoing table, while the number of files opened remained fairly constant, the number of billable hours was reduced dramatically. This is a direct result of our efforts at settling cases which continued to increase to 46.6%, efficiencies within the office, increased utilization of law students from William Mitchell College of Law, and several other new types of cases referred to the office which required considerably less time to complete. With respect to the latter comment, the Department of Revenue began submitting cases under the state's Revenue Recapture Act passed in 1980 and discussed in Chapter 6. Additionally, the office began to receive more cases from political subdivisions of the state, especially from Special School District No. 1 (the City of Minneapolis school district), the City of Minneapolis Civil Service Commission, and the Hennepin County Personnel Board. Many of these cases involved very little time yet accounted for a large number of the files opened and closed each year.

From a purely fiscal point of view, the following table, similar to that in Chapter 6, shows the financial status of the office for fiscal years 1982 through 1985.

Fiscal Year	Authorized Complement	Positions Filled	Income	Expenses	Profit (Loss)	Carry Forward
1982	25.5	21.25	1,253,410	1,163,077	90,333	177,036
1983	25.5	20.5	939,357	1,013,037	(73,680)	103,356
1984	20.5	15.5	824,105	864,916	(40,811)	62,545
1985	20.5	15.5	855,167	832,492	22,675	85,220

In reviewing the two tables above, it must be remembered that at the beginning of FY 82 workers' compensation was transferred to the office. As part of the reorganization, several of the positions from the APA section were split between the workers' compensation section and the APA section. As an example, one-half of the position and thus one-half of the costs of the chief hearing examiner and the administrative assistant are split between the two funds. This helps in accounting for the reduction in the total number of positions filled and thus the reduction in expenditures. Besides the splitting of several positions between the two funds, the APA section further reduced its staff of hearing examiners during this period by three, bringing the total number of hearing examiners at the end of FY 85 to nine. Thus, over the ten years of operation, the OAH reduced its staff of hearing examiners by

five-and-one-half positions (37.9%) while the total number of cases received from FY 77 to FY 85 was reduced from 823 to 651, a reduction of 172 cases or 20.1%. From FY 79 where a high of 520 hearing examiner reports were issued there has been a reduction in the number of reports issued of 189 or 36.3%.

As indicated in a prior chapter, at the inception of the office an internal policy was established whereby all reports were to be issued within 30 days of the close of the hearing record unless an extension of time was granted for good cause. Statistics on this issue were first kept beginning with FY 78. During that fiscal year, 85.1% of the reports were issued within 30 days of the close of the record. For FY 85, 93.7% of the 310 reports issued were issued within 30 days of the close of the hearing record. Office-wide, the average length of time for the issuance of a report from the close of the hearing record was 14.5 days. (FY 85 was the first year wherein office-wide statistics on the length of time to issue decisions was kept.)

During this last four years, legislation directly impacting the OAH was passed. Other legislation having indirect impact on the OAH was also passed by the legislature, not the least of which were the budget-cutting provisions of the special and regular sessions of 1982. At the same time, the legislature continued to amend the APA as well as continued to grant further exemptions from the APA requirements. The following is a review of the legislation passed during this four-year period.

1982

1982 Minn. Laws, Chapter 424, § 130. This section of the law gave specific authority for the revisor of statutes to recompile (recodify) the APA if the revisor deemed it appropriate. Following this authority, the revisor recodified the APA from Chapter 15 to Chapter 14 of the Minnesota Statutes.

1982 Minn. Laws, Chapter 512, §§ 4 and 6. Section 4 of this bill amended Minn. Stat. § 17.83 (1981) to provide that when an agency was adopting rules which may have a direct and substantial impact on agricultural lands, it must include that fact in the notice of hearing and must further inform the commissioner of agriculture of that fact, in writing. Additionally, the statement of need and reasonableness must describe the possible adverse effect on the agricultural lands and discuss the alternatives considered. Section 6 of the law amended the APA to cite to the amendments to Minn. Stat. § 17.83. Obviously, this amendment created an additional burden on state agencies in rule adoption. Whether the legislature considered the additional delay or costs to the agencies in the rulemaking process versus the benefits to the agricultural land at the time of the amendment is not known to this writer as very few state agencies were aware of the amendments and thus did not testify at any committee hearings on the legislation.

1982 Minn. Laws, Chapter 560, §§ 10, 32 and 33. This bill recodified the laws relating to the Commissioner of the Department of Employee Relations. The law allows the commissioner to develop "administrative procedures" which are exempt from the provisions of the APA. The administrative procedures are to be procedures relating solely to internal management of the state and are not to have any direct or indirect impact on the rights of citizens in dealing with state government. Sections 32 and 33 amended the personnel law to clarify the provisions relating to appeals by employees from disciplinary action when the employee does not have a collective bargaining agreement which contains specific grievance procedures. The amendments allow that employee

the right to appeal a discharge, demotion, or suspension directly to the chief hearing examiner who is to assign the case to a hearing examiner. A hearing is conducted at the expense of the disciplining agency and the decision of the hearing examiner is a final decision appealable by the employee or the agency to the courts.

1982 Minn. Laws, Chapter 562. This bill directly amended the APA. The bill responded to a problem discovered in temporary rulemaking. It was proposed jointly by the Department of Human Services and the OAH. Previously, temporary rules were allowed to be effective for 90 days plus an additional 90 days if a notice was published. That section was amended to provide for 180 days without any extension. This amendment allowed an additional 180 days following a notice. Testimony supporting this provision came from several agencies which had found it difficult to be able to publish temporary rules and permanent rules at the same time and complete the entire hearing process within 180 days. This testimony included direct testimony from the OAH which had found it nearly impossible to complete the process of adopting permanent rules for workers' compensation within 180 days. The second section of this bill amended Minn. Stat. § 256B.02, subd. 8, relating to the Department of Public Welfare's drug formulary which had previously been allowed to be adopted without complying with the APA. This had been changed to allow temporary rulemaking and this amendment specifically allowed a change in the fixed dispensing fee to be accomplished under temporary rulemaking but limited any change to 180 days.

1983 (The APA is now recodified as Chapter 14.)

1983 Minn. Laws, Chapter 138. This bill amended Minn. Stat. § 14.38, subd. 6, to exempt rules of the Game and Fish Division of the Department of Natural Resources from approval of their form by the revisor of statutes. This bill was proposed by DNR and was found to be necessary to clarify that the game and fish rules were totally exempt from all APA provisions which had been the initial intent. A question had been raised over the revisor's authority.

1983 Minn. Laws, Chapter 188. This was an entirely new provision which became codified as Minn. Stat. § 14.115. It amended the APA to require agencies to give consideration to small businesses in rulemaking. The provisions require agencies to take additional steps in giving notice and considering alternatives when new or amended rules will affect small businesses. If the agency fails to give the notice and consider alternatives, the rules are prohibited from being adopted if the hearing examiner or the attorney general find noncompliance. It further requires each agency to review its rules every five years and to consider, during this review, reducing the impact of the rules on small business. Certain temporary rules and fees under Minn. Stat. § 16.085 were exempted. The LCRAR was required to monitor the implementation of this law.

1983 Minn. Laws, Chapter 210. This was the APA bill for the 1983 session. It accomplished a number of things:

1. It clarifies the authority of the revisor of statutes that all rules, unless exempt, must have approval of the revisor; clarified incorporation by reference as approved by the revisor; clarified procedural steps for filing with the revisor at all stages of the rule promulgation.

2. It changes the statutory language of six months to a computation of 180 days within which agencies must propose rules after a law is passed granting rulemaking authority and requires agencies to give notice to the LCRAR if they do not propose the rules within the deadline.

3. Clarifications were made to what must be included in a mailed notice of rulemaking.

4. The time for keeping the hearing record open following a hearing was expanded by three days to allow agencies an opportunity to respond to proposed amendments and comments filed by members of the public.

5. This clarified the deadline for the adoption of rules by changing the term "six months" to "180 days" after receipt of the report of the hearing examiner but excludes the time for the chief hearing examiner's review, the attorney general's review or any review by the LCRAR.

