

A HISTORY OF MINNESOTA ADMINISTRATIVE PROCEDURE
AND THE OFFICE OF ADMINISTRATIVE HEARINGS

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I. BACKGROUND

A. *The Origins of Minnesota Administrative Law*

The Minnesota Constitution of 1858, like the federal Constitution, established legislative, executive, and judicial departments that were to exercise constitutionally separate powers.¹ However, unlike the federal Constitution, the Minnesota Constitution did not create a unitary executive by vesting all executive powers in a single chief executive officer. Rather, executive powers in Minnesota were divided among several constitutional officers—a governor, a lieutenant governor, secretary of state, treasurer, auditor, and attorney general.² Even with six constitutional officers sharing the state’s executive powers, the initial composition of Minnesota’s executive branch was nothing like complex executive branch of today. There were none of state agencies that currently exist. In fact, the 1858 legislature only provided the governor with a single private secretary, whose duty was to maintain a book containing all “letters written by and to the Governor, as are official and important.”³ The lieutenant governor was provided with no staff, and each of the remaining constitutional officers was provided with the assistance of a single clerk.⁴

In short, the framers of the Minnesota Constitution did not envision a cohesive and complex executive branch with numerous executive departments and agencies under the governor. The first legislature only created a handful of very specialized executive agencies—for example, the state prison in Stillwater,⁵ a board of education to govern a state agricultural college,⁶ and establishment of a State Normal School to educate teachers for the state’s school districts.⁷ Many of what are today considered administrative functions were originally performed by *ad hoc* special commissions,⁸ by counties,⁹ by the state’s district courts,¹⁰ or not at all. Similarly, in 1858 most of the regulatory functions now performed by state agencies were either performed by the legislature itself, delegated to counties, cities, townships, or the courts, or did not exist. For example, the first Legislature enacted a very detailed statute regulating the operation

¹ MINN. CONST. of 1858, art. III, § 1 (1858).

² MINN. CONST. of 1858, art. V, § 1 (1858). The constitutional office of treasurer was abolished by a constitutional amendment on November 3, 1998.

³ Act of Aug. 9, 1958, ch. 87, 1858 Minn. Laws 282-83.

⁴ See Act of Mar. 8, 1860, ch. 86, 1860 Minn. Laws 274-5.

⁵ The Stillwater prison was governed by a Board of Supervisors “appointed by the Governor by and with the consent of the Senate.” See Act of August 2, 1958, ch. 34, 1858 Minn. Laws 81-89.

⁶ Act of August 2, 1858, ch. 79, 1858 Minn. Laws 261-264.

⁷ Act of Mar. 10, 1858, ch. 21, sec. 4, 1858 Minn. Laws 42-45.

⁸ For example, the 1875 legislature created a special commission to investigate the feasibility of constructing a canal connecting Lake Superior with “the head of steamboat navigation on the Saint Croix river.” See Act of Mar. 9, 1875, ch.154, 1875 Minn. Laws 191-2.

⁹ It was the responsibility of county boards to construct roads and bridges and “to take charge of the poor, and the management of the Poor House in their respective counties.” See also Act of August 18, 1858, ch. 75, art. 15, 4, 16, 1858 Minn. Laws 205, 207

¹⁰ The district courts were responsible for setting bridge tolls. See Act of Jul. 23, 1858, ch. 95, sec. 7, 1858 Minn. Laws 292-93.

of railroads, including the minimum time that trains were required to stop at stations, with violations and penalties determined by justice of the peace.¹¹ Hunting laws were also enforced by civil actions before justices of the peace, with civil penalties appropriated to local school districts.¹² The responsibility for regulating ferries was delegated to county boards.¹³

*B. Nineteenth Century Administrative Procedure:
The Minnesota Railroad and Warehouse Commission*

Although the Minnesota legislature was slow to follow the congressional example of establishing cabinet level departments to conduct most executive functions, Minnesota and other states began administrative regulation of commercial activity well before the federal government started to regulate interstate commerce. In fact, key features of modern administrative processes emerged within state governments during the mid-19th Century.

Illustrative of the development of administrative regulation in Minnesota during the 19th and early 20th centuries was the state's regulation of railroads. In 1871, the legislature established the position of railroad commissioner as an independent officer in the executive branch. Rather than serving at the pleasure of the governor, the railroad commissioner was appointed by the governor with the advice and consent of the senate for a fixed term of two years.¹⁴ The commissioner's duties were primarily to:

inquire into and report annually any neglect or infringement of the laws for the regulation of railroads in this state, by officers, employees, or agents of such roads, to the legislature the first week of its session; and shall also, from time to time, carefully examine and inspect the condition of each railroad in this state, and learn the state of its repair and sufficiency, and that of its carriages, engines, furniture and equipage, and the manner of its conduct and management for the public safety, and shall also report the same to the legislature, during the first week of its session.¹⁵

The commissioner was empowered to issue subpoenas and administer oaths.¹⁶ Rather than giving the railroad commissioner quasi-legislative rulemaking or quasi-judicial hearing authority, the legislature made it a felony to “willfully obstruct, hinder, and impede such commissioner in the execution of his duties, punishable by a \$10,000 fine, ten years’ imprisonment, or both.”¹⁷

¹¹ Act of Aug. 12, 1858, ch. 70, sec. 20, 1858 Minn. Laws 171-72.

¹² Act of March 8, 1858, ch. 19, sec. 20, 1858 Minn. Laws 40-41.

¹³ Act of Jul. 23, 1858, ch. 95, sec. 7, 1858 Minn. Laws 228-31.

¹⁴ Act of Mar. 4, 1871, ch. 22, sec. 1, 1871 Minn. Laws 56-57.

¹⁵ *Id.* at sec. 3.

¹⁶ *Id.* at sec. 9.

¹⁷ Act of Mar. 4, 1871, ch. 22, 2, 9, 1871 Minn. Laws 56-57.

In 1885 the position of railroad commissioner was assimilated into a newly created railroad and warehouse commission consisting of three commissioners, again appointed by the governor but this time not with the advice and consent of the senate.¹⁸ Rather, the authorizing statute sought to establish a different form of political accountability by requiring one of the commissioners to “be of the leading opposite political party to the governor.”¹⁹ As was the case with the railroad commissioner, the function of the new commission was primarily investigative.²⁰ In addition to the earlier general powers to issue subpoenas and administer oaths, commissioners were explicitly empowered to examine the “books, records, accounts, papers, and proceedings” of railroads and to compel the attendance and examine witnesses under oath.²¹

When it was originally established in 1885, the railroad commission was not empowered to issue regulatory orders or rules having the force of law. The legislature continued to assume sole responsibility for regulating the operation of railroads by enacting substantive regulatory legislation.²² However, the new commissioners were given a more active role in enforcement than their predecessor. Although they were not given quasi-judicial power to institute and conduct administrative hearings, they were empowered to direct the attorney general or any county attorney “to institute and prosecute any and all proceedings ... for a violation of this act or any law of this state concerning railroad companies.”²³ By the 1880s, the legislature was still not yet inclined to delegate to state executive agencies the power to adopt rules having the force and effect of law. However, in the early 20th Century the legislature began giving the railroad and warehouse commission more authority than the authority to enforce existing statutes. In 1901 the legislature empowered the commissioners to promulgate rules relating to the weighing and inspection of grain “if in their judgment it is considered desirable, [to] make and promulgate special rules and regulations covering such service at country terminal points.”²⁴ In another statute enacted in 1917, the legislature confirmed that the power to adopt administrative rules included the power to amend them:

The railroad and warehouse -commission upon such reasonable notice as it may prescribe may from time to time upon its own motion, or upon the application of any corporation, partnership or person interested therein, revise change or add to any rule or regulation fixed hereunder and any such revised, changed or added rules and regulations shall be served in the same manner and have the same force and effect as the rules and regulations originally established.²⁵

In 1886, the administrative jurisdiction of Minnesota’s Railroad and Warehouse Commission and the railroad commissioners of other states were limited by the U. S.

¹⁸ Act of Mar. 5, 1885, ch. 188, sec. 1, 1885 Minn. Laws 243-53.

¹⁹ *Id.*

²⁰ *Id.* at sec. 7.

²¹ *Id.* at 11, 12.

²² *See, e.g., id.* at 15-20.

²³ *Id.* at sec. 22.

²⁴ Act of April 6, 1901, ch. 157, 1901 Minn. Laws 203-04.

²⁵ Act of Mar. 26, 1917, ch. 118, 1917 Minn. Laws 146-47.

Supreme Court's 1886 decision in *St. Louis & Pacific Railway Co. v. Illinois*, in which the court held that state laws regulating interstate railroads were unconstitutional intrusions on the exclusive power of Congress to regulate interstate commerce.²⁶ At the time of that decision, there was no federal regulation of interstate railroads. However, in the following year Congress established the Interstate Commerce Commission in 1887 primarily for that purpose.²⁷ What is notable is that the states, including Minnesota, led the federal government in making independent executive agencies a salient feature of executive branches of government. The Minnesota's Railroad and Warehouse Commission's quasi-judicial processes changed it continued as a discrete regulatory entity until 1967, when its duties were assimilated by the newly created Minnesota Public Service Commission.²⁸

*C. Early Twentieth Century Administrative Procedure:
The Department of Labor and Industry*

As discussed above, neither the framers of the Minnesota Constitution nor the state's early legislatures envisioned the possibility of agencies of the Executive Branch exercising quasi-legislative powers through rulemaking or quasi-judicial powers through administrative adjudication. Early legislatures dealt with emerging social and economic issues and problems conventionally and directly by enacting regulatory statutes. But the legislature soon encountered a major shortcoming with its direct approach to regulation—a shortage of governmental investigative and enforcement capabilities. In the mid-nineteenth century neither the attorney general nor county attorneys possessed significant investigative resources. They also lacked the internal expertise necessary to investigate and enforce technical statutes regulating industrial and commercial activity. The legislature filled that void by establishing specialized boards and commissions, which like the railroad commission, at the outset were purely investigative agencies responsible for monitoring the compliance of regulated industries and occupations with applicable statutes. Those boards and commissions were then expected to provide results of their investigations to the attorney general or county attorneys for enforcement proceedings in the district court.

By the late nineteenth century, creating new boards and commissions had become a common legislative response for dealing with social and economic issues that had become the focus of public concern. For example, in 1887 the legislature established the Bureau of Labor Statistics with the responsibility to:

collect, assort, systematize ... statistical details relating to all departments of labor in the state; especially in its relations to the commercial, industrial, social, educational and sanitary condition of the laboring

²⁶ 118 U.S. 557 (1886).

²⁷ See Interstate Commerce Act of 1887, 24 Stat. 379, now codified as 49 U.S.C. §1 *et seq.*

²⁸ Act of May 25, 1967, ch. 864, 1967 Minn. Laws 1778-84.

classes, to visit and examine factories and all other establishments where people are employed at any kind of labor.²⁹

The Bureau's Commissioner was given the power to issue subpoenas, administer oaths and take testimony;³⁰ and he was responsible for ensuring that:

all laws regulating the employment of children, minors and women, and all laws established for the protection of the health and the lives of operatives in workshops and factories are enforced, and he shall have power to prosecute offenders against the same in any court of competent jurisdiction.³¹

Creation of the Bureau of Labor Statistics was followed in 1893 by establishing a Bureau of Labor, with virtually identical duties and responsibilities.³² In 1905 the legislature created a Bureau of Child and Animal Protection for the purpose of enforcing "the laws for the prevention of wrongs to children and dumb animals." But even as new separate labor-related agencies were proliferating, the legislature was also beginning the process of consolidation by expanding the regulatory jurisdiction of the existing Bureau of Labor. In 1905, the legislature also established a Free Public Employment Bureau within the existing Bureau of Labor, and in 1907 it authorized the Commissioner of Labor to appoint "a competent woman as a special inspector ... to examine into the sanitary conditions in all factories, workshops, hotels or restaurants, and all places where women are employed."³³ In the same year, the legislature renamed the agency the Bureau of Labor and Industries, with the expanded jurisdiction to:

enforce all laws regulating the employment of minors and women, for the protection of the health, lives, limbs, and rights of the working classes, and those prescribing the qualifications of persons in trades and crafts, and whenever requested by the proper school authorities of any school district shall also be clothed with the same powers for the enforcement of the compulsory education and truancy laws as those conferred on truant officers by section 1448, Revised Laws of 1905. It shall gather statistics relating to all branches of labor, to labor troubles and unions, to Sunday labor, to the industrial and social condition of the laboring classes, and to the condition of industries, commerce and agriculture.³⁴

In 1909, the legislature upgraded the ability of the Bureau of Labor and Industries enforcement of labor laws applicable to women and children by establishing a Women's and Children's Department headed by a woman assistant commissioner to supervise

²⁹ Act of March 8, 1887, ch. 115, 1887 Minn. Laws 199-201.