6. Clarifications were added to the notice requirements for notice and comment rulemaking and added the requirement, under notice and comment rulemaking, that rules are to be submitted to the attorney general within 180 days at the end of the comment period or the rules are prohibited from going forward.

7. The OAH authority relating to court reporters was changed to specifically allow parties to hire their own court reporters when the OAH determined to keep the record by an audio magnetic recording device. (This is identical to the change which was made for workers' compensation during the 1981 Third Special Session.)

1983 Minn. Laws 1983, Chapter 247. This bill created the Minnesota Court of Appeals. Previous to the implementation of this law, appeals from administrative agencies went directly to the district courts in the state, either Ramsey County which is the seat of state government, or the district wherein the action arose. This bill changed the jurisdiction for appellate review of administrative agency decisions to the newly-created Court of Appeals. This included review of contested case decisions and review of adopted rules.

1983 Minn. Laws 1983, Chapter 290. This was the 1983 workers' compensation reform bill which was discussed in a previous chapter. The bill did increase the complement of the OAH by two positions to allow for the hiring of a workers' compensation specialist to assist the judges in computation of benefits and for the hiring of an assistant chief hearing examiner. Procedurally, the bill removed jurisdiction for medical disputes from the compensation judges and gave such jurisdiction to the commissioner of DOLI. A requirement that medical evidence be submitted by report only unless the compensation judge determined that full medical testimony was crucial to the determination of the employee's entitlement to benefits was added. A provision was added to allow DOLI, the WCCA and the OAH to adopt joint procedural rules. The approval of attorney fees was changed from the requirement that all fees be approved to an automatic award of up to $6500. It removed the jurisdiction for determining excess fees from the WCCA to the WCJs. The bill established administrative conferences for all notices of intention to discontinue, following which the aggrieved party can file an objection to discontinuance or a petition for discontinuance depending on the determination of the commissioner. It also specifically allows for the filing

of affidavits of prejudice similar to that in district court in workers' compensation cases. Clarifications were made to the notice of hearing provisions to assist the OAH in its work. An amendment was added to allow non-attorneys to file petitions for intervention from the Departments of Human Services and Economic Security. (This amendment was necessary because the WCCA had ruled that only attorneys could make filings on behalf of those two agencies.) Clarifications were added to the provisions requiring decisions by compensation judges in order to clarify the content, format and timing of the decisions which also included the requirement of decisions being issued within 60 days or the judges were to suffer a loss of pay. Clarifications were added to the provisions for transcripts in order to delineate who is responsible for the preparation of the transcript in case of appeals. The jurisdiction of the WCCA was limited to only those issues specifically listed in the notice of appeal by the parties, thus prohibiting the WCCA from taking up issues it determined to decide on its own motion. The standard of proof for hearings was set at a preponderance of the evidence while removing all language relating to "remedial legislation". The "conclusive presumption" for settlements was limited so that it does not apply to full, final and complete settlements of rehabilitation or medical issues.

1983 Minn. Laws 1983, Chapter 299. This was the bill which established salary ranges for department heads. As passed by the House of Representatives, the chief hearing examiner's salary was established at the same salary as the district judges for the state courts. This was an effort to keep the chief hearing examiner's salary ahead of the WCJ's whose salaries had previously been established as a percentage of the district court judges as had the WCCA judges. As finally passed, the chief hearing examiner's salary was established in a range of $50,000 to $60,000 to be determined by the Governor. (In 1984, the Governor determined that the chief administrative law judge's salary should be the same as the district court judges but given the law could not set the salary at the same level because the top of the range would have had to have been exceeded.

1983 Minn. Laws 1983, Chapter 301. This was the 1983 State Departments Appropriations Bill. Section 15 of this bill was a rider to the appropriation to the OAH which established the study of alternative dispute resolution to be headed by the LCRAR. The LCRAR was to include the OAH, the State Planning Agency, and the Bureau of Mediation Services in the study. Section 64 of the bill contained language which was intended to clarify the fee setting provisions of the APA which allowed agencies to set fees without going through a rulemaking hearing. (As will be seen later, these amendments added further confusion and required changes during subsequent legislative sessions.) Section 148 through 152 of the bill amended the workers' compensation law by limiting the authority of the WCCA, on their review of a WCJ's decision, to the substantial evidence test and further prohibited the WCCA from disregarding findings of fact of the workers' compensation judge. The purpose of this amendment was to give more weight to the compensation judge's findings with the hope that this would reduce the number of appeals filed in workers' compensation matters. (The percentage of appeals of compensation judges' decisions had risen to 47.6% during FY 83. This percentage dropped to 43.1% for FY 84, 42.2% at the end of FY 85, and was 45% at the end of the first six months of FY 86. However, the amendments have had the effect of reducing the percentage of cases reversed by the Court of Appeals. Prior to the amendments, the Court of Appeals had been reversing at the rate of approximately 22%. For the second quarter of FY 86, the percentage of reversals had been reduced to 16%.)

1984

1984 Minn. Laws 1984, Chapter 567. This bill amended the Minnesota Human Rights Act by authorizing the OAH to adopt "policies" to provide sanctions for intentional and frivolous delays while discrimination cases were being investigated or prosecuted. It also provided that parties could file their cases directly with the OAH if the Department of Human Rights had failed to find either probable cause or no probably cause within a specified time period. Finally, a clarification on the amount of damages to be awarded was made to allow the imposition of treble damages in certain situations.

1984 Minn. Laws 1984, Chapter 640. This was the 1984 APA bill which was the result of more than six months of meetings conducted by the Administrative Law Section of the Minnesota Bar Association and a committee appointed by the chairman of that section. The committee contained representatives of state agencies, the attorney general's staff, public interest groups, and private sector lawyers and businesses. While a great number of changes to the APA were considered by this committee, because the committee could not reach a consensus on major changes, the bill eventually proposed and passed did not contain as many significant changes as had originally been assumed were going to be made. However, several significant amendments were made as follows:

1. During the pendency of this legislation, the Department of Economic Security had received word from the federal government relating to social security disability determinations. The federal government was attempting to remove some cases from the federal administrative law judges and had requested the 50 states to establish a disability determination unit within their states. The establishment of such a unit would clearly have come within the definition of a contested case. The department proposed an exemption to the APA with the support of the United States Department of Health and Human Services. The legislature granted an exemption from the APA for this unit so that it would remain within the Department of Economic Security. (Subsequent investigation of other states has determined that the disability determination programs in other states are conducted by independent hearing units within those states.)

2. "Temporary" rules were changed back to "emergency". Following the 1980 changes and the use of the word "temporary", the legislature had passed numerous bills containing temporary rulemaking authority. It was thought that the use of the word "temporary" had been the reason for the increased use of this rulemaking provision. The intent was that rules be adopted solely under emergency situations and thus the term "emergency" was replaced in the statute.

3. Rules which incorporate by reference other materials, are required to specifically state that they are incorporating other material by reference and what those materials are.

4. The procedures for filing rules with the revisor of statutes were clarified.

5. In order to allow parties an opportunity to review what an agency proposes to utilize in support of its rules before the notice of hearing is issued, a provision requiring the preparation of a statement of need and reasonableness before an agency orders the publication of a hearing notice was added. (It should be noted that through an oversight this provision does not apply to notice and comment rulemaking.)

6. Several amendments were added to clarify the provisions of the APA without changing their meaning. One was to restructure the language in the APA to give emphasis to notice and comment rulemaking rather than giving emphasis to rules being adopted following a hearing.

7. The number of persons required to force an agency to go to hearing on rules was raised from seven to twenty-five. The number 25 was picked from the 1981 Model State Administrative Procedure Act and was a compromise between competing interests.

8. Certain of the procedures relating to the public hearings were clarified including requirements on the agency, questioning of persons who testify, and clarifying the authority of the hearing examiner to limit repetitive or immaterial oral statements and questioning. The three extra days which had been added to the law in 1983 for the agency to respond was extended by allowing all parties an opportunity to respond during the three days. Another clarification amendment related to procedures for review of rules by the hearing examiner and the chief hearing examiner.

9. One of the most significant amendments to the APA in 1984 related to the problem of emergency rulemaking. The APA was amended to limit the authority of an agency to adopt emergency rules to 180 days after the effective date of a law giving the emergency authority, with certain exceptions for agencies issuing bonds. This limitation was necessary, in the eyes of some, because several agencies had obtained temporary rulemaking authority in 1982 and had not, as of the 1984 session, adopted any rules. Thus, this "use it or lose it" provision was added to the bill. (Of interest to some will be the fact that several laws passed during the same legislative session specifically exempted temporary rules in those laws from this provision.)

10. The APA listed, for the first time, the specific materials which were to be included in the rulemaking record.

11. Of significance to the staff of the OAH was the change in title from hearing examiner to administrative law judge. This change in title brings Minnesota into conformity with the federal government and the majority of states in titles for their administrative hearing officials.

12. A clarification was made specifically authorizing unclassified positions within the OAH. It had been thought that the OAH had this authority when it obtained additional positions in 1983 for the workers' compensation section. Because of a difference of opinion of the placement of a comma in Minn. Stat. Ch. 43 (1984), this additional authority was requested and obtained. (The positions utilized by these unclassified positions were the positions of administrative assistant and the assistant chief administrative law judge.)

1985

1985 Minn. Laws, Chapter 305, Article 6, Section 15. This law, originally intended to be a recodification of the state liquor laws, amended a provision of law which had previously been interpreted by the Minnesota Supreme Court to allow political subdivisions to suspend or revoke liquor licenses without hiring the OAH even though it had to comply with the other provisions of the APA. During the recodification process, this section of the law was amended

so that the political subdivisions, when suspending or revoking a liquor license, are required to use the entire Chapter 14, which thus requires use of an ALJ of the OAH to conduct the hearings.

1985 Minn. Laws, First Special Session, Chapter 4, Section 1. This provision eliminated an exemption previously obtained by the Department of Public Safety from the rulemaking provisions for rules adopted under Minn. Stat. § 169.128 relating to DWI license suspension. This section of the law specifically repealed the rules which had been adopted under the exemption and required the agency to follow the full APA in adopting its rules.

1985 Minn. Laws, First Special Session, Chapter 10, Sections 34 through 38. These sections require the preparation of fiscal notes by agencies for all rules if the rules will result in increased, mandated costs to local agencies. (Of concern is the fact that a new definition of "rule" is added to the law which is not identical to the definition of "rule" in the APA.)

1985 Minn. Laws, First Special Session, Chapter 13. This was the State Departments Appropriations Bill. It contained a number of significant amendments impacting the OAH and the APA as follows:

1. The funding for the workers' compensation section of the OAH was transferred from the state general fund to the special compensation fund. This amendment has the effect of removing the costs of the workers' compensation system from the taxpayers of the state to the employers and insurers, including all state agencies and all self-insured employers.

2. Agencies are specifically prohibited from contracting with persons from outside of their agency for the drafting of rules unless they obtain the approval of the revisor of statutes.

3. The revisor of statutes is required to assess the costs of both drafting rules and reviewing rules directly to the agencies.

4. The attorney general is required to assess the costs of their required review of rules and all other services provided to state agencies to the agencies.

5. The LCRAR, having been faced with an ever-increasing number of petitions for review of rules, obtained a provision amending the APA to specifically allow the LCRAR to request the OAH to conduct hearings for it, the cost of the hearings to be borne by the agencies whose rules were the subject of the hearing, provided that the rules had not been adopted following a hearing conducted by the OAH.

6. The chief ALJ was specifically authorized to adopt procedural rules for voluntary mediation, including rulemaking, except for disputes which were within the jurisdiction of the Bureau of Mediation Services.

7. Amendments to the APA were adopted specifically allowing the chief ALJ to delegate certain responsibilities to subordinates provided that the delegations are filed with the secretary of state. These amendments were necessitated because the secretary of state had indicated that the chief ALJ was without authority to delegate responsibilities.

Other Internal Changes to the OAH.

In addition to the changes discussed above, including legislative changes, during the last four years the OAH has continued its efforts to streamline the office. In this regard, the OAH has continued its search for better ways of managing its calendar of cases. As discussed in Chapter 7, the OAH has developed a computerized program for the scheduling of cases for workers' compensation. This was a result of DOLI obtaining approval for the computerization of its workers' compensation records. As the OAH receives approximately 10% of the total number of cases filed at DOLI, the OAH began utilizing the same computer as had been purchased by DOLI. DOLI had purchased a mainframe computer from the Sperry corporation and its MAPPER software system. Sperry terminals were installed at the OAH and a telecommunications hookup to the DOLI mainframe was installed. While the system was originally "sold" on the basis that employees of DOLI and OAH could very easily learn to prepare the "runs", which were actually computer programs, we found it extremely difficult to train our existing staff to perform this function. Therefore, it was determined that we should utilize salary savings from vacant positions to contract directly with the Sperry Corporation for consultant services to complete the computerization of the records at OAH. This proved to be a cost-effective way of achieving the desired results in the least amount of time possible. However, we quickly found that even Sperry had miscalculated the amount of time necessary to write the runs to computerize the calendar system of the office. However, effective February 1, 1986, the total automation of the record-keeping, assignment of cases, scheduling of cases, issuing of pretrial orders and hearing notices will be accomplished. The end results of this automation will be increased efficiency of the office, quicker response to questions from the public, our calendar judge being able to hear cases 50% of the time, thus increasing the number of cases we are able to dispose of each year, and providing needed managerial reports from the data found in the records of the office which are presently obtainable only through a manual system.

While working on the Sperry system for workers' compensation, the OAH continued to look at methods of upgrading its existing word processing system so as to be able to make its record-keeping and scheduling of cases in the APA section more efficient. During 1985 the office upgraded its existing Wang WP system to a Wang VS 65 system which gives the office both word processing and data processing capability. Software has been purchased to upgrade the time-keeping and billing system of the office so that invoices for services of the office can be generated up to ten days earlier, and to reduce the margin of error in any billings. At the same time, the system will provide the computerization of the docketing and calendaring system. At the present time, cases are docketed manually and are set based upon telephone calls from agencies to the chief ALJ or a supervisory ALJ. It presently takes from ten minutes to 30 minutes to schedule a case depending upon the amount of information necessary before we can notify an agency of the date, time and place of the hearing and the ALJ assigned. The new system will allow the same process to occur in less than three minutes by having terminals in the offices of the supervisory ALJs and the chief ALJ. As in the case of workers' compensation, by entering all of our calendar and docket information on the Wang VS system, we will be able to generate reports much more quickly, will be able to monitor our billings much more carefully, and will be able to respond to questions from the public much more rapidly.

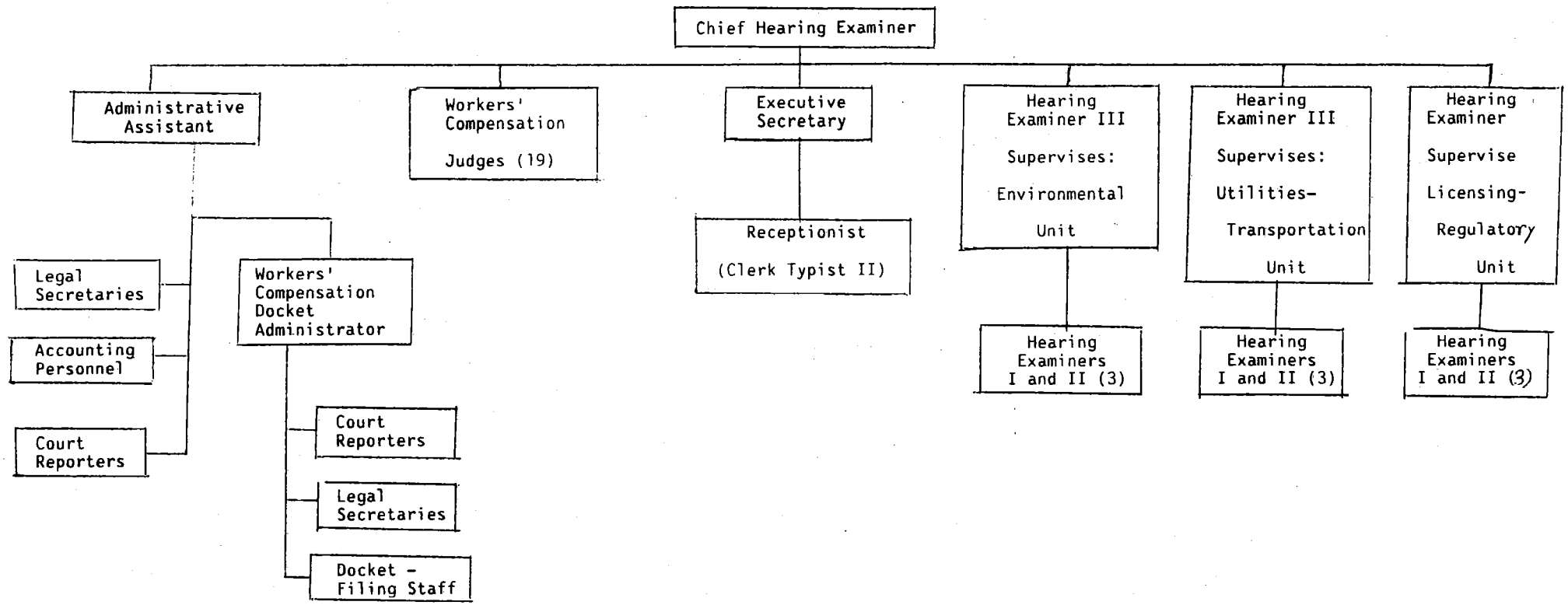
As with most computerized systems, vendors of the systems continue to say that their equipment is "user friendly". However, we have found that it will