³⁰ Act of March 8, 1887, ch. 115, sec 4, 1887 Minn. Laws 199-201.

³¹ *Id.* at sec. 2.

³² Act of April 19, 1893, ch. 6, 1893 Minn. Laws 96-99.

³³ Act of April 23, 1907, ch. 456, 1907 Minn. Laws 705-06.

³⁴ Act of April 23, 1907, ch. 356, sec 3, 1907 Minn. Laws 493-96.

woman factory inspectors to carry out the Bureau's regulatory mandates regarding women and children.³⁵

Finally, in 1913 the legislature completed the process of consolidating labor regulatory functions by creating a new state department named the Department of Labor and Industries, consisting of Bureaus of Statistics, Factory Inspection, Women and Children, and State Free Employment³⁶ Thus began a trend during the early twentieth century of merging multiple boards and commissions with similar kinds of regulatory jurisdiction into single state departments in the Executive Branch. The governor exercised more direct control over the new Commissioner of Labor and Industries than had been the case with many earlier commissioners and members of various state boards. The commissioner was appointed to a four-year term by the governor by and with the advice and consent of the senate. The assistant commissioner and a confidential secretary served at the commissioner's pleasure, but all other department officers and employees first had to be certified as "morally, mentally, and physically fit" for office by a Board of Examiners. That Board consisted of the commissioner and two appointees of the incumbent governor.³⁷ The new department duties were to enforce the substantive labor laws that the legislature had enacted. The legislature did not immediately grant the department any new quasi-legislative rulemaking power. However, the department could still exercise the specific rulemaking authority previously granted to its predecessor agencies. On the other hand, the department and its officers were given the quasi-judicial authority to issue enforcement orders, enforceable in district court. "[A]ny person aggrieved" by an enforcement order could also apply to district court for a restraining order, followed by a hearing on the merits. However, a party who failed to prevail on the merits could be taxed with the costs of the proceeding.³⁸ Thus, in this and other contemporary legislation the groundwork was laid for future developments in administrative adjudication.

In 1909 the legislature began what would later result in a sea change in administrative procedure. The legislature created a Minnesota Employees'(sic) Compensation for the purpose of studying workers' compensation legislation enacted in other states and foreign countries.³⁹ Four years later in 1913, the legislature enacted Minnesota's first workers' compensation law, which limited the defenses an employer could assert in cases of work-related injuries in exchange for limitation of damages to statutorily-defined amounts of compensation. Disputes arising under that first workers' compensation statute were adjudicated using the existing judicial processes of the district courts, and the Department of Labor and Industries initially played no role in administration of the system. However, that and the entire structure of the Department changed dramatically eight years later.

In 1921 the legislature fundamentally altered the governance of the Department of Labor and Industries. The office of Commissioner of Labor was abolished and replaced

³⁵ Act of April 24, 1909, ch. 497, 1909 Minn. Laws 622-23.

³⁶ Act of Apr. 1 25, 1913, ch. 518, 1913 Minn. Laws 749-55.

³⁷ *Id.* at 3-5.

³⁸ *Id.* at sec. 11.

³⁹ Act of April 20, 1909, ch. 286, 1909 Minn. Laws 338-39.

by an Industrial Commission of Minnesota composed of three commissioner appointed by the Governor by and with the advice and consent of the senate to six-year terms. The governor was given the power of removal but only for cause.⁴⁰ The duties and powers of the Department were greatly expanded to include a “Division of Workmen's Compensation, Division of Boiler Inspection, Division of Accident Prevention, Division of Statistics, Division of Women and Children, Division of Employment, Division of Mediation and Arbitration, and such other divisions as the Commission may deem necessary and establish.”⁴¹

Contemporaneously, the new Industrial Commission was empowered to adjudicate the merits of claims for workers’ compensation benefits using administrative processes that have changed little in the succeeding 89 years. Proceedings on disputed claims were initiated by a petition to the Commission setting forth the relevant facts and circumstances; thereafter, the adverse party was required to file an answer to the petition similar in form and effect to answers in court proceedings.⁴² The Commissioner, a designated commissioner, or an appointed referee would then conduct a public hearing, similar to a civil trial, and upon its conclusion:

make, in writing and as soon as may be after the conclusion of the hearing, such findings of fact, conclusions of law, and award or disallowance of compensation or other order, as the pleadings and the evidence produced before it or him and the provisions of this act shall, in its or his judgment require.⁴³

If an award or disallowance was made by a single commissioner or referee, it could be appealed to the full Industrial Commission.⁴⁴ Appeal of an award or disallowance of the full Commission could be taken to the Minnesota Supreme Court.⁴⁵

In *Breimhorst v. Beckman*,⁴⁶ the Minnesota Supreme Court considered the question of whether the legislature’s delegation of adjudicatory powers to the Industrial Commission violated the constitutional principle of separation of powers. The court concluded that it did not, and that the delegation in the Act was within constitutional limits:

In the exercise of the police power, the vesting by the legislature in the industrial commission of quasi-judicial powers-inclusive of the power to determine facts and apply the law thereto in employment-accident controversies-is not in violation of state constitutional provisions for the division of the powers of government or for the vesting of the judicial power in the courts, as long as the commission's awards and determinations are not only subject to review by certiorari, but lack

⁴⁰ Act of March 14, 1921, c. 81, 1-4, 1921 Minn. Laws 85-90.

⁴¹ Act of March 14, 1921, c. 81, sec. 13, 1921 Minn. Laws 85-90.

⁴² *Id.* at 37, 45.

⁴³ *Id.* at sec. 49.

⁴⁴ *Id.* at 56, 57.

⁴⁵ *Id.* at sec. 60.

⁴⁶ 35 N.W. 2d 719 (Minn. 1949).

judicial finality in not being enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court.⁴⁷

The Industrial Commission continued to exist until 1967 when the legislature abolished that body and replaced it with a single Commissioner of Labor and Industry. The Commissioner did not serve at the governor's pleasure; rather, he was to be appointed by the governor with the advice and consent of the senate to a four-year term and could only be removed for cause.⁴⁸ That legislation also transferred the workers' compensation duties and powers to a new three-member Workmen's Compensation Commission, which continued to operate like its predecessor. In 1969, the hearing referees employed by the Commission were became "compensation judges,"⁴⁹ and in 1973 the compensation judges became the sole trial-level hearing officers, and the Workmen's Compensation Commission became a purely appellate tribunal.⁵⁰ In 1979 a Workers' Compensation Court of Appeals was created within the Department of Labor and Industry to replace the Workmen's Compensation Commission as the appellate tribunal for workers' compensation claims.⁵¹

By 1949 Minnesota's Workmen's Compensation Act had established both the constitutional foundation for future developments in administrative adjudication, as well as a detailed framework for adjudicatory process.⁵² Administrative adjudication and procedure in other state agencies evolved more slowly. The legislature was also slow in delegating quasi-legislative powers to state agencies. During the nineteenth century the legislature had delegated legislative powers to newly incorporated cities and villages to enable them to regulate various aspects of public health, safety, and welfare within their local corporate limits.⁵³ However, instances of granting state agents or agencies authority to adopt rules with the force and effect of law were rare during the nineteenth century and very specific in terms of subject matter. For example, 1893 legislation required owners of grain elevators and warehouses to operate them "in accordance with the laws of this state and the rules and regulations prescribed by [the railroad and warehouse commission]."⁵⁴ However, grants of authority to state agencies to promulgate substantive rules of general application were generally a development that occurred during the early twentieth century.

In 1925 the legislature enacted a major reorganization of the executive branch of state government, consolidating the functions of many of the commissions that had proliferated and renaming the resultant agencies as "departments,"⁵⁵ although the new

⁴⁷ 35 N.W. 2d at 734.

⁴⁸ Act of May 27, 1967, c. 1, 1, 3, 5, 1967 Minn. Laws 1991-93. Legislation providing that the Commissioner of Labor and Industry and other cabinet level departments were to serve at the pleasure of the governor was enacted in 1977. Act of May 27, 1977, c. 305, sec. 1, 1977 Minn. Laws 575-78.

⁴⁹ Act of May 6, 1969, c. 276, 1969 Minn. Laws 431-32.

⁵⁰ Act of May 19, 1973, ch. 388, 3, 93, 1973 Minn. Laws 787, 789, 827.

⁵¹ Act of Jun. 7, 1979, ch. 3, sec. 26, §. 175.006, 1979 Minn. Laws 1st Spec. Sess. 1256, 1268.

⁵² Minn. Stat. ch. 176 was renamed Workers' Compensation Act, rather than Work men's compensation Act in

⁵³ Act of January 27, 1878, ch. 14, sec. 4, 1878 Minn. Spec. Laws 44-47.

⁵⁴ Act of April 7, 1893, ch. 28, sec. 1, 1893 Minn. Laws 131-32.

⁵⁵ Act of April 25, 1925, c. 426, art. 1, § 1, 1925 Minn. Laws 756.

state departments continued to be administered by boards of multiple commissioners rather than a single agency head.⁵⁶ What is noteworthy about the 1925 legislation is that it contained some broader grants of authority to adopt rules of general application having the force and effect of law. For example, the act provided that the commission administering the new Department of Administration and Finance:

subject to the approval of the governor, may make rules, regulations, and orders regulating and governing the manner and method of purchasing, delivering, and handling of, and the contracting for supplies, equipment, and other property for the various officials, departments, and agencies of the state government and institutions under their control. Such rules, regulations, and orders shall be uniform, so far as practicable, shall be of general or limited application.⁵⁷

But what the legislature did not do in 1925 was spell out any process for promulgating agency rules or establish a uniform, well-defined rulemaking process for all state agencies. That development did not begin for another twenty years. Additionally, as the examples above illustrate, the legislature's grants of rulemaking authority to state agency heads had generally been episodic—that is, rulemaking authority was limited to what was necessary for an agency to accomplish the purpose of some specific legislation. That changed dramatically in 1939, when the legislature experimented with giving agency heads broad, general rulemaking authority:

Except as otherwise expressly provided by law, the commissioner or head of any state department or agency shall have the following powers:

* * *

(5) To prescribe, rules and regulations, not inconsistent with law, for the conduct of his department or agency and –other matters within the scope of the functions thereof, including the custody and preservation of books, records, papers, documents, and other property, and the certification of copies of papers, and documents; provided, that every rule or regulation affecting any person or agency other than a member of the department or agency concerned shall be filed with the secretary of state.⁵⁸

II. THE EMERGENCE OF UNIFORM ADMINISTRATIVE PROCESSES IN MINNESOTA

A. *Influence of the Federal Administrative Procedure Act*

Even before the Civil War, railroads were recognized as important instruments of growth and economic development of states. Thus, when Minnesota became a state, high on the agenda of the First Legislature was legislation allowing the incorporation of

⁵⁶ For example, the new Department of Administration and Finance was administered by three commissioners, a Comptroller, a Commissioner of the Budget, and a Commissioner of Purchases. *Id.* at art. 3, § 1.