be necessary for the office to hire a full-time person to continue to monitor and work with both of our computer programs. However, the utilization of the computerized systems has allowed us to reduce the number of support staff anticipated to be necessary so that no new positions will be necessary to fulfill our needs. In fact, it is anticipated (hoped) that the upgrading of our system will result in the reduction of support staff by one and possibly two full-time positions. However, we will not be able to make this final determination until the end of the current biennium.

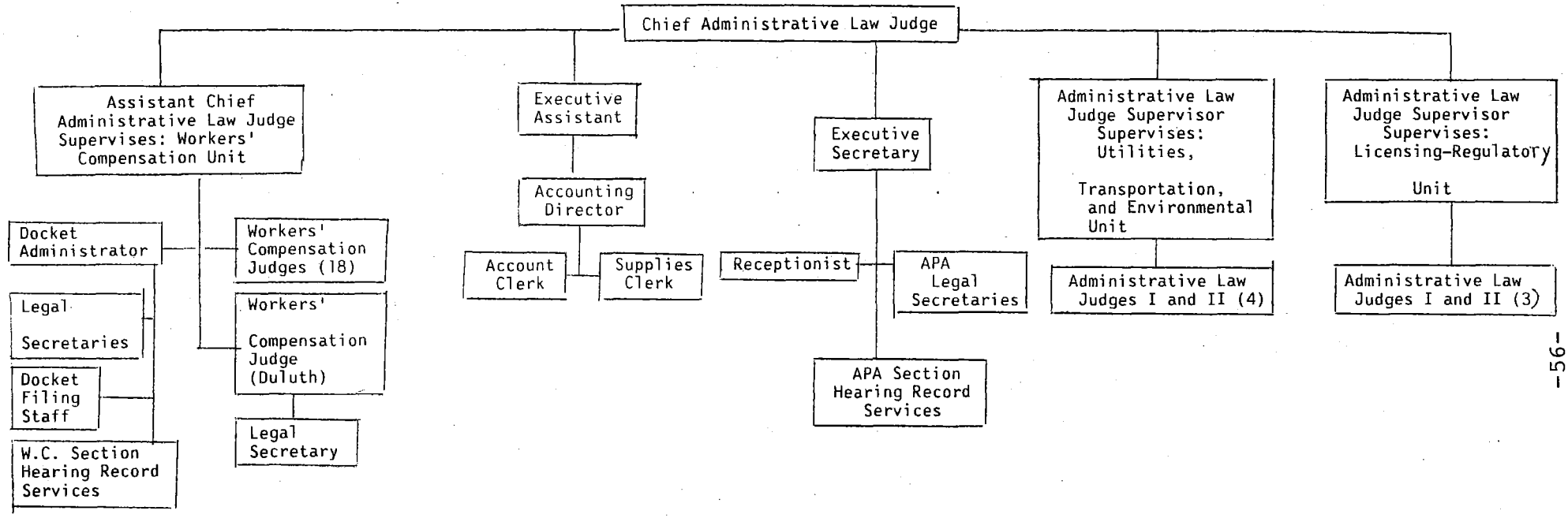
As a result of the various changes made internally both as required by legislative changes and by attempting to bring more efficiencies to the office, the office established a new organizational structure as of July 1 of 1984. This followed the hiring of an assistant chief administrative law judge to directly supervise the entire workers' compensation unit. Additionally, instead of three units within the APA section, the utilities/transportation unit was combined with the environmental unit for the purpose of supervision. As part of this reorganization of the APA section, ALJs were transferred from one unit to another in order that they may develop expertise in additional areas of the law. This "cross-fertilization" had been occurring over a lengthy period of time. The office has been using ALJs with a high degree of expertise in a given subject matter area to assist in the training of other ALJs. As an example, the office "inherited" five hearing examiners from the public service commission who had expertise in transportation and utility matters. Only one of these five persons remains on the staff today. This person has continued to assist in providing training from his experience and background to other ALJs as we have moved these other ALJs into the utilities/transportation unit. Thus, while the office continues to operate under its mandate of attempting to assign persons with expertise in the subject matter to all hearings, we have continued to utilize nearly all ALJs in all areas. We are able to do this because of the highly professional staff in the office who are willing to work with each other and to assist each other in the fulfillment of their responsibilities under the law.

The organizational structure for the office which was implemented on July 1, 1984, and which remains in effect as of January 1, 1986, if found at the end of this chapter.

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
ORGANIZATION STRUCTURE
AS OF JULY 1, 1981



MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
ORGANIZATION STRUCTURE
AS OF JULY 1, 1984



Chapter 9

A Look to the Future
Recommendations for Change

The creation of the independent OAH has been hailed by some as the greatest advancement in bringing credibility and professionalism to state administrative law practice since the first adoption of an APA in this state. On the other hand, there are those that are heard to say that the creation of the OAH has merely added another layer of bureaucracy to state government, results in too much formality in many hearings, is time consuming and costly, fails to deliver necessary expertise and is an infringement on the decisionmaking authority of state agencies. Not too surprisingly, the supporters come from the legal profession and the private sector while the detractors come primarily from within state agencies and representatives of some special interest groups, both yearning for the return of the "good old days". Exactly what is meant by the "good old days" is better left to the reader's imagination. However, no persons have been heard to dispute the fact that the creation of the OAH has brought uniformity in both procedures and decisionmaking format to the administrative process as well as being a giant step toward bringing governmental action into the "sunshine".

A prime example of why the interjection of an independent, professionally trained fact finder is important to the integrity of the administrative process is the recent discussion relating to the propriety of commissioners, directors or other agency heads working for those they regulate either prior to or subsequent to their employment in state government. It is a fact of life that those regulating a particular industry must have some amount of expertise in the subject matter of the laws. This expertise only comes from practical experience prior to appointment or "on the job" learning experiences. Part of the job of regulating is to come into frequent contact with those being regulated. To do otherwise would be to keep one's head in the sand and remain ignorant of what is happening in the "outside world". State agencies' personnel are in a "no win" situation in this regard. On the one hand, if they refuse to meet with or talk to those regulated by the agency, they are accused of ignorance of the industry, egotism, and shortsightedness. On the other hand, if they are seen to meet with those regulated, they are accused of "selling out" to or being "in bed with" the regulated industry.

The OAH brings a reasonable buffer into the process by providing an open forum for discussion of ideas (in rulemaking), requiring agencies to make a full and complete record prior to their decisionmaking, and through the insertion of an impartial fact-finder. Lest there may be those who would scoff at the importance of the impartial fact-finder, case after case coming from the Minnesota courts have indicated quite clearly the importance of the process. Agencies cannot ignore the findings, conclusions and recommendations of an ALJ. Rather, agency decisionmakers must show a familiarity with the record of the proceedings[67], may not merely rubber stamp the ALJ's report[68], and must clearly explain any divergence from the report, pointing to evidence in the record supporting rejection of the ALJ's findings or recommendations.[69] Agencies may reach their own conclusions in a case but if they are different from the ALJ's, the difference must be explained.[70]

The OAH has tried to listen to its critics and to respond to constructive criticism or positive suggestions for improvement. The use of an internal

policy relating to the implementation of a uniform format for the issuance of contested case reports in November of 1980 was the result of discussions with state agencies and lawyers appearing before the OAH. The legislative adoption of new procedures allowing agencies to take certain licensing actions without first conducting a hearing was a direct result of discussions with agencies and practitioners who were heard to complain about costs and delays.[71] the adoption of a "notice and comment" rulemaking process for noncontroversial rules in 1980[72] was first proposed to the 1979 APA Task Force by the OAH after discussions with agencies and a review of past rulemaking hearings. The implementation of an anonymous questionnaire which is sent to parties to a hearing following issuance of the ALJ's report was due in part to comments from attorneys who had some reluctance to lodge complaints about an ALJ and in part due to our looking for better ways of evaluating the performance of the ALJ. The implementation of a formal training program which includes training in areas of substantive law such as workers' compensation, discrimination law, public utilities regulation, etc. is in response to the need for subject matter expertise while courses on alternative dispute resolution are the result of persons seeking less onerous procedures for resolving disputes. In 1984-85 the OAH attempted to amend its procedural rules to provide for less formal procedures for certain classifications of contested cases. While everyone supported the effort, it failed due to a lack of statutory authority to adopt classifications and thus "mandate" specific procedures for certain types of cases.

While attempting to respond to constructive criticism and positive suggestions for change, as well as being mindful of its charge to conduct fair, expeditious and less costly hearings, the OAH has also continued to monitor the APA, changes proposed, and to provide a neutral position in many legislative discussions relating to the APA. The OAH has taken the position that the purpose of the APA is to provide a uniform and open administrative process whereby agencies proposing action must establish the reasonableness of their proposed action, prove their case, before they can take any action, while at the same time providing an opportunity for the public to participate fully in the administrative process. In so doing, the OAH has sometimes taken positions on proposed legislation which has been viewed as anti-state-agency or pro-state-agency, depending on the nature of the issue, the position taken, and the viewpoint of the critic. The old adage that 50% of the people will be upset with a decision regardless of which way it goes therefore applies not only to decisions issued by the OAH but in its legislative proposals.

The numerous changes to the APA over the past decade, as enumerated in preceding chapters, have done much to improve the process by which governmental agencies establish policies and take actions which affect the lives of the citizens of this state. However, even though the Minnesota APA presently imposes what most consider to be the most onerous, time consuming and costly requirements for rulemaking in the country, there remain those who believe that even more stringent requirements should be imposed in order to correct actual or perceived "loopholes" or problems in the rulemaking process. When discussing the existing provisions relating to adjudicative proceedings (contested case) concerns continue to be expressed although not as often nor as loud as when discussing rulemaking. The OAH shares some of these views while at the same time remains concerned that in attempting to correct the deficiencies, more problems might be created.

The OAH supports a continuing review of the administrative process. However, rather than a piecemeal or "band-aid" approach which has occurred from 1976 to 1985, perhaps it is time to step back and take a comprehensive

look at the entire APA just as was done in 1974-75. Much has happened in the field of administrative law over the past decade, not just in Minnesota but nationwide. A new Model State APA has been published by the National Conference of Commissioners on Uniform State Laws. There are now ten states which have adopted provisions creating an independent agency much like the OAH while 18 other states and the United States Congress are presently considering similar legislation. There have been numerous decisions issued by the United States Supreme Court, the Minnesota Supreme Court and the Minnesota Court of Appeals relating to administrative practice and procedure which should be reviewed for the purpose of codifying or legislatively overruling them. With these factors in mind as well as the problems previously discussed, the following recommendations for discussion or change are being proposed.

Rulemaking

A. The LCRAR's rule suspension authority should be repealed because of its very questionable constitutionality. Instead of creating a new joint legislative commission on regulatory oversight as is being discussed for the 1986 Legislative Session, the role of the LCRAR should be reviewed and, if deemed appropriate, expanded to include the functions presently being proposed for the new joint commission. For those that fear that loss of rule suspension authority will result in a diminution of the effectiveness of the LCRAR, consideration should be given to the provisions of sections 3-203 and 3-204 of the 1981 Model State APA. Those sections are all encompassing and in some instances have proven effective in other states. Of particular significance to those sections is the authority of the commission to "object" to the provisions of a proposed rule. Unless the objection is removed, if a rule is challenged, the burden is upon the agency to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency. At present, a person challenging a rule has the burden of proof at court. This shifting of the burden of proof has proved to be an effective legislative oversight mechanism in the State of Florida.[73]

B. Agency Bulletins. As discussed in Chapter 2, the issuance of bulletins or guidelines by agencies was one of the prime motivating factors behind the 1975 APA amendments. Recently, the same issue has come to the attention of at least one legislative committee.[74] The issue is: How can agencies effectively communicate with those regulated by the agency without constituting illegal rulemaking? The APA and court decisions are very clear. Rules must be adopted, amended, suspended or repealed only in compliance with the APA. Any agency statement of general applicability and future effect made to implement or make specific the law administered by the agency which has not gone through the APA requirements is unenforceable. How then can an agency very quickly inform the regulated of changes required by court decisions or federal law or regulations which would, in effect, amend a duly adopted rule? When an agency issues an advisory opinion, where authorized, or a precedential policy decision following a contested case, how can it inform the regulated without being accused of illegal rulemaking? When an agency has issued a statement which looks like a rule but which has not been adopted as a rule, how can a person obtain a determination of the legality question prior to an enforcement action challenge? If an agency issues an "Order" rather than a "rule", and the order is intended to have the effect of a rule but has not been issued following an adjudicative proceeding, what recourse does a person have other than a judicial challenge? The following suggestions to correct these problems are not meant to be the "only way" but may serve to further discussions which will hopefully result in a proper solution.

1. Amend the definition of "rule" as presently found at Minn. Stat. § 14.02, subd. 4 (1984), as follows: "'Rule' means the whole or a part of every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, issued or adopted to prescribe law or policy, implement, interpret or make specific the law enforced or administered by it or to govern its organization or procedure. Every agency statement that meets this definition is a 'rule' regardless of whether the agency labels the statement with another term, such as a policy, informational, interpretive, or instructional bulletin or statement."

The foregoing proposal is a combination of the existing definition of "rule", the definition contained at section 1-102(14) of the 1981 Model State APA, and a recently drafted proposal of Mark Shepard of the House Research staff, who is currently assigned to the House Governmental Operations Committee. The intent of these amendments is not to broaden the definition but to make it more specific so as to provide clearer guidance to state agencies' personnel.

2. As is recommended by the 1981 Model State APA at section 1-104, allow for the suspension of the requirements of the APA when necessary to avoid a loss of federal funds or services. The suspension authority should vest in the Attorney General so that a legal determination of the necessity for the suspension can be made. Placing this authority in the Attorney General will provide a check by a constitutional officer separate from the executive branch agency requesting the suspension. The suspension order should not be subject to the APA requirements for rule adoption as recommended in the Model Act,for to do so would delay the action, possibly resulting in a loss of the federal funds or services sought to be preserved. The proposed language is as follows:

"To the extent necessary to avoid a denial of funds or services from the United States which would otherwise be available to the state, the attorney general by order may suspend, in whole or in part, one or more of the rulemaking provisions of this act. The attorney general by order shall declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States. The issuance of the order is not subject to the provisions of this chapter.

If any provision of this act is suspended pursuant to this section, the attorney general shall promptly publish the order of suspension in the State Register and report the suspension to the legislature.

Any suspension issued pursuant to this section shall apply solely to the agency seeking the suspension and solely to the rules required to be adopted, amended, suspended or repealed. An agency which receives a suspension order from the attorney general shall immediately publish the required changes in the State Register and give immediate notice to all persons whose names are registered with the agency for the purpose of receiving rulemaking notices.