Act of April 7, 1893, ch. 28, art. 3, sec. 7, 1893 Minn. Laws 131-32. The requirement for gubernatorial approval of rules anticipated an amendment

⁵⁸ Act of April 22, 1939, ch. 431, art. 8, sec 6, 1939 Minn. Laws 949, later codified as Minn. Stat. § 15.06(5) (1941).

intrastate railroad companies.⁵⁹ Railroads were given immense powers, including the power of eminent domain,⁶⁰ and since they owned the track they constructed, railroads operated as monopolies. In the years following the Civil War, the nation's railroad experienced rapid expansion and acquired great economic power. It is therefore not surprising that many states, like Minnesota, became the pioneers in administrative regulation by establishing railroad commissions to regulate the operation of railroads within their borders.⁶¹ In fact, it was the limited ability of states to effectively regulate interstate railroads that prompted Congress in 1887 to enact the Interstate Commerce Act⁶² and create the Interstate Commerce Commission.⁶³

With the notable exception of worker's compensation legislation, grants by the Minnesota Legislature of quasi-legislative and quasi-judicial powers to Executive Branch agencies generally proceeded slowly and incrementally during the late nineteenth and early twentieth century. This, however, was not the case with administrative regulation on the federal level. The New Deal brought a proliferation of administrative agencies with quasi-legislative and quasi-judicial powers. But what was lacking was uniformity of process. To address that, President Roosevelt established the Attorney General's Committee on Administrative Procedure in 1939. That committee issued a report in 1941 that reflected some differing views between members favoring a significant degree of standardization and members favoring a greater degree of agency flexibility.⁶⁴

In 1946 Congress enacted the federal Administrative Procedure Act as a compromise between the two differing approaches.⁶⁵ The APA's approach to the rulemaking process is relatively simple. It provides federal agencies with a large degree of flexibility and discretion. In substance, it contains only three statutory requirements for adopting federal regulations. First, it requires a federal agency to publish prior notice of proposed rulemaking in the Federal Register.⁶⁶ Second, it requires public participation in the rulemaking process by requiring agencies to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation,"⁶⁷ Third, it provides that "[a]fter consideration of the relevant matter present presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purposes."⁶⁸ During the last 65 years, the federal courts have supplied additional detail to the three rulemaking requirements in 5 U.S.C. § 553. Nevertheless, the federal administrative rulemaking process remains relatively straightforward and uncomplicated.

⁵⁹ Act of August 12, 1858, ch. 70, 1858 Minn. Laws 166-74.

⁶⁰ *Id.* at sec. 9.

⁶¹ See WILLIAM A. CRAFTS, TEN YEARS' WORKING OF THE MASSACHUSETTS RAILROAD COMMISSION 1 (1883).

⁶² 24. Stat. 379 (codified as 49 U.S.C. § 1 *et seq.*).

⁶³ STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 19 (2002).

⁶⁴ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. REP. 8, 77th Cong., 1st Sess. (1941), available online at <http://www.law.fsu.edu/library/admin/1941report.html>.

⁶⁵ Pub. L. No. 79-404, 60 Stat. 237, Ch. 324, 1-12 (codified as amended at 5 U.S.C. §§ 500 *et seq.*) (the APA).

⁶⁶ 5 U.S.C. § 553(b).

⁶⁷ 5. U.S. C. § 553(c).

⁶⁸ *Id.*

The new federal APA also addressed the process of administrative adjudication. Although the rulemaking process the Act created was relatively simple and flexible, the adjudicatory process was somewhat more detailed. Because one of the APA's goals was to create greater consistency of hearing processes across a wide range of federal agencies, 5 U.S.C. §§ 554–558 creates some relatively detailed procedural standards for adjudicative hearings. The APA requires federal agencies to notify persons entitled to a hearing of the time, place, and nature of the hearing, the legal authority and jurisdiction under which the hearing is to be held, and that matters of fact and law at issue.⁶⁹ It also requires agencies to give interested parties the opportunity to submit factual material, arguments, offers of settlement, or proposals of adjustment to the extent that time permits.⁷⁰ Additionally, the APA establishes standards for the admission of evidence that are significantly more liberal than the standards in court proceedings. Federal agencies are given the discretion to receive “any oral or documentary evidence” but are to exclude “irrelevant, immaterial, or unduly repetitious evidence.”⁷¹ Nevertheless, the adjudicatory standards in the APA still leave room for agency discretion. Nothing in the Act prevents federal agencies from adopting procedural rules for adjudicative hearing which filled gaps within, and were not inconsistent with, the requirements in the APA.

B. Developments Leading to the Minnesota Administrative Procedure Act

What is readily apparent is that the hearing process that the Minnesota legislature established for workers' compensation proceedings in 1921 was even more detailed and covered more of the adjudicatory process than what Congress established for federal adjudicatory hearings in 1945. What was missing in Minnesota was breadth of coverage. From time to time, the legislature granted agencies other than the Department of Labor and Industries authority to conduct administrative hearings. For example, 1939 legislation empowering the Commissioner of Banking to license and regulate lending simply provided that:

Whenever the Commissioner shall revoke or suspend a license issued pursuant to this Act, he shall forthwith file in his office a written order to that effect and findings with respect thereto containing the evidence and the reasons supporting the revocation or suspension, and forthwith serve upon the licensee a copy thereof.⁷²

It was not until 1957 that the legislature addressed uniformity of process for agency administrative hearings. The legislature did so by adding new sections to existing sections in Minn. Stat. Ch. 15, which governed the administrative rulemaking process.⁷³ Uniformity of hearing process was accomplished by coining a new term “contested case” and then establishing a set of procedures for all agency administrative hearings that met that definition. A contested case was defined in new section 15.46, subd. 4, as “a

⁶⁹ 5 U.S.C. § 554(b).

⁷⁰ 5 U.S.C. § 554(c)(1).

⁷¹ 5 U.S.C. § 556(d).

⁷² Act of February 15, 1939, c. 12, § 9, 1939 Minn. Laws 26.

⁷³ Act of April 27, 1957, c. 806, 1957 Minn. Laws 1100-1105 (codified as Minn. Stat. §§ 15.46–15.56 (1957)).

proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.”⁷⁴ Parties to a contested case were to be given an opportunity to a trial-type hearing after reasonable notice many the contents of which were specified by statute⁷⁵ Parties were also given statutory rights to present evidence and argument, to cross-examine witnesses, and to present rebuttal evidence.⁷⁶ There was also a statutory standard for admission of evidence that, like the federal APA, was more liberal than the rules of evidence in the state court system:

In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence.⁷⁷

In short, the 1957 legislation established virtually all of the statutory standards for conducting contested case hearings that are found in Minnesota’s current Administrative Procedure Act.⁷⁸ However, like the federal APA, the legislation allowed state agencies to adopt their own procedural rules to supplement the statutory procedural requirements:

In addition to other rule-making powers or requirements provided by law each agency may adopt rules governing the formal or informal procedures prescribed or authorized by this act. Such rules shall include rules of practice before the agency and may include forms and instructions.⁷⁹

However, discussion of some uniformity in the rulemaking process on the federal level appears to have influenced developments in Minnesota. About the same time the federal APA was being considered by Congress, the Minnesota legislature began to consider uniform rulemaking processes for state agencies. The legislature’s initial effort came in 1945.⁸⁰ As previously discussed, 1939 legislation had given virtually unlimited substantive rulemaking authority to agencies.⁸¹ That legislation turned out to be the peak of agency authority to make substantive law. Within a few years the legislature began having second thoughts and began enacting both procedural and substantive limits on that authority. First, the legislature replaced the 1939 language that had given agencies authority to adopt substantive rules “not inconsistent with law” with a slightly more moderate grant of authority allowing them to “promulgate reasonable rules and regulations.”⁸² The legislature reversed course completely in 1974 when it repealed the

⁷⁴ *Id.* at sec. 1, subd. 4.

⁷⁵ MINN. STAT. § 15.53 (1957).

⁷⁶ MINN. STAT. §§ 15.53 and 15.54, subd. 3 (1957).

⁷⁷ MINN. STAT. § 15.54, subd. 1 (1957).

⁷⁸ MINN. STAT. ch. 14.

⁷⁹ MINN. STAT. § 15.47, subd. 1 (1957).

⁸⁰ See Act of April. 21, 1945, c. 452, 1945 Minn. Laws 869-71.

⁸¹ See discussion *supra*, at 10.

⁸² Act of April 21, 1945, ch. 452, sec. 2. 1945 Minn. Laws 869.

“reasonable rules” provision and required agencies to have specific delegations of rulemaking authority:

Each agency shall adopt, amend, suspend or repeal its rules in accordance with the procedures specified in sections 15.0411 to 15.051 and section 16 of this act, and only pursuant to authority delegated by law and in full compliance with its duties and obligations.⁸³

In 1945 the legislature defined the terms “rule” and “regulation” for the first time:

"Rules and Regulations" means and includes rules, regulations, and amendments thereto, of general application issued by any administrative agency interpreting, regulating the application of, or regulating procedure under the statutes which the administrative agency is charged with administering, but shall not apply to rules and regulations adopted by an administrative agency relating solely to the internal operation of the agency nor to rules and regulations adopted relating to the management, discipline, or release of any person committed to any state institution.⁸⁴

The legislature also established uniform procedural requirements for rulemaking, which were simpler and only slightly more numerous than those in the federal APA: “[state agencies] shall prescribe reasonable notice, a fair hearing, findings of fact based upon substantial evidence, and shall not exceed the powers vested' by statute.” Like the federal APA, the legislation also required agencies to hold a public hearing on proposed rules.⁸⁵ Upon completion of the rulemaking process, agencies were required to file the rules with the attorney general, who was empowered to approve or disapprove them.⁸⁶ Rules approved by the attorney general were given “the force and effect of law.”⁸⁷

In 1957, in addition to enacting statutory standards for conducting administrative hearings, the legislature also added a number of additional procedural requirements for rulemaking to Minnesota Statutes, Chapter 15,⁸⁸ and in 1969, the pertinent provisions of that chapter were first given the name Administrative Procedure Act.⁸⁹ In 1982 the legislature authorized the Revisor of Statutes to re-codify sections of Chapter 15 dealing with administrative procedure into a new, separate Chapter, and the Revisor thereafter re-codified the Administrative Procedure Act as Chapter 14 of Minnesota Statutes.⁹⁰

The last major overhaul of the substantive contested case and rulemaking provisions of MAPA accompanied the creation of what is now Minnesota’s Office of

⁸³ Act of June 4, 1975, ch. 380, sec. 2, 1975 Minn. Laws 1286.

⁸⁴ Act of April 21, 1945, ch. 452, sec. 1, subd. 4, 1945 Minn. Laws 869, 869-70.

⁸⁵ *Id.* at sec. 2, subd. 4.

⁸⁶ *Id.* at sec. 2, subd. 2.

⁸⁷ *Id.* at sec. 2, subd. 3.

⁸⁸ Act of April 27, 1957, ch. 806, 2-7, 1957 Minn. Laws 1100, 1101-04. (codified as Minn. Stat. §§ 15.47–15.52 (1957)).

⁸⁹ Hereafter sometimes “MAPA.”

⁹⁰ *See* Act of March 18, 1982, ch. 424, sec.130, 1982 Minn. Laws 301. 368.

Administrative Hearings in 1975,⁹¹ Since then the legislature has done very little to modify or amend contested case procedures for conducting administrative hearings. On the other hand the legislature has continued to enact progressively more detailed and prescriptive rulemaking requirements that leave little to state agency discretion or imagination.⁹² One particularly notable change in the rulemaking process occurred in 1995. Until then, first hearing examiners, and later administrative law judges, had played important roles in the rulemaking process, for example by conducting public rule hearings, but it was the responsibility of the attorney general to review and approve all agency rules before they could become law. In 1995, however, the legislature transferred rule approval authority from the attorney general to the chief administrative law judge, thereby consolidating all rulemaking oversight functions in the Office of Administrative Hearings that the legislature had created in 1975.⁹³ The increasingly detailed rulemaking requirements of Chapter 14 suggest that the legislature remains uncomfortable with delegating its lawmaking authority to agencies of the executive branch and mistrusts the ability of agencies to conduct their lawmaking functions in ways that are acceptable to the legislature.

II. CREATION OF THE OFFICE OF ADMINISTRATIVE HEARINGS⁹⁴

A. *Trend to Centralize Minnesota Administrative Processes*

Until the 1970s Minnesota's approach to where administrative hearings should be conducted was similar to the federal approach. Like federal agencies, state agencies that were required to conduct administrative hearings employed their own hearing officers to preside over proceedings and develop records for decision. However, a problem with that approach is the perception of bias that occurs when a regulatory agency also employs the hearing officer. The federal APA addresses the possibility of bias with provisions designed to ensure the integrity of the hearing process. For example, one section of the APA generally prohibits any employee who performs investigative or prosecutorial functions for an agency from offering advice or being involved in making the agency's decision in a case.⁹⁵ Another prohibits interested persons from engaging in substantive *ex parte* communications about a pending case with agency decision makers, administrative law judges, and participating employees.⁹⁶ Notably, however, no such safeguards were placed in the 1957 Minnesota legislation that created a uniform hearing process for contested cases.