3. In cases where an agency has issued a statement which may be thought to be a rule without compliance with the APA, a procedure for immediate review should be established outside of the judicial

system. One proposal is for a petition to be filed with the LCRAR. That proposal is contained in a draft of legislation prepared by Mark Shepard of the House Research staff.[75] That proposal appears to call for what could be lengthy procedures, but is certainly worth review. An alternative is to provide for an administrative review which could be conducted under strict timeliness. Guidance for such a provision can be found in the rulemaking procedures in the Florida APA.[76] In Florida, once a rule is proposed or even after adoption, a limited challenge can be made by petition to the director of the Florida Division of Administrative Hearings. The decision of the ALJ is a final determination. The proposal for Minnesota would be to allow a petition to be filed with the chief ALJ with a copy to be served on the agency which issued the statement in question. Within a very short time (3 to 5 working days) the agency must give notice to all persons on the agency's rulemaking list for the subject matter of the statement, or to all persons who received the statement in question, the notice giving the date, time and place for any interested person to appear or present oral comment. The hearing would be limited solely to the issue of determining whether the agency statement in question involved illegal rulemaking, the ALJ's decision being a final decision subject to judicial review by the Court of Appeals and the Supreme Court. Short and specific time deadlines for the hearing, the decision and the appeals should be included.

C. Exemptions. Besides the problem of agencies issuing statements which may be rules, a more pervasive problem is the existence of a very large number of exemptions from the rulemaking provisions of the APA. These exemptions fall into three categories, the first being found in Minn. Stat. § 14.02, subd. 4 (1984), the second and more difficult to ascertain being those found "hidden" in the many substantive laws and statutes, and the third being agencies given authority to do certain things "by rule or order". Each of these categories have caused problems of one kind or another. Each year since 1981 the Revisor of Statutes has attempted to identify newly enacted exemptions. In 1984, the chief ALJ, with the help of the revisor, conducted a review of all known or discoverable exemptions. Before that review could be totally completed, the 1985 Legislative Session began and additional exemptions were created.

The review of the exemptions found that there are nine exemptions specifically listed in Minn. Stat. § 14.02, subd. 4 (1984) (as amended by 1985 Minn. Laws, First Special Session, Ch. 4, Sec. 1, which removed an exemption for the department of public safety) of which two are susceptible of questioning with regard to the necessity for the exemption. In the 1984 compilation of the Minnesota Statutes, the revisor listed an additional eleven exemptions in a footnote. The 1984 review by the chief ALJ included a review of 64 exemptions from the rulemaking provisions, including those discussed above. Of the exemptions reviewed, 21 appear to be questionable as to their propriety or necessity. All should be listed in the APA, at the very least so that persons looking for exemptions will only have to look in one place. (Exemptions created in 1985 are not included in these figures.)

A more difficult problem is the issuance of orders rather than rules. When a law authorizes agency action "by rule or order", is the language intended to allow the issuance of a "rule" without compliance with any APA

requirements? Apparently, there is some concern that this question is being answered in the affirmative by some agencies. If this is true, then a clarification is appropriate.

The drafters of the 1981 Model State APA also wrestled with this distinction. In section 1-102, the definition section, the Model Act defines "agency action", "order", and "rule". Each of the definitions must be read in conjunction with the other. The stated purpose of the Model Act provisions is to identify every type of agency activity impacting on the citizens, to establish procedures for the issuance of all actions and to provide for judicial review. The definition of "order" [Sec. 1-102(9)] is clearly intended to apply to agency action taken following an adjudicative (contested case) proceeding. The Minnesota APA should follow the lead of the Model Act and codify what most believe has been the historical intent of the legislature. In short, this is one of the possible "loopholes" mentioned earlier as a concern to some.

Adjudicative (Contested Case) Proceedings

Unlike the rulemaking provisions of the APA, the contested case sections have had very few significant changes during the past decade. While rulemaking has a much broader impact on more people in less time, the most significant cases conducted by the OAH in terms of media attention, legislative interest, costs to the participants, and financial impact on the litigants have been adjudicative proceedings, called "contested cases" under our APA. The OAH has routed high voltage transmission lines, sited large electric generating facilities (power plants), considered the need for expansion of the spent nuclear fuel pool at a nuclear powered generating facility, considered hundreds of millions of dollars in utility rates, been asked to sort through allegations of child abuse, sex abuse, discrimination of every kind and nature, fraud and misrepresentation, considered rates for long term care facilities for the aged and the retarded, and has considered evidence relating to licensing of every regulated occupation and profession except attorneys. Yet, whenever "regulatory reform" is mentioned, only rulemaking is discussed.

It could be argued that as long as there are no concerns being publicly expressed, why "rock the boat"? However, just because there is no large outcry for changes does not mean that the system cannot be made better nor that it is free from problems. It must be remembered that agencies establish policy not only through rulemaking but also through the issuance of orders/decisions following an adjudicative proceeding. As but one example, the Public Utilities Commission establishes policy for the regulation of public utilities rates each time it considers an individual rate case. It can, and has, changed policy on such things as the treatment of charitable contributions on a case-by-case basis. It is through the adjudicative process that agencies interpret statutes where rules are inappropriate, unauthorized or not yet adopted, or interpret their rules where necessary. Thus, can a case be made for the proposition that these proceedings are just as important as rulemaking, especially when an agency considers rulemaking too costly or lengthy and chooses to issue policy on a case by case basis?

The existing APA provisions relating to adjudicative proceedings are in need of review and change in many respects. Costs and delays in the process have been greatly reduced since 1975 but can be reduced further. At the same time, there are exemptions from these provisions, some historical and some

new, which are in need of review. The following are some areas for discussion with, in some instances, proposals for change. Decisions were made in the past based upon many factors, not the least of which were political factors. If the same factors do not exist today, perhaps changes should be made. At the very least, a discussion of the issues may lead to the discovery of changes other than those discussed herein which should be made.

A. Publication of Precedential Decisions. Agencies establish statewide policy through adjudicative proceedings. It is a case-by-case process where, usually , only one specific party and the agency are present. Yet, a final determination can have applicability to all other persons similarly situated. The determination in one case is applied as "precedent" in all future similar cases. These precedential decisions are not presently published, indexed or otherwise generally available to the public. The 1981 Model State APA, at section 2-102 speaks to this problem by imposing certain requirements on all written orders before they can be relied on as precedent.

It is recommended that section 2-102 of the 1981 Model State APA, as well as section 1-102(9) which defines "order", be adopted into the Minnesota APA, modified as may be necessary or appropriate.

B. Alternative Dispute Resolution (ADR). Since the legislature mandated a study of this subject, the LCRAR, the State Planning Agency, the Attorney General's Office, the Director of the Bureau of Mediation Services and the chief ALJ have been involved in reviewing ADR. While a final report on this study has not yet been issued, several general conclusions have been reached and several actions have been taken. After several discussion sessions, a short mediation training was provided to the ALJs at the OAH. Thereafter, the departments of human services and natural resources, selected as pilot agencies, reviewed their cases prior to referral for hearing to determine the appropriateness of the cases for mediation. At the same time, ALJs began a review of all cases referred to them to determine their appropriateness for mediation. Procedural rules for voluntary mediation of contested cases were adopted by the OAH. Legislation specifically authorizing mediation of rulemaking was passed in 1985 as previously discussed.

The conclusions reached have been that mediation in the classical labor-relations setting is not appropriate in all contested case proceedings but most contested cases are susceptible to some form of mediation or settlement conference. Another conclusion reached is that state agency personnel need training in mediation/settlement techniques and must be given authority to settle all or portions of disputed issues when attending mediation/settlement conferences. Due to the very high success rate (nearly 100%) in cases mediated to date, the study should continue with greater emphasis placed on training of all agencies' personnel to not only spot cases where settlement is possible, but in the art of settlement discussions. A positive ADR program will save the state and its citizens both time and money and will result in participants turning a "win-lose" or "lose-lose" situation into "win-win".

C. Classification of Adjudicative Proceedings. Because these cases vary so greatly in nature and scope, the formality of the hearings should also be varied so that the issues can be determined in the most timely and cost-efficient manner possible. An ALJ ruled that the OAH is without

authority to classify the hearings, a task that was proving to be very difficult at best and one more probably belonging to each agency, subject to general guidelines. The 1981 Model State APA, Article IV, addresses this problem.

It is strongly recommended that the legislature adopt the Model Act concept for classification of adjudicative proceedings. The specific Model Act provisions must be modified to fit the existing Minnesota APA but the concept will work in Minnesota and was the subject of unanimous support at public hearings conducted in 1984. The disagreements arose over which cases were to fit into each of the categories. The Model Act places all cases under the formal procedures until the agencies have, by rule, classified their own hearings within the guidelines found in the Model Act. This same procedure should be workable in Minnesota.

D. Delays in Issuing Final Decisions. Minn. Stat. § 14.62 requires all agencies to render a written decision within 90 days of receipt of an ALJ's report. However, if an agency fails to act, the party seeking a final determination is required to hire an attorney to bring an action against the agency in the Minnesota Court of Appeals. The court may only require the agency to issue a decision "within such time as the court determines to be appropriate". There are no provisions allowing for the recovery of costs, damages or attorney's fees in any case where the agency has unreasonably delayed taking action. The 90-day requirement was added to the law in 1980.[77]

Even with this existing provision, agencies continue to unreasonably delay final action to the detriment of the other party. The most recent example is a case wherein the ALJ's report in a licensing case was issued on April 18, 1984, 15 days after the hearing. There were no exceptions filed by any party. The final agency action, which adopted the report and recommendation of the ALJ in its entirety, was not issued until January 16, 1986. The final decision dismissed the proposed action against a licensee. Pending the final decision, the licensee was left in a state of limbo, arguably to the licensee's financial detriment and most certainly to the detriment of the licensee's emotional condition and respect within the community.

To correct this problem, it is recommended that the legislature adopt the 1981 Model State APA's concept of an "initial order". Under this concept, the ALJ would issue an "initial order" rather than a recommendation. the "initial order" would become the final order unless within ten days the agency head gives notice that the initial order will be reviewed, or upon appeal by any party to the agency head within the same time frame. Thereafter, a specific time deadline should be established for the issuance of a final order by the agency which is mandatory rather than directory, with possible provisions for costs, damages and attorney's fees in the event a decision is not issued within the statutory deadline.

Some might say that this recommendation is "overkill" or that all agencies should not be required to pay the consequences of dilatorious actions of a few agencies. After observing the process for over ten years, I doubt that there are more than a handful of agencies which can honestly state that they have issued all decisions within 90 days. At the same time, when agencies are faced with deadlines which, if not met, will result in the agency losing jurisdiction to take action or funds from its budget, they meet the deadlines.

E. Licensing Cases. Final agency decisions in occupational and professional license disciplinary cases seldom, if ever, involve the issuance of a decision which establishes statewide policy. Rather, they involve an investigation by the agency, a preliminary determination by the agency that the licensee has violated some provision of law or rule, prosecution by the agency, an ALJ's recommendation that disciplinary action be taken or not taken, and a final decision by the agency on whether disciplinary action should be taken and if so the extent of the discipline. At the hearing, the agency must prove its allegations by a preponderance of the evidence which is the lowest standard of proof commonly recognized in civil proceedings.

Several issues have been raised in conversations with practitioners in this area over the past several years. The first issue raised is whether the standard of proof necessary before a licensee can be disciplined should be the higher "clear and convincing" standard. The second issue raised is whether the ALJ should recommend a specific penalty if a violation is proved. The final issue is whether the ALJ's decision should be a final decision rather than a recommendation. These issues and recommendations are discussed below.

1. Standard of Proof. It has been said that "preponderance of the evidence" means that if the scales of justice are tipped ever so slightly to one side of the case, that side wins. This is the standard of proof presently applied in all contested cases unless the substantive law provides otherwise. Using a standard such as this does not mean that the party with the most evidence or largest number of witnesses prevails. It is not the quantum of evidence which counts but the quality of the evidence which is important. The "clear and convincing evidence" standard is somewhat higher and requires a better quality of evidence so that the trier of fact is "clearly convinced" of the truth. The trouble with this standard is in its application. We are not faced with jury trials. Rather, a party must convince one person, except in the case of a board, of the merits of their argument. Who is to say whether that fact finder is clearly convinced or merely convinced? In short, does it really make any difference? I think not. therefore, it is recommended that the legislature adopt, by statute in lieu of the present rule, the preponderance of evidence standard of proof for all adjudicative proceedings unless the substantive law provides a different standard.

2. Specificity of Recommendations. At the outset of the establishment of the OAH and adoption of its internal policies and procedures, it was decided that in cases involving disciplinary actions against licensees, no specific penalties would be recommended. Rather, if the ALJ finds that the licensee has violated the applicable law or rules, the recommendation is solely that disciplinary action be taken or if no violation is found to have occurred, that no disciplinary action be taken. In some cases this has led to controversy , not only from the public but from within the OAH. Nevertheless, once established, it was felt that we should maintain uniformity and the policy remains today.

It is now recognized that the policy was not correct and that all cases involving disciplinary action should result in a specific recommendation as opposed to the present general recommendation. However, before unilaterally making such a change, it was thought that it would be more appropriate to present the issue to the legislature for its consideration and recommendation or for specific statutory guidance.

The arguments against proposing specific penalties include the theory that it invades the jurisdiction of the agency to establish policy through the imposition of penalties and that it is the agency's responsibility to determine what penalty would be in the "public interest", which is the standard in several licensing statutes. The other side of the coin is that the agency should be required to state, at the outset, the penalty it seeks to impose so that the licensee can better understand the implications of an adverse determination and make a more informed decision on any possible settlement. Another argument is that the state should be required to establish the necessity for discipline and the reasonableness of the specific proposal plus the "public interest" evidence where appropriate.

A survey of other states which utilize an independent agency to determine licensing cases indicates that every one of those agencies make specific disciplinary proposals. The OAH recommends that the legislature review this issue and specify its intent through legislative enactment. If the legislature discusses the issue but takes no action nor makes any recommendation one way or the other, it is the intent of the OAH to change its present policy and to begin issuing specific disciplinary action where appropriate.

3. Finality of Decisions. In all cases where the final decision in an adjudicatory proceeding requires the exercise of agency expertise or represents the exercise of a legislative function of establishing policy for the state, the agency should make the final determination rather than the ALJ. However, where the agency has investigated a matter, made a preliminary determination of guilt through its decision to proceed, conducts the prosecution of the case, where an adverse determination may result in the lose of a person's right to conduct a business or pursue a profession and where a final determination does not require the exercise of any special expertise, where should the final decisionmaking authority rest?

On this issue, final decisions are made by independent agencies such as the OAH in the states of California, Missouri, Maine, North Carolina, Wisconsin and Florida in most licensing cases. It is our recommendation that the legislature consider this issue and determine where the final decisionmaking authority belongs. Bringing the issue up for discussion and making a decision one way or another will put this issue to rest.

F. Exemptions. As in the rulemaking provisions, when the APA was amended in 1975, certain exemptions from the contested case provisions were created for one reason or another. As an example, while the Minnesota Municipal Board exemption at Minn. Stat. § 14.03, subd. 1 (1984), was exempted under the guise of the expertise argument, in fact, if it was not able to continue to conduct its own hearings, there would have been little for the Board or its executive director to do.[78] The exemption for unemployment compensation, workers' compensation and hearings conducted by the Bureau of Mediation Services were also based on the expertise argument. However, as those present at the time are aware, that was not the real reason. They were exempted based solely on political reasons, which is entirely proper for a legislative process which, by its nature, is political. As discussed in a previous chapter, the exemption for workers' compensation hearings was partially repealed in 1981 when the workers' compensation judges were transferred to the OAH without a

loss of expertise. Why the rest of the workers' compensation division at the department of labor and industry remained exempt was never fully discussed nor explained in 1981.