⁹¹ *Id.*

⁹² Forty-four of the seventy-three current sections of Chapter 14, or 60% of the chapter, address various aspects of rulemaking in considerable detail. *See* Minn. Stat. §§ 14.05–14.47 (2009 Supp.). This represents a major difference of approach with the federal APA, which continues to leave most of the rulemaking process to agency discretion,

⁹³ *See* Act of May 25, 1995, ch. 380, , 1975 Minn. Laws 1285-98.

⁹⁴ *See generally* Bruce H. Johnson, *Strengthening Professionalism within an Administrative Hearing Office: The Minnesota Experience*, 53 Admin. Law Rev. 446-51 (2001); Raymond R. Krause, *30 Years of Innovation in Administrative Review: Minnesota's OAH*, BENCH AND BAR, Vol. LXIII Number II (Feb. 2006); Duane R. Harves, *THE STATE OF MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS 1975 –1985: A REPORT ON THE FIRST DECADE* (1986).

⁹⁵ 5 U.S.C. § 554(d).

⁹⁶ 5 U.S.C. 556(d).

A second potential weakness with the federal approach to administrative hearing procedure, when applied state agency practice, is authorizing agencies to supplement the statutory hearing process with their own procedural rules. Having agency supplemental rules is desirable, and perhaps necessary, in federal administrative practice where scores of agencies conduct thousands of unique kinds of hearings of varying complexity. It also does not create problems of complexity for practitioners of federal administrative law. In the federal system agency attorneys, and not the U. S. Justice Department, normally represent their respective agencies in hearings, and opposing counsel are frequently members of specialized bars. Practitioners therefore are not often required to become familiar with a number of different agency procedural rules and practices. However, this is not the case in Minnesota where only the Office of the Attorney General is authorized to represent agencies in administrative hearings and only a small segment of the private bar maintains specialized administrative law practices. In short, between 1957 and the early 1970s proliferation of agency procedural rules in Minnesota was undermining uniformity of process.

With regard to agency rulemaking, even though some uniformity of process had been in place since 1945, legislative dissatisfaction with agency rulemaking resurfaced in the mid-1970s. One cause was that the statutory definition of “rule” in existing legislation turned out to be somewhat ambiguous, and it appeared that agencies were taking advantage of ambiguities to avoid rulemaking. There was also growing evidence that state agencies were engaging in “informal rulemaking” — that is, basing regulatory actions on statements of policy that were not being adopted as rules.⁹⁷ Additionally, agency authority to adopt supplemental procedural rules was being interpreted to apply to the rulemaking process itself, again resulting in divergences in process. In other words, there continued to be lack of uniformity and consistency in the rulemaking practices of the seventy-five or so state agencies that were promulgating rules.⁹⁸ All of these issues came to a head in the legislature’s 1974 and 1975 sessions when committees in both chambers conducted thorough reviews of existing rulemaking processes.⁹⁹

About the same time, some states had begun experimenting with a concept that departed significantly from the federal model, namely centralizing administrative process and hearings. In 1946, California departed from the federal model by creating a “central panel” administrative hearing office, an independent executive branch agency whose sole function was to provide administrative hearing services for other state agencies. Since the central panel’s hearing officers were not employees of agencies whose actions were being contested, parties to hearings were provided with greater assurance of a neutral and impartial forum. Additionally, the central panel was able to adopt single set of hearing rules, thereby resolving the problem of procedural divergence among agencies. In 1974

⁹⁷ In Thomas J. Triplett and James Nobles, *Rule-making under Minnesota’s Administrative Procedure Act: 1975 Amendments*, HENNEPIN LAWYER, Jul.-Aug. 1975 at 14, the authors, both of whom were serving as legislative staff, list a number of fairly egregious examples of informal rulemaking by agencies. See also the discussion in Harves at pp. 3-4.

⁹⁸ TRIPLETT & NOBLES, *supra* note 94, at 14.

⁹⁹ *Id.*

Florida, Massachusetts, and Tennessee followed California's lead by establishing central panel hearing offices.¹⁰⁰

B. Creating Minnesota's Central Panel

In 1975 the Minnesota legislature responded to continuing concerns about agency impartiality, consistency, and accountability in conducting their hearing and rulemaking responsibilities by establishing the country's fifth independent central panel.¹⁰¹ Legislation created a new state agency, the Office of Hearing Examiners, to conduct most of the due process hearings that the law required other state agencies to conduct.¹⁰² The new agency was to be administered by a Chief Hearing Examiner appointed by the governor by and with the advice and consent of the senate.¹⁰³ To further assure independence and to minimize potential politicization of the office, the Chief Hearing Examiner was given a term of six years — two years longer than the governor's term of four years. The legislation authorized the Chief to "appoint additional hearing examiners to serve in his office as necessary to fulfill the duties prescribed in this section."¹⁰⁴ Based on estimates provided by the agencies that would be using the new central panel's hearing services, Duane Harves, the newly appointed Chief Hearing Examiner, hired one part-time and fourteen full-time hearing officers.¹⁰⁵ To facilitate initial staffing, persons who had been employed as hearing officers for the agencies whose hearing functions were being assimilated were to be transferred to the new central panel.¹⁰⁶ The Office of Hearing Examiners acquired five of its hearing officers in that way and hired another nine.¹⁰⁷ The legislature was also concerned about shielding the office's other hearing examiners from political influence. First, hearing examiners were made classified employees in the state civil service and therefore subject to all of the protections associated with that status.¹⁰⁸ Second, the legislation explicitly required that hearing

¹⁰⁰ See HARVES, *supra* note 94, at p. iii.

¹⁰¹ Act of June 4, 1975, ch. 380, sec. 16, § 15.052 *et seq.*, 1975 Minn. Laws 1285, 1293-98. Twenty-eight other states, the District of Columbia, and the City of Chicago currently have central panels, and several additional states are seriously considering doing so.

¹⁰² *Id.*

¹⁰³ *Id.* at sec. 16.

¹⁰⁴ *Id.* at sec. 16.

¹⁰⁵ HARVES, *supra*, note 94, at 11.

¹⁰⁶ Minn. Stat § 15.052, subd. 9 (1976). Hearing officers who did not meet certain statutory qualifications were not eligible for transfer. The primary statutory qualification that some agency hearing officers did not meet was a law degree. See Act of June 4, 1975, ch. 380, § 16, § 15.052, subs. 1 and 3, 1975 Minn. Laws 1285, 1293. The term of art in Minnesota legislation is "learned in the law."

¹⁰⁷ HARVES, *supra* note 94, at 11. The agency estimates ultimately proved to be inaccurate, and staffing was later scaled back to ten full-time hearing officers, a number that has generally remained stable over the last twenty-five years. *Id.* at 15-16.

¹⁰⁸ *Id.* The judges' status as classified employees is generally defined in Minn. Stat. ch. 43A. Perhaps the most important incident of classified status is that classified employees may not "be reprimanded, discharged, suspended without pay, or demoted, except for just cause." Minn. Stat. § 43A.33, subd. 1 (2000). In Minnesota all judges in the judicial branch must stand for election. MINN. CONST. art. VI § 7. They are therefore directly accountable to voters. The issue of how to establish some form of personal accountability of administrative law and workers' compensation judges, who enjoy civil service protection, is discussed in detail *infra* at 46-47.

examiners “be free of any political or economic association that would impair their ability to function officially in a fair and objective manner.”¹⁰⁹

C. Establishing Uniform Rulemaking and Hearing Rules

Like the hearing provisions of the federal APA, MAPA does not address hearing procedure in any detail. Before 1975 many state agencies, like federal agencies, had adopted their own procedural rules to govern how their administrative hearings would be conducted. Even though the rulemaking provisions had become more specific by 1975, many agencies also had adopted their own procedural rules and practices for the rulemaking process. As discussed above, legislative frustration with the lack of uniformity in agency rulemaking practices was a major factor in prompting the 1975 overhaul of MAPA.¹¹⁰ The legislature cured the problem of inconsistent agency rulemaking and hearing rules by empowering the Chief Hearing Examiner to:

[p]romulgate rules to govern the procedural conduct of all hearings, relating to both rule adoption, amendment, suspension or repeal hearings and contested case hearings. Such procedural rules for hearings shall be binding upon all agencies and shall supersede any other agency procedural rules with which they may be in conflict.¹¹¹

In short, the new Office of Hearing Examiners not only became the forum for adjudicating most contested administrative disputes, the legislature also gave the office authority to define the process by which administrative disputes were to be adjudicated. Additionally, the office was also given both oversight role in the agency rulemaking process and the authority to define that process. Although MAPA had previously required agencies to hold public hearings before adopting rules, it had not specified who the hearing officer should be. The 1975 amendments required that one of the newly appointed hearing examiners must preside over each public hearing and, thereafter, that the hearing examiner must review the proposed rule to determine whether the agency complied with statutory rulemaking requirements.¹¹²

¹⁰⁹ Act of June 4, 1975, ch. 380, sec. 16, § 15.052, subd. 1., 1975 Minn. Laws 1285, 1293. The requirement of political and economic neutrality still remains.

¹¹⁰ Triplett & Nobles, *supra* note 95, at 14.

¹¹¹ Act of June 4, 1975, ch. 380, sec. 16, § 15.052, subd. 4., 1975 Minn. Laws 1285, 1293-94.

¹¹² Act of June 4, 1975, ch. 380, sec. 16, § 15.0412, subd. 4., 1975 Minn. Laws 1285, 1286-87. In subsequent sessions the legislature has expanded the Office’s role in rulemaking to embrace more general oversight over the rulemaking process. *See* Act of May 25, 1995, ch. 233, art. 2, sec. 24, § 14.26, subds. 1-2, 1995 Minn. Laws 2085, 2097-98.

III. THE GROWTH OF OAH JURISDICTION¹¹³

A. *Initial Jurisdiction of the Office of Hearing Examiners*

The 1975 legislation ostensibly gave the Office of Hearing Examiners jurisdiction over all hearings that met the definition of “contested case,” which the legislation defined as “a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.”¹¹⁴ This definition included most categories of administrative hearing then being heard by state agencies. However, for various, largely political reasons, the legislature decided that jurisdiction over some kinds of administrative hearings would remain in the state agencies that had been conducting them.¹¹⁵ Most prominent among the exceptions were five categories of high volume administrative hearings—namely, hearings involving inmate discipline and management, unemployment benefit claims, labor arbitrations and mediations, workers’ compensation benefit claims,¹¹⁶ and public welfare benefit and human service licensing cases.¹¹⁷ A sixth category of high volume hearings that many other state administrative tribunals were then conducting were hearings appealing implied consent drivers’ license revocations. In 1975, the Minnesota’s district courts had been hearing those appeals since 1961 when revocation of drivers’ licenses based on implied consent was first authorized.¹¹⁸ It has been only recently, that the Minnesota legislature has considered adding those hearings to OAH’s jurisdiction.¹¹⁹

B. *Hearings for Political Subdivisions*

¹¹³ In 1980, the Office of Hearing Examiners was renamed the Office of Administrative Hearings (hereinafter sometimes “OAH”). See Act of April 24, 1980, ch. 615, sec. 26, § 15.052(1), 1980 Minn. Laws 1542, 1544. Subsequent references to the office reflect its name at the time the events under discussion occurred. Additionally, hearing examiners were renamed “administrative law judges” in 1984. See Act of May 2, 1984, ch. 640, sec. 32, 1984 Minn. Laws 1783, 1795. Again, references to the hearing officer’s titles will reflect the times being discussed.

¹¹⁴ *Id.* at sec. 1, codified as Minn. Stat. § 15.0411, subd. 4.

¹¹⁵ HARVES, *supra*, note 95, at 4-15.

¹¹⁶ The way in which the legislature removed the first four classes of cases from OAH jurisdiction was by specifying in the amendments that the agencies that had been conducting those proceedings did not meet the definition of “agency” for purposes of the MAPA. Those agencies were, respectively, the Minnesota Corrections Authority and Pardon Board, the Department of Employment Services, the Director of Mediation Services, and the Workmen’s Compensation Division and Workmen’s Compensation Commission in the Department of Labor and Industry. See Act of June 4, 1975, ch. 380, sec. 16, § 15.0411, subd. 2., 1975 Minn. Laws 1285. Of those classes of proceedings, only workers’ compensation benefit claims were later brought within OAH’s jurisdiction. See Act of June 1, 1981, ch. 346, sec. 2, § 15.052(1), 1981 Minn. Laws 1611, 1613-14; see also *infra*, at 22-23.

¹¹⁷ This fifth class of high volume case was excepted by specifying in other legislation that welfare benefit hearings would remain under the jurisdiction of the Commissioner of Public Welfare and were to be conducted by welfare referees who were not to be “a part of the office of hearings examiners established pursuant to Minnesota Statutes, Section 15.052.” See Act of April 2, 1976, ch. 131, sec. 1, 1976 Minn. Laws 310, codified as Minn. Stat. § 256.046, subd. 1 (1976).

¹¹⁸ Act of April 20, 1961, c 454, 5-7, § 169.123, subd. 5-7, 1961 Minn. Laws 713, 715-16.

¹¹⁹ See H.F. 3479 and S.F. 3010, 86th Leg., 2d Sess. 2010.

State law or local ordinances often require a political subdivision to undertake an administrative hearing before taking a regulatory action. As previously discussed, during the 19th century the legislature delegated most regulation of economic activity to county boards and city councils.¹²⁰ Examples of the type of cases as to which a hearing may be required of local units of government include revocations of liquor or business licenses, proposed employee discipline, or student expulsion. Before 1975, those local administrative hearings were conducted either by the governing bodies of the state's political subdivisions or by contract hearing officers selected by those governing bodies. Moreover, because MAPA's definition of "agency" has not included any political subdivisions,¹²¹ the Act's contested case provisions generally do not cover local administrative hearings. In the absence of ordinances establishing local hearing processes, administrative procedure in hearings conducted by the state's political subdivisions was defined only by principles of procedural due process of law, as recognized by the federal courts or the state's appellate courts. Moreover, if a party to a local administrative hearing lacked a property interest in the subject matter, principles of procedural due process did not even apply.¹²²

The 1975 amendments to the MAPA did not directly change administrative practice for units of local government.¹²³ But the new section 15.052, subd. 8, did give political subdivisions direct access to the professional hearing officers in the new Office of Hearing Examiners by allowing the Office to conduct local administrative hearings for the state's political subdivisions on a contract basis:

The chief hearing examiner may enter into contracts with political subdivisions of the state and such political subdivisions of the state may contract with the chief hearing examiner for the purpose of providing hearing examiners and reporters for administrative proceedings.¹²⁴

Increasing use of that option over time has resulted in significant changes in how many local administrative hearings are now conducted.

Separate 1975 legislation also made an important change in local administrative practice. In an amendment to Minnesota's Liquor Act, the legislature required local licensing authorities to conduct hearings challenging suspension or revocation of liquor licenses in accordance with the contested case provisions of the MAPA.¹²⁵ That legislation specifically excluded application of new section 15.052 and therefore did not

¹²⁰ See discussion *supra*, at 1-2.

¹²¹ MINN. STAT. § 15.0411, subd. 2 (1974) required a governmental agency to have "statewide jurisdiction" to be considered an "agency."

¹²² See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); however, compare *Bird v. Department of Public Safety*, 329 N.W.2d 324 (Minn. 1983).

¹²³ However, legislation requiring political subdivisions authorities to provide hearings whenever they suspend or revoke intoxicating liquor licenses was enacted in 1967. Act of Feb. 24, 1967, ch. 19, § 9, 1967 Minn. Laws (then codified as Minn. Stat. § 340.135).

¹²⁴ Act of June 4, 1975, ch. 380, sec. 16, § 15.052, subd. 6, 1975 Minn. Laws 1285, 1293 (codified as amended at MINN. STAT. § 14.55).

¹²⁵ Act of June 2, 1975, 1975 Minn. Laws ch. 231, sec. 1, (codified as MINN. STAT. § 340.135, as amended).

expressly require those liquor license hearings to be conducted by the Office of Hearing Examiners. However, eight years later in *Hymanson v. City of St. Paul*¹²⁶ the argument was made that by incorporating APA standards into the hearing process, the amended Liquor Act¹²⁷ implicitly required the city to employ an independent hearing officer to conduct the evidentiary hearing. There, the city council itself had conducted the evidentiary hearing and also made the final decision to revoke the licenses. In a four-three decision, the court rejected the licensee's argument and held that the portions of the APA contested case process that the legislature had incorporated into Minn. Stat. § 340.135 did not necessarily require appointment of an independent hearing officer. That remains the state of the law.

Although the legislature has not subsequently expanded coverage of the MAPA to other kinds of local administrative hearings, in *Hard Times Café v. City of Minneapolis*¹²⁸ the court of appeals held that if a political subdivision represents that an administrative hearing will be governed by provisions of MAPA, then the referenced provisions in MAPA will, in fact, govern how the hearing is conducted.¹²⁹ Because few political subdivisions have enacted procedural ordinance defining procedural requirements for their administrative hearings, it has become common practice for political subdivisions that contract with OAH for the services of an administrative law judge to include the following provision in their notices of hearings:

The hearing will be conducted pursuant to the contested case procedures set out in chapter 14 of Minnesota Statutes, the Rules of the Office of Administrative Hearings, Minn. Rules 1400.5100 – 1400.8500 (or 1400.8505 – 8612) ...¹³⁰

Some political subdivisions contracting with OAH have enacted ordinances containing procedural requirements for some kinds of their hearings. Their notices of hearing either state that the hearing will be governed solely by the local ordinance or that the contested case provisions of MAPA and OAH's contested case rules will apply to the extent not inconsistent with the governing local procedural ordinance.

Over the last thirty-five years, local administrative hearings have become an increasingly important part of OAH's docket. Recently, as a result of the state's court system increasing workload and serious fiscal challenges, many Minnesota's cities have encountered significant delays in having their misdemeanor municipal code violation cases adjudicated. In 2009 the City of West St. Paul adopted charter amendments and enacted ordinances that some of their misdemeanor code violations into administrative penalty proceedings.¹³¹ The City then contracted with OAH to have those administrative citation cases heard by administrative law judges on an expedited basis. OAH began hearing those cases for the City of West St. Paul in July 2009. A calendar of pending

¹²⁶ 329 N.W.2d 324 (Minn. 1983).

¹²⁷ MINN. STAT. § 340.135, as amended in 1975.

¹²⁸ 625 N.W.2d 165 (Minn. App. 2001).

¹²⁹ *Id.* at 173.

¹³⁰ See <http://www.oah.state.mn.us/forms/noh-loc.doc>.

¹³¹ See West St. Paul City Code, § 120 (2009).

cases is heard monthly, and respondents leave the courtroom with an order. This program has proven to be highly successful for the city. Speedy adjudication of violations has increased code compliance and reduced the number of cases going to hearing. As a result, the League of Minnesota Cities has been endorsing and recommending the program to other municipalities. OAH began a similar program with the City of South St. Paul in July 2010, and several other cities have indicated interest in replicating the program.

C. Workers' Compensation Hearings

As previously discussed, the 1975 legislation required most state agency administrative hearings to be heard and adjudicated by administrative law judges, but there were statutory exceptions for workers' compensation claims and some other high volume case. Worker's compensation claims continued to be heard and adjudicated by compensation judges employed by the Department of Labor and Industry.¹³² However, problems arose with that particular exception almost immediately. In 1967 the legislature had created a special compensation fund from which the Department was required to pay workers' compensation benefits for "any employee [sustaining] injury arising out of and in the course of his employment and while in the employ of an employer not insured or self-insured."¹³³ From time to time, disputes arose regarding benefits payable to employees of uninsured and self-insured employers, and the Department was obliged to take positions that were adverse to those claimants. Those disputes were being adjudicated by compensation judges, and appeals from their decision were heard by the Department's Industrial Commission.¹³⁴ This created potential conflicts of interest within the Department. The existence of those conflicts and other concerns about adjudicatory neutrality and independence within the state's workers' compensation system prompted significant legislative action in 1981. In 1979 the legislature had created the Workers' Compensation Court of Appeals within the Department of Labor and Industry. That court was initially subordinate to the Commissioner.¹³⁵ Two years later the legislature reconstituted that court of appeals as an independent agency in the executive branch.¹³⁶ The same legislation also transferred all workers' compensation hearing functions and the compensation judges who were performing them from the Department of Labor and Industry to the renamed Office of Administrative Hearings.¹³⁷ Concomitant changes in the office's governing legislation preserved a statutory distinction between the functions of hearing examiner and workers' compensation judge:

All hearing examiners shall have demonstrated knowledge of administrative procedures and shall be free of any political or economic

¹³² See discussion *supra*, at 9, 19.

¹³³ See Act of May 10, 1967, ch. 330, 1967 Minn. Laws 511 (codified as MINN. STAT. § 176.183 (2009 Supp.)).

¹³⁴ See discussion *supra*, at 7-8.

¹³⁵ *Id.*

¹³⁶ Act of June 1, 1981, ch. 346, sec. 42, 1981 Minn. Laws 1611, 1638 (codified as MINN. STAT. § 175A.01 (2009 Supp.)).

¹³⁷ *Id.* at sec. 2, § 15.052(1), 1981 Minn. Laws 1611, 1613-14 (codified as amended at MINN. STAT. § 14.48(2) (2009 Supp.)).

association that would impair their ability to function officially in a fair and objective manner. All workers' compensation judges shall be learned in the law, shall have a demonstrated knowledge of worker's compensation laws and shall be free of any political or economic association that would impair their ability to function officially in a fair and objective manner.¹³⁸

Only workers' compensation hearing functions were transferred to OAH in 1981. The Department of Labor and Industry continued to administer all other aspects of the state's workers' compensation system, including some quasi-judicial claim settlement functions. Thus, the Department continued to employ a cadre of compensation judges, known as "settlement judges," who presided over settlement conferences and certain other related pre-hearing proceedings. Matters were only referred to OAH's "hearing judges" if those efforts at pre-hearing resolution failed to dispose of a claim petition. The two quasi-judicial functions continued to be done in the two different state agencies until 1998 when the legislature created a Settlement Division within OAH and transferred all of the quasi-judicial settlement functions to OAH, along with the settlement judges who had been performing them.¹³⁹

In addition to increasing OAH's subject matter jurisdiction, the 1981 and 1998 legislation represented the first addition of high volume cases to OAH's docket. In 2008, for example, OAH received 9,307 workers' compensation claim petitions for disposition in comparison with only 711 contested case proceedings of every kind.

D. Child Support Hearings

The second addition of high volume cases to OAH's docket proved to be less durable. For many years prior to the 1980s, the federal government had been contributing to the costs that states incurred in enforcing child support obligations for children who were on public assistance. Since family court proceedings were often complicated, lengthy, and expensive, the federal government began looking at ways of reducing those costs and the federal contribution. In the early 1980s the federal government began encouraging states to develop expedited processes for establishing, modifying, and enforcing support orders. In 1985, it promulgated regulations which, as a condition of federal financial participation, required states to develop state plans that "have in effect and use ... expedited processes ... to establish, modify, and enforce support orders."¹⁴⁰ The original federal regulations specified that "expedited processes" could not be processes over which a *judge* presided¹⁴¹—in other words, they necessarily had to be administrative enforcement proceedings. Because Minnesota had no administrative child support enforcement process in 1985, it began losing the federal

¹³⁸ Act of June 1, 1981, ch. 346, sec. 2, , § 14.48, 1981 Minn. Laws 1611, 1613-14.

¹³⁹ Act of April 6, 1998, ch. 366 §§ 80-82, 1998 Minn. Laws 622, 662-64.

¹⁴⁰ 45 C.F.R. 303.101(b) (2010). See. 50 FR 19655 (May 9, 1985), amended by 50 C.F.R. 23958 (June 7, 1985).

¹⁴¹ See 45 C.F.R. §303.101(a). In 1995, the federal regulations were amended to allow judicial, as well as administrative, enforcement proceeding so long as the processes were designed to meet the federal requirements for "expedited" proceedings. See 45 C.F.R. 303.101(b) (1995).

match for the cost enforcing child support obligations for the benefit of children on public assistance. That federal match amounted to several million dollars per year.¹⁴²

Because of the continuing loss of federal matching funds, the 1987 the legislature enacted Minn. Stat. § 518.551, subd. 10, which created a pilot project in Dakota County “to obtain, modify, and enforce child support and medical support orders and maintenance through administrative process. [and] to evaluate the efficiency of the administrative process.”¹⁴³ The pilot project was to begin on August 1, 1987, and continue until June 30, 1989. The administrative enforcement proceedings were to be conducted by administrative law judges from OAH, who were given “all powers, duties, and responsibilities conferred on judges of the county or district court to obtain and enforce child and medical support obligations,” subject to certain restrictions.¹⁴⁴ The legislature appropriated funds to the Department of Human Services¹⁴⁵ to cover the pilot project’s costs.¹⁴⁶ The Department, in turn, provided funding to the Dakota County Social Services Department to cover the costs of child support enforcement hearings—namely, the costs of creating necessary administrative infrastructure within DHS and Dakota County and the cost of having OAH’s administrative law judges conduct enforcement hearings. With regard to enforcement proceedings, the 1987 legislation essentially incorporated existing contested case hearing procedures, but supplemented them with family court discovery procedures:

For the purpose of this pilot project, the hearings shall be conducted under the conference contested case rules adopted by the chief administrative law judge. Any discovery required in a proceeding shall be conducted under the rules of family court and the rules of civil procedure. Orders issued by an administrative law judge shall be enforceable by the contempt powers of the county or district courts.

The administrative law judge shall make a report to the chief administrative law judge or the chief administrative law judge's designee, stating findings of fact and conclusions and recommendations concerning the proposed action, in accordance with sections 14.48 to 14.56. The chief administrative law judge or a designee shall render the final decision and order in accordance with sections 14.61 and 14.62. The decision and order of the chief administrative law judge or a designee shall be a final agency decision for purposes of sections 14.63 to 14.69.

Upon the completion of hearings, OAH was to bill Dakota County for the administrative law judge and staff attorney services at the prevailing hourly rates, which at that time were set biennially by the legislature.

¹⁴² OFFICE OF ADMINISTRATIVE HEARINGS ANNUAL REPORT—1991 at 5.

¹⁴³ Act of June 12, 1987, ch. 403, art. 3, sec. 80, 1987 Minn. Laws 3255, 3444-45 (codified as MINN. STAT. § 518.551, subd. 10 (1987 Supp.)).

¹⁴⁴ *Id.* at art. 1, sec. 2.

¹⁴⁵ Hereinafter sometimes “DHS.”

¹⁴⁶ 1987 Minnesota Laws, ch. 403, art. 1, sec. 2.

During its 1989 session, the legislature amended Minn. Stat. § 518.551, subd. 10, by converting the pilot project into a permanent administrative child support enforcement process.¹⁴⁷ That amendment gave DHS and OAH the ability to align the pace of program expansion with agency capabilities by allowing the Commissioner of Human Services to designate when future counties would be participating. Five years later in August 1994 the legislature made the expedited administrative child support process mandatory for all of the state's counties in order to maximize federal funding.¹⁴⁸ That expanded the program to all of Minnesota's 87 counties. By 1999 the number of child support cases referred to OAH increased to about 11,000 cases per fiscal year.

However, in 1999 three child support obligors challenged the constitutionality of Minn. Stat. § 518.5511 (1996) that created the process for administrative enforcement of child support obligations arguing that the statute violated the separation of powers doctrine.¹⁴⁹ In *Breimhorst v. Beckman*, the Minnesota Supreme Court had ruled that the state's workers' compensation statutes and system did not violate the separation of powers doctrine because those administrative adjudications were subject to judicial review by writ of certiorari and could only be enforced by a judgment of "a duly established court."¹⁵⁰ The subsequent case of *Wulff v. Tax Court of Appeals*,¹⁵¹ had held that the creation of Minnesota's tax court as an executive tribunal also did not violate the separation of powers doctrine because taxation was primarily a legislative function "in which judicial assistance may be invoked as a matter of convenience."¹⁵² However, in *Holmberg* the Minnesota Supreme Court ruled that although the administrative child support process may have met *Breimhorst* test, it failed the *Wulff* test noting:

[T]he administrative child support process encompasses an area of the law which arises in equity. Family dissolution remedies, including remedies in child support decisions, rely on the district court's inherent equitable powers. Thus, cases involving family law fall within the district court's inherent jurisdiction.¹⁵³

The court found three features of Minnesota's administrative child support process to be particularly problematic. The process removed from the district courts a class of cases falling within their original jurisdiction. The statute explicitly granted administrative law judges "all the powers, duties and responsibilities conferred on judges of the district

¹⁴⁷ 1989 Minnesota Laws, ch. 282, art. 1, sec. 191, codified as Minn. Stat. § 518.551, subd. 10 (1989 Supp.).

¹⁴⁸ Act of May 10, 1994, 1994 Minnesota Laws, ch. 630, art. 10, § 1. The Act of May 10, 1994, also repealed, MINN. STAT. § 518.551, subd. 10 and re-codified the administrative child support enforcement program as Minn. Stat. § 518.5511.

¹⁴⁹ *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999).

¹⁵⁰ *Id.* at 734; see also discussion *supra*, at 8-9.

¹⁵¹ 288 N.W.2d 221 (Minn. 1979).

¹⁵² *Id.* at 224.

¹⁵³ 588 N.W.2d at 724.

court,”¹⁵⁴ and it made administrative child support orders appealable on direct review with findings given the same deference as those of district court judges.¹⁵⁵

The *Holmberg* decision was issued on January 28, 1999. To avoid the potential for systemic chaos, the court ordered the administrative child support process to remain in place until July 1, 1999,¹⁵⁶ allowing time for either a legislative response or an orderly transfer of enforcement proceedings to the state court system.¹⁵⁷ Rather than attempting to cure the constitutional defects in the administrative child support system, the legislature chose to repeal that legislation and create a child support magistrate system within the state court system.¹⁵⁸ OAH staff cooperated fully with the state court system in effecting the transfer of functions, and that transfer turned out to be remarkably smooth under the circumstances.¹⁵⁹ In short, OAH’s second experience with high-volume cases ended up considerably less positive than its first.

E. Community Notification Act Appeals

Following the lead of other states, the Minnesota legislature in 1996 enacted the Community Notification Act, which was designed to provide notice to interested governmental units and members of the public that registered sex offenders were being released from incarceration and would be living in the notified community.¹⁶⁰ Before their release, end of confinement review committees at their respective institutions are required to assess whether their risk of reoffense was low (Risk Level I), moderate (Risk Level II), or high (Risk Level III).¹⁶¹ The assigned risk level then dictates the extent of community notification that law enforcement authorities must provide upon the offender’s release.¹⁶² Minn. Stat. § 244.052, subd. 6, gives offenders the right to seek administrative review of the end of confinement review committee’s risk level determination before in a contested case proceeding under Minn. Stat. Ch. 14. The presiding administrative law judge must decide whether or not the end-of-confinement review committee's risk assessment determination was erroneous and, based on that decision, must either uphold or modify the review committee's determination.¹⁶³

¹⁵⁴ Minn. Stat. § 518.5511, subd. 1(e) (1996).

¹⁵⁵ 588 N.W.2d at 724-25.

¹⁵⁶ *Id.* at 727.

¹⁵⁷ The 81st Legislature had begun its session on January 4, 1999, and was scheduled to remain in session until mid-May.

¹⁵⁸ See Act of May 24, 1999, ch. 196, 1999 Minn. Laws 1055, 1055-75. Since the federal regulations providing for matching funds still specified that “expedited processes” could not be processes over which a judge presided, it was necessary to create a replacement “magistrate” system rather than simply transferring the function back to the district courts.

¹⁵⁹ See discussion, *infra*, at 44.

¹⁶⁰ Act of April 2, 1996, ch. 408, art. 5, sec. 4, 1996 Minn. Laws 605, 660-63, codified as amended at MINN. STAT. § 244.052 (2009 Supp.).

¹⁶¹ MINN. STAT. § 244.052, subd. 3 (2009 Supp.).

¹⁶² *Id.* at subd. 4.

¹⁶³ *Id.* at subd. 6.

The administrative law judge's decision is final, and is appealable by writ of certiorari to the Minnesota Court of Appeals.¹⁶⁴

In 2000 the legislature expanded the registration and community notification requirements to include all "predatory offenders," which includes persons convicted of certain violent crimes, as well as sex offenders.¹⁶⁵ During the last thirteen years community notification appeals have become a regular feature of the Administrative Law Division's docket.

F. Special Education Hearings

Passed by Congress in 1990 as a re-codification of earlier legislation, the Individuals with Disabilities Education Act¹⁶⁶ (IDEA) was enacted, among other things, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."¹⁶⁷ The Act requires states to provide due process hearing on claims that a school has denied a student with a disability an opportunity for a free and appropriate education. The Minnesota Department of Education¹⁶⁸ started out using OAH's administrative law judges exclusively as hearing officers. However, in 1993 the U. S. Department of Education became concerned that many states were not exercising sufficient control over the hearing process. In response, the Minnesota Department of Education and departments of education in other states created panels of specially trained hearing officers to conduct evidentiary hearings and make initial decisions, with the education department assuming a review function with final decision authority. The departments' final decisions were appealable in federal district court. The MDE subsequently established a reconstituted hearing panel that included some of OAH's administrative law judges and some other qualified individuals. However, in 2003 the MDE concluded that OAH had assembled a sufficient number of trained special education hearing officers, and that it was no longer necessary for the Department to be a review authority. The change in process was codified in Minn. Stat. § 125A.091.¹⁶⁹ Thereafter, OAH has been the exclusive provider of special education hearings for the Department, and the office's administrative law judges now issue final decisions, which are directly appealable to federal district court.

G. Violations of the Fair Campaign Practices Acts

Efforts by the legislature to regulate the conduct of political campaigns go back to 1912 when legislation was enacted to regulate expenditures and prohibit "corrupt

¹⁶⁴ *Id.* at subd. 6(d).

¹⁶⁵ See Act of April 3, 2000, ch. 311, art. 2, 1-10, 2000 Minn. Laws 185, 189-96.

¹⁶⁶ Individuals with Disabilities Education Act, Pub. L. 101-479, 104 Stat. 1142 (1990), codified as amended at 20 U.S.C. §§ 1400 *et seq.*

¹⁶⁷ 20 U.S.C. § 1400(d)(1)(A).

¹⁶⁸ Hereinafter sometimes "MDE."

¹⁶⁹ Enacted in 2003. See Act of May 30, 2003, ch. 9, art. 3, sec. 9, 21, § 125A.091, subd. 12, 2003 Minn. Laws, 1st spec. Sess. 1509, 1579, repealing and replacing MINN. STAT. § 125A.09, subd. 6 (2002).

practices” of candidates in election campaigns.¹⁷⁰ The most recent version of Minnesota’s campaign laws came in 1988 when existing election campaign laws were re-codified, as amended, in Minn. Stat. Chs. 211A (Campaign Financial Reports and 211B (Fair Campaign Practices).¹⁷¹ Violations of both chapters were misdemeanors or gross misdemeanors,¹⁷² and county attorneys therefore had the exclusive authority to enforce the Acts by criminal prosecution in district courts.¹⁷³ Over time aware of some fundamental weaknesses in the enforcement process came to light. First, county attorneys were themselves elected officials and subject to those laws during their election and reelection campaigns. Second, because of the political sensitivity of prosecution for violation of the campaign laws, county attorneys rarely initiated prosecutions by criminal complaint but rather sought grand jury indictments. If bills of indictment were returned, there was a trial by jury. In short, complaints of violation of campaign laws were rarely finally adjudicated until long after the election in question occurred. This, in turn, gave rise to a practice of filing spurious campaign complaints against an opponent shortly before an election and then disseminating information indicating that the opponent was under investigation for violating the law, knowing that exoneration of the charge would not occur before the election was held.

In 2004 and on the initiative of the Minnesota County Attorneys Association, the legislature amended Minn. Stat. Ch. 211B to move primary responsibility for adjudicating complaints of campaign practices violations from county attorneys to OAH.¹⁷⁴ An administrative remedy was created in newly enacted Minn. Stat. §§ 211B.31–211B.37 that had to be exhausted before criminal prosecutions by county attorneys could be considered.¹⁷⁵ In order to resolve campaign complaints swiftly, administrative proceedings under Chapter 211B were excepted from coverage under MAPA. Instead, the legislated created an expedited administrative process modeled on one created by Ohio in 1995.¹⁷⁶

Under the new process, the chief administrative law judge is required to randomly assign an incoming complaint to an administrative law judge for *prima facie* review and preliminary disposition within three business days.¹⁷⁷ If the complaint is filed close to an election, further proceedings are expedited. If the reviewing judge concludes that the complaint does state a *prima facie* violation of the campaign laws, the reviewing judge is then required to conduct a probable cause hearing within three days after receiving the assignment. If the complaint was not filed close to an election, the probable cause hearing must only be held within 30 days later.¹⁷⁸ If the reviewing judge makes a finding of probable cause, the chief administrative law judge must refer the complaint to a three-

¹⁷⁰ Act of June 20, 1912, c. 3, 1912 Minn. Laws 23-40.

¹⁷¹ Act of April. 21, 1988, c. 578, arts. 2-3, 1988 Minn. Laws 583, 585-599.

¹⁷² See, e.g., MINN. STAT. §§ 211A.11, 211B.06, and 211B.13 (1988).

¹⁷³ See MINN. STAT. § 211B.16 (2009 Supp.).

¹⁷⁴ Act of May 28, 2004, c.277, 2004 Minn. Laws 1165, 1165-71.

¹⁷⁵ See MINN. STAT. § 211B.32, subd. 1 (2009 Supp.).

¹⁷⁶ See OHIO REV. CODE §§ 3517.151–357.157 (2010).

¹⁷⁷ MINN. STAT. § 211B.33, (2009 Supp.).

¹⁷⁸ MINN. STAT. § 211B.34, (2009 Supp.).

judge panel for hearing and disposition.¹⁷⁹ Under the expedited process, the evidentiary hearing must be held within 10 days after it is assigned to the panel; if the complaint was not filed close to an election, the evidentiary hearing can be held within 90 days.¹⁸⁰ Possible administrative dispositions include dismissal of the complaint, a reprimand, a civil penalty of up to \$5,000, or referral to a county attorney for criminal prosecution.¹⁸¹ The decisions of three-judge panels are final decisions appealable by writ of certiorari to the Minnesota Court of Appeals.¹⁸²

In 2006 a losing party in a campaign complaint case appealed not only the decision on the merits but also challenged the constitutionality of the program by again raising the separation of powers issue. When the legislature established the administrative process, it did not alter the substantive requirements of Minn. Stat. Ch. 211B, which continued to provide that violations were misdemeanors or gross misdemeanors. The appellant in *Riley v. Jankowski*¹⁸³ raised several arguments on appeal, including the contention that the criminal nature of the substantive requirements, coupled with the authority of administrative law judge to assess civil penalties, represented an unconstitutional delegation of the district court's original jurisdiction in criminal cases. After carefully analyzing the constitutionality of Minn. Stat. §§ 211B.31–211B.37 in the context of *Breimhorst*, *Wulff*, and *Holmberg*, the Minnesota Court Appeals rejected that argument. It first pointed out that “nothing in the statute requires a county attorney to wait for a complaint to be filed before prosecuting a violation or limits a county attorney’s authority to prosecute an alleged violation when no complaint has been filed ...”¹⁸⁴ The court also rejected the argument that the statute had the effect of placing administrative law judges on a par with district courts in adjudicating violations of criminal statutes, which was “an inherently judicial function”.¹⁸⁵ Finally, the court cited *Breimhorst* in concluding that the statutory provision making OAH decisions reviewable in the court of appeals by writ of certiorari¹⁸⁶ gave an Article III court sufficient supervision over the process.¹⁸⁷

By all accounts, the administrative process for disposing of complaints of violations of the state’s campaign laws has been extremely successful and has produced several positive results. Since enactment of the process, OAH has consistently met all of the statutory deadlines, and the use of a complaint as a last-minute weapon against a political opponent has all but disappeared. OAH maintains a searchable database on its website of decisions rendered in campaign complaint cases. A body of case law has therefore developed over the last five years to educate candidates for public office about the campaign practices which are permissible and which are not. Finally, creation of a

¹⁷⁹ The requirement of a three-judge panel was intended to forestall the possibility of a politically-motivated result.

¹⁸⁰ MINN. STAT. § 211B.35, subd. 1(2009 Supp.).

¹⁸¹ MINN. STAT. § 211B.35, subd. 2 (2009 Supp.).

¹⁸² See MINN. STAT. § 211B.36, subd. 5, and §§ 14.63–14.69 (2009 Supp.).

¹⁸³ 713 N.W.2d 379 (Minn.App. 2006).

¹⁸⁴ *Id.* at 391.

¹⁸⁵ 713 N.W.2d at 392.

¹⁸⁶ Minn. Stat. § 211B.

¹⁸⁷ 713 N.W.2d at 393-94; see MINN. STAT. § 211B.36, subd. 5, and §§ 14.63–14.69 (2009 Supp.).

speedy and certain process for enforcing Minnesota’s campaign laws has resulted in a demonstrable increase in compliance with the law. Campaign complaints filed in years in which statewide and legislative elections are held¹⁸⁸ have dropped from 52 complaints in 2004 to 40 complaints in 2008. Complaints filed in years in which local elections are held¹⁸⁹ have dropped from 21 complaints in 2005 to 10 complaints in 2009.

H. Municipal Boundary Adjustments

In 1957 the legislature created the Commission on Municipal Annexation and Consolidation to conduct a comprehensive study of Minnesota’s laws relating to “urban towns and to incorporation and change of boundaries of cities and villages.”¹⁹⁰ That commission subsequently submitted a report to the 1959 Legislature that addressed the current state of laws relating to the adjustment of municipal boundaries:

Examination of the present Minnesota statutory structure and testimony of municipal lawyers indicates that present statutory authority does not exist in many instances where annexation, detachment or other boundary changes are not only desirable but supported by virtually everyone in the affected area. This results in part from scattering of the related statutes throughout the chapters covering villages and cities of the first, second, third, and fourth classes.¹⁹¹

The commission recommended overhaul of existing statutes on municipal boundary adjustment and re-codifying them in a single new chapter of Minnesota Statutes. It also recommended establishing “a Minnesota Municipal Commission to hear and determine petitions with respect to incorporation, annexation or other municipal boundary changes.”¹⁹² Responding to the report of the Commission on Municipal Annexation and Consolidation, the 1959 Legislature enacted Minnesota Statutes, Ch. 414, which codified all Minnesota laws on municipal boundary adjustment and which created the Minnesota Municipal Commission to consider petitions for municipal incorporations, annexations, and detachments and, when necessary, to conduct administrative hearings and adjudicate disputes relating to those petitions.¹⁹³ That body was subsequently renamed the Minnesota Municipal Board,¹⁹⁴ and it continued to perform those functions until 1997, when the legislature acted to sunset the Board in 1999:

¹⁸⁸ Even-numbered years in Minnesota.

¹⁸⁹ Odd-numbered years in Minnesota.

¹⁹⁰ Act of Apr. 29, 1957, ch. 833, 1957 Minn. Laws 1181.

¹⁹¹ REPORT OF THE COMMISSION ON MUNICIPAL ANNEXATION AND CONSOLIDATION, 60th Legis. 1959 Sess. (1959) at 11.

¹⁹² *Id.* at 6.

¹⁹³ Act of April 24, 1959, ch. 686, 1959 Minn. Laws 1306-27.

¹⁹⁴ Act of June 2, 1975, ch. 271, sec. 3(27), 1975 Minn. Laws 742, 745.

The municipal board shall terminate on December 31, 1999, and all of its duties under this chapter shall be transferred to the office of strategic and long-range planning according to section 15.039.¹⁹⁵

In 1999 the legislature accelerated the sunset and transfer of functions by seven months to June 1, 1999,¹⁹⁶ and at the same time gave the Director of the Office of Strategic and Long-Range Planning discretionary power to dispose of pending and future contested proceedings:

Notwithstanding anything to the contrary in sections 414.01 to 414.11, the director of the office of strategic and long-range planning, upon consultation with affected parties and considering the procedures and principles established in sections 414.01 to 414.11, and Laws 1997, chapter 202, article 4, sections 1 to 13, may require alternative dispute resolution processes, including those provided in chapter 14, in the execution of the office's duties under this chapter.¹⁹⁷

Thereafter the Commissioner of Administration issued a reorganization directive transferring pending contested proceedings for which hearings had been completed or had been scheduled to OAH for administrative adjudication by an administrative law judge.¹⁹⁸ A party to one of the pending proceedings immediately sought a writ of prohibition challenging OAH's authority and jurisdiction to hear and adjudicate those matters; however, the Minnesota Court of Appeals rejected that challenge and denied the writ.¹⁹⁹ In the following year the legislature gave the Director authority to resolve contested municipal boundary adjustment cases "by means of alternative dispute resolution processes in place of hearings that would otherwise be required pursuant to sections 414.01 to 414.09."²⁰⁰ Those processes specifically included "the contested case procedures provided by sections 14.57 to 14.62,"²⁰¹ over which OAH was given jurisdiction:

The director may, with the agreement of the chief administrative law judge, delegate to the office of administrative hearings, in any individual case or group of cases, the director's authority and responsibility to conduct hearings and issue final orders under sections 414.01 to 414.09. In the case of detachment of lands from a municipality, if the parties do not agree to resolve a boundary adjustment matter by mediation or

¹⁹⁵ Act of May 30, 1997, ch. 202, art 5, sec. 8, 1997 Minn. Laws 1493, 1580.

¹⁹⁶ Act of May 25, 1999, ch. 243, art. 6, sec. 24, 1999 Minn. Laws 2054, 2251.

¹⁹⁷ *Id.* at sec. 25.

¹⁹⁸ Commissioner of Administration Agency Directive dated September 29, 1999.

¹⁹⁹ Order of November 23, 1996, *In Re Frederick W. Knaack vs. State of Minnesota by David Fisher, Commissioner of Administration; Kenneth Nickolai, Chief Judge of the Office of Administrative Hearings; Dean Barkley, Director of the Office of Strategic and Long Range Planning*, #C7-99-1871 (Minn. App. 1999).

²⁰⁰ Act of April 26, 2000, ch. 446, sec. 1, § 414.12, subd. 1, 2000 Minn. Laws 1441.

²⁰¹ *Id.*

arbitration, then the case shall be referred to an administrative law judge to conduct hearings and issue final orders under sections 414.01 to 414.09.²⁰²

On March 13, 2003, the Commissioner of Administration issued Reorganization Order No. 188 transferring the functions, powers, duties and responsibilities of the Director of the Office of Strategic and Long Range Planning pertaining to municipal boundary adjustments, to the Department of Administration.²⁰³ The Commissioner of Administration then became responsible for considering and taking action on boundary adjustment petitions and for referring contested boundary adjustment disputes to OAH for mediation or adjudication. However, two years later the governor concluded that the transfer turned out not to be a good fit for either agency, and that combining all municipal boundary adjustment functions under a single roof appeared to make more administrative sense. On February 2, 2005, By Reorganization Order No. 192, was issued again transferring the functions, powers, duties, and responsibilities formerly exercised by the director of the state planning office—this time to the chief administrative law judge.²⁰⁴

Bringing the administrative functions associated with adjusting municipal boundaries into the agency that performs the quasi-judicial function of adjudicating contested boundary adjustment proceedings created the potential for conflicts. The Municipal Boundary Adjustment Unit was therefore established internally as an entity operationally separate from the Administrative Law Division, which conducts contested case hearings pursuant to Minn. Stat. Ch. 414. The Chief Administrative Law Judge then formally delegated all administrative boundary adjustment duties and functions to an Assistant Chief Administrative Law Judge, who was internally sequestered from the contested boundary adjustment hearing process. Thus, the Assistant Chief Administrative Law Judge approves or disapproves the boundary adjustment petitions that the Unit receives each month or refers any contested cases to the Chief Administrative Law Judge for assignment of an administrative law judge for mediation or a contested case hearing, as the case may be.

I. Data Practices Disputes

In 2010 the legislature enacted another new administrative enforcement program that was modeled on the successful administrative process created in 2004 for resolving complaints of violations of the Fair Campaign Practices Act.²⁰⁵ The Minnesota Government Data Practices Act (MGDA²⁰⁶) serves much the same function as the federal Freedom of Information Act.²⁰⁷ On the one hand, it protects confidential and private information maintained by governmental units on individuals from unauthorized release.

²⁰² *Id.* at § 414.12, subd. 2.

²⁰³ MINN. STAT. § 16B.37, authorizes the Commissioner of Administration to issue reorganization orders transferring the personnel, powers, and duties from one state agency to another.

²⁰⁴ Conforming changes to Minn. Stat. Ch. 414 were made in 2008. *See* Act of Apr. 17, 2008, ch. 196, 2008 Minn. Laws 456-73. The Office of Strategic and Long Range Planning was not statutorily abolished until 2009. *See* Act of May 16, 2009, ch. 101, art. 2, sec. 6, 2009 Minn. Laws 1653, 1667-68.

²⁰⁵ Act of May 10, 2010, ch. 297, 2010 Minn. Laws 724-29, codified as MINN. STAT. § 13.085.

²⁰⁶ MINN. STAT. ch. 13 (2009 Supp.)

²⁰⁷ Public Law 89-554, 80 Stat. 383; codified as amended, 5 U.S.C. Section 552.

On the other hand, it guarantees individuals access to their own protected information and guarantees members of the public access to government information that is not private or confidential.

Challenges to determinations by governmental entities that data being requested was not public under the MGDPA could take one of two forms. First, a person could challenge the determination by requesting a written opinion from the Commissioner of Administration on whether the information was releasable.²⁰⁸ However, no administrative process existed for enforcing a favorable decision by the Commissioner. The administrative determination had to be enforced by initiating a civil action in district court. Alternatively, denial of a data practices request could be directly appealed in district court.²⁰⁹ In either case, gaining access to data that a governmental entity unreasonably refused to provide could take months, and even years, and involve expensive civil litigation

OAH estimated that the average cost of the new proceedings would be \$1,000.²¹⁰ Accordingly, the new enforcement process specified that complaints be accompanied by a \$1,000 filing fee or surety bond in that amount. Upon completion of the proceedings the cost of the administrative appeal would then borne by the losing party, to a maximum of \$1,000. If the complainant prevails, the filing fee will be refunded and the costs assessed against the unit of government up to a maximum of \$1,000.

A data practices appeal begins with receipt of a written complaint and filing fee. Thereafter, the Chief Administrative Law Judge assigns the case to an administrative law judge for disposition, beginning with a probable cause review within 20 business days. The administrative law judge must dismiss the complaint if the complaint and response, taken together, do not present sufficient facts to believe that a violation of the MGDPA has occurred.²¹¹ If the administrative law judge concludes that probable cause exists, a hearing must be scheduled within 30 days. OAH believes that, in practice, many complaints can be adjudicated after *in camera* review of the data at issue, followed by oral argument. Costs can also be contained by conducting an evidentiary by conference telephone call or using an interactive audio/video system.²¹²

After the hearing the administrative law judge must issue a decision within ten days after the hearing record closes.²¹³ Possible dispositions are similar to those available for campaign complaint cases. The administrative law judge may dismiss the complaint or find a violation of the MGDPA and impose a civil penalty against the governmental

²⁰⁸ MINN. STAT. § 13.072, subd. 1 (2009 Supp.)

²⁰⁹ See MINN. STAT. § 13.08.

²¹⁰ The estimate was based prior experience with the expedited campaign complaint process, adjusted to reflect the fact that cases would be heard by a single judge rather than a three-judge panel and other differentiating factors.

²¹¹ MINN. STAT. § 13.085, subd. 3. Unlike campaign complaint, the legislature omitted the *prima facie* review stage in the process for adjudicating data practices complaints, concluding that data practices challenges would almost invariably state a *prima facie* claim.

²¹² *Id.* at subd. 4.

²¹³ *Id.* at subd. 5(c).

entity of up to \$300 and an order compelling the governmental entity to comply with provisions of the MGDPA. In appropriate cases, the administrative law judge can also refer the matter for criminal prosecution. Unlike campaign complaint cases, the administrative law judge may also make award attorneys fees, not to exceed \$5,000, to a substantially prevailing complainant.²¹⁴ Like campaign complaint cases, decisions by administrative law judges in data practices cases are appealable by writ of certiorari to the Minnesota Court of Appeals.²¹⁵

The legislation creating the new administrative enforcement process for citizen appeals from improper governmental refusals to release information under the MGDPA became effective on July 1, 2010. There is therefore not yet sufficient operational experience with the program to determine its efficacy.

IV. LEADERSHIP, STAFFING, AND ADMINISTRATION

Since its creation in 1975, OAH has been led by five Chief Administrative Law Judges. Although the length of their service has varied, each of them began programs and initiatives and made decisions that shaped not only the form and structure of the organization but also its character and values.

A. July 25, 1975 to June 30, 1988

The first chief judge of the new Office of Hearing Examiners was Duane R. Harves. He was appointed on July 25, 1975, and served for two full terms²¹⁶ until June 30, 1988. His contributions cannot be overstated. He was charged with creating a central panel administrative hearing office in a state that had no prior experience with that kind of organization and at a time when only one other state had significant experience.²¹⁷ The decisions he made underlie much of OAH's current structure and operations, and the values he embedded in the organization have played a key role in OAH's success.

The 1975 legislation that established OAH contemplated that its operating costs would be borne by the state agencies and political subdivisions referring hearings to the new agency. That would be accomplished by charging the governmental entities hourly charges for hearing examiner services and depositing those revenues into a revolving fund account.²¹⁸ Although the office was formally established on July 1, 1975, the

²¹⁴ *Id.* at subd. 5(a). and 6. Although the maximum civil penalty is nominal, the legislature concluded that additional cost to a governmental unit of litigating the data practices appeals, together with the potential for a large attorney fee award, would be a sufficient deterrent to noncompliance with the law.

²¹⁵ *Id.* at subd. 5(d) and §§ 14.63–14.69 (2009 Supp.).

²¹⁶ The 1975 legislation became effective on July 1, 1975, and required the chief hearing examiner to be appointed not more than 30 days after that date. The legislation went on to give the chief hearing examiner time to assemble the new agency, and the net effect of the various statutory timetable was to give Judge Harves an initial term of seven years.

²¹⁷ *i.e.*, California. *See* discussion *supra*, at 16-17.

²¹⁸ Act of June 4, 1975, ch. 380, sec. 16, § 15.052, subd. 6, 7, 1975 Minn. Laws 1285, 1294, provided:

legislation specified that it would not begin conducting hearings until January 1, 1976, in order to give the chief hearing examiner time to hire staff, rent facilities, and order necessary equipment and supplies.²¹⁹ The legislature therefore provided for operating capital until the office was able to begin collecting hearing revenues by giving it an initial, nonrecurring general fund appropriation.²²⁰

Chief Hearing Examiner Harves was immediately faced with the problem of determining the new office's needs for staffing, facilities, and equipment. He constructed his initial budget by obtaining estimates from other state agencies of the numbers of hearings that they expected to refer each year and by consulting with the State of California, which then had the only operational central panel hearing office.²²¹ Proceeding in accordance with the legislative directive,²²² the chief hearing examiner and the commissioner of administration then established an hourly charge for hearing examiner services by dividing the estimated annual operating costs by the projected number of hearing hours.²²³

The estimates developed when projecting the office's resources and budget indicated that office would need a complement of thirty-five positions—the chief hearing examiner fifteen staff hearing examiners, and nineteen support staff.²²⁴ The enabling legislation required the chief hearing examiner to transfer to the new agency “[a]ny state employee currently employed as a hearing examiner, if the employee qualifies under this section.” The state's department of personnel provided the chief with a list of state employees who were then serving as hearing examiners in other state agencies, some of whom were not attorneys. Because the legislation required both the chief hearing examiner and any other hearing examiners conducting contested case hearings to be licensed to practice law,²²⁵ only six employees of other agencies qualified for transfer, and only five ended up being transferred. The legislation also specified that the agency's hearing examiners “shall have demonstrated knowledge of administrative procedures,”²²⁶ and that “[i]n assigning hearing examiners to conduct such hearings, the chief hearing examiner shall attempt to utilize personnel having expertise in the subject to be dealt with

Subd. 6. In consultation with the commissioner of administration the chief hearing examiner shall assess agencies the cost of services rendered to them in the conduct of hearings. All agencies shall include in their budgets provisions for such assessments.

Subd. 7. A state office of hearing examiner account is hereby created in the state treasury. All receipts from services rendered by the state office of hearing examiner shall be deposited in the account, and all funds in the account shall be annually appropriated to the state office of hearing examiner for carrying out the duties specified in this section.

Essentially the same provisions are now codified as amended in MINN. STAT. §§ 14.53 and 14.54 (2009 Supp.).

²¹⁹ Act of June 4, 1975, ch. 380, sec. 23, Minn. Laws 1285, 1298.

²²⁰ Act of June 4, 1975, ch. 380, sec. 19, subd. 1, Minn. Laws 1285, 1297.

²²¹ HARVES, *supra* note 94, at 9-11.

²²² Act of June 4, 1975, ch. 380, sec. 16, § 15.052, subd. 6, 7, 1975 Minn. Laws 1285, 1294.

²²³ *Id.*

²²⁴ HARVES, *supra* note 94, at 9.

²²⁵ See Act of June 4, 1975, ch. 380, § 16, § 15.052, subs. 1 and 3, 1975 Minn. Laws 1285, 1293.

²²⁶ Act of June 4, 1975, ch. 380, § 16, § 15.052, 1975 Minn. Laws 1285, 1293.

in the hearing."²²⁷ This reflected the prevailing view that administrative issues are often complex and highly technical, and that hearing officers with commensurate special expertise are therefore necessary.²²⁸ The chief hearing examiner therefore proceeded to hire ten more hearing examiners who met the statutory qualifications. Unfortunately, once hearings began, it became clear that agency estimates of hearing referrals had been inflated,²²⁹ and the chief was soon confronted with the necessity of a reduction in staffing from fifteen hearing examiners to ten.²³⁰

Minnesota's new central panel hearing officers were organized into three units, which corresponded roughly with their agencies of origin and prior legal experience—a utilities regulation and transportation unit, an environmental unit, and a general regulatory unit. None of those units' dockets included high-volume cases. Rather, the dockets consisted of low-volume cases of relatively diverse subject matter. The desire to preserve subject matter expertise did not initially result in many cross-assignments of hearing officers between units. However, that state of affairs did not last long. Fluctuating dockets within each of the units combined with fixed staffing levels ultimately compelled cross-assignments, and hearing officers, who began their tenure as subject matter specialists, began to become generalists. As will be discussed in greater detail below,²³¹ having specialty units within OAH's Administrative Law Division became less and less meaningful over time until they disappeared both in theory and in fact in the late 1990s.

In 1981 the office experienced another major organizational and administrative challenge. Expressing concern about issues of adjudicatory neutrality and independence within the state's workers' compensation system, the legislature in that year transferred all workers' compensation hearing functions and the compensation judges who were performing those functions from the Department of Labor and Industry to the renamed Office of Administrative Hearings.²³² The legislation transferring the newly acquired high-volume workers' compensation case docket to OAH did not specify that those cases would then become subject to the contested case provisions of Minn. Chapter 14 and to OAH's existing procedural rules. Rather, workers' compensation cases continued to be governed by the procedural requirements of Minn. Stat. Ch. 176. Contemporaneous changes in the office's governing legislation established a statutory distinction between the functions of hearing examiner and workers' compensation judge:

All hearing examiners shall have demonstrated knowledge of administrative procedures and shall be free of any political or economic association that would impair their ability to function officially in a fair

²²⁷ Minn. Stat. § 15.052, subd. 3 (1976).

²²⁸ For a discussion of the view that specialization of administrative law judges is essential and that "[a] system requiring study and re-education is inefficient and contrary to the fundamental goal of administrative law," see Norman Zankel, *A Unified Corps of Federal Administrative Law Judges Is Not Needed*, 6 W. NEW ENG. L. REV. 587, 735-36 (1984).

²²⁹ Agencies had estimated 2,000 cases per year but only 901 were received in Calendar Year 1976. See HARVES at 9, 17.

²³⁰ HARVES at 11.

²³¹ See discussion, *infra