Some exemptions are appropriate. For example, agencies such as the public employment relations board and the workers' compensation court of appeals, whose sole hearing functions are on appellate review rather than initial hearings, are appropriately exempt. However, the same cannot be said for other exemptions listed within the APA nor for most of those found within other sections of the statute. The revisor has located these exemptions and has published the list as a footnote to Minn. Stat. § 14.03. In 1984, these exemptions were reviewed at the same time as the review of the rulemaking exemptions. Of the total of 35 exemptions reviewed, including those found in Minn. Stat. § 14.03, subd. 2, 17 were found to be of questionable necessity. It is recommended that these exemptions be reviewed along with the questionable rulemaking exemptions. (The foregoing did not include a review of any exemptions which may have been granted in 1985.)

Conclusion

The OAH has completed ten years of existence which is considerably longer than many of its earlier detractors would have guessed or desired. Today, it is a fixture in state government as one of ten central panel systems for administrative hearings in existence in the country. The statistics presented in this report should show that the goals established for the OAH through the 1975 legislation, uniformity of proceedings, reduction of delays and costs of the administrative hearing process, and independent decisionmaking, free from political pressure, have been achieved.

What will happen to the OAH in the future is dependent upon legislative action. At some future time, the remaining exemptions from the APA contested case provisions will probably be removed and all adjudicative hearings brought under a single agency. Either the political reasons for the exemptions will dissolve or pure economics will dictate the consolidation, either in total or at least under one roof with separate directors so that the presently existing duplication of support staff functions such as typing, scheduling, etc. will be eliminated. Whether it will happen next year, within five years or twenty-five years does not really matter. My only hope is that Minnesota will remain a leader in this effort and that total consolidation happens first in Minnesota.

FOOTNOTES

1. 1975 Minn. Laws, Ch. 380, § 60.
2. Shepard, Mark; "Administrative Rulemaking Procedure in Minnesota", 1977-1978.
3. 1945 Minn. Laws, Ch. 452
4. Shepard, Supra.
5. 1945 Minn. Laws, Ch. 590.
6. 1957 Minn. Laws, Ch. 806.
7. Minn. Stat. § 15.0412 (4) (1957).
8. Nobles, James and Wallace, Marcy; "A legislative research report on the Minnesota APA", 1975.
9. 1961 Minn. Laws, Ch. 136.
10. 1963 Minn. Laws, Ch. 633.
11. 1963 Minn. Laws, Ch. 822.
12. 1969 Minn. Laws, Ch. 9, § 6.
13. 1974 Minn. Laws, Ch. 344.
14. 1967 Minn. Laws, Ch. 864, § 4.
15. 1969 Minn. Laws, Ch. 1129, Art. 4, § 5 (M.S. 45.032).
16. 1967 Minn. Laws, Ch. 897, § 20 and 1969 Minn. Laws, Ch. 975, §§ 11-13.
17. 1973 Minn. Laws, Ch. 688, § 3, subd. 8.
18. 1973 Minn. Laws, Ch. 732, § 15.
19. 1967 Minn. Laws, Ch. 882. See also generally Minn. Stat. Chs. 115 through 116G.
20. Nobles, James R. and Triplett, Thomas, "A Staff Report to the House and Senate Governmental Operations Committees on the Minnesota Administrative Procedures Act and its Current Application", (January 22, 1975).
21. Ibid.
22. Information obtained in conversations and meetings with William Brooks from 1972 through present.
23. Peter S. Popovich was appointed to the position of Chief Judge of the Minnesota Court of Appeals upon its inception in 1983.
24. James Nobles was subsequently appointed by the legislature to serve as Legislative Auditor, where he continues to serve with distinction.
25. Thomas J. Triplett was appointed as counsel to the Governor during the first term of Governor Rudy Perpich (1977-78), served as a vice president of the Minnesota Project from 1978-1982, conducted hearings under contract to the OAH from 1980-1982, was appointed to the position of State Planning Director by Governor Rudy Perpich in 1983, and was appointed Minnesota Commissioner of Revenue in 1985.
26. Information obtained in conversations with James Nobles, then a member of the staff of the House Research Department, and Thomas J. Triplett, then a member of the staff of the office of Senate Counsel, Representative Harry A. Sieben and Senator Winston Borden, authors of the 1975 APA legislation. This information was also obtained through my personal observation of the legislative committee hearings.
27. Nobles and Triplett, Supra note 20.
28. Triplett, Thomas J. and Nobles, James R., "Rule-making Under Minnesota's Administrative Procedure Act: 1975 Amendments", Hennepin Lawyer, pp. 14-17 (July-August 1975).
29. 1974 Minn. Laws, Ch. 355, § 69.
30. Minn. Stat. 1984, §§ 14.39 through 14.45 as amended by 1985 Minn. Laws, First Special Session, Ch. 13, § 84.
31. 1975 Minn. Laws, Ch. 380, § 1.
32. Id. at § 16.

33. Id.
34. Id. at § 2.
35. Id. at §§ 7 and 16.
36. Id. at § 1, subd. 3.
37. Id. at § 1, subd. 2.
38. Id. at § 16.
39. Id. at § 16, subds. 1 and 3.
40. Id. at § 16, subd. 9
41. Id. at § 16, subd. 3.
42. Id. at § 19.
43. Id. at § 16, subd. 6.
44. Id. at § 16, subd. 2.
45. Id. at § 16, subd. 4.
46. Id. at § 16, subd. 5.
47. Id. at § 23.
48. 1976 Minn. Laws, Ch. 131, § 1, later codified as Minn. Stat. § 256.045.
49. 1976 Minn. Laws, Ch. 68, § 2.
50. 1977 Minn. Laws, Ch. 203, §§ 1-3.
51. 1984 Minn. Stat., § 171.18.
52. 1976 Minn. Laws, Ch. 341, § 2, subd. 3 (Minn. Stat. 1984, § 169.127, subd. 3).
53. 1977 Minn. Laws, Ch. 346. The legislation applied to the Ethical Practices Board, livestock marketing bond claims and wholesale produce dealer bonds at the Department of Agriculture, industrial loan and thrift applications at the Department of Commerce, ambulance services at the Department of Health, licensing of hairdressing/beauty schools, petitions for motor carrier permits at the Public Service Commission, and railroad crossing permits and authority to eliminate agency service or remove trackage heard for the Department of Transportation.
54. Minnesota-Dakotas Retail Hardware Association v. State, 279 N.W.2d 360 (1979).
55. 1975 Minn. Laws, Ch. 380, § 16, subd. 3.
56. 1981 Minn. Laws, Ch. 346, § 141.
57. Id. at § 7.
58. Id. at § 4.
59. Id. at § 141.
60. Id. at § 106.
61. 1983 Minn. Laws, Ch. 290, § 149.
62. 1983 Minn. Laws, Ch. 290.
63. 1981 Minn. Laws, Third Extra Session, Ch. 2, Art. 1, § 2.
64. Id. at § 10.
65. 1981 Minn. Laws, Ch. 2, Art. 1, §§ 25 and 26.
66. 1983 Minn. Laws, Ch. 290, § 156.
67. PEER, Inc. v. MEQB, 266 N.W.2d 858 (Minn. 1978).
68. Supra.
69. Beaty v. Minnesota Board of Teaching, 354 N.W.2d 466 (Minn. App. 1984); Brinks, Inc. v. Minnesota Public Utilities Commission, 355 N.W.2d 446 (Minn. App. 1984).
70. Supra.
71. 1977 Minn. Laws. Ch. 346.
72. 1980 Minn. Laws, Ch. 615.
73. Discussion with Sharyn Smith, Director, Florida Division of Administrative Hearings, October 1985.

74. On January 10, 1986, Representative Robert Waltman, Chair of the House Governmental Operations Committee's subcommittee on administrative procedures conducted a hearing on the question of agency bulletins versus formal rulemaking.
75. See January 9, 1986, draft of legislation to amend Minn. Stat. § 14.40 (1984), revisor's number [RESDEPT] MS/fa R27000.
76. Florida Statutes § 120.56 (1983).
77. 1980 Minn. Laws, Ch. 615, § 18.
78. Information obtained from former executive director of the board who was responsible for obtaining the exemption and who is now an ALJ at the OAH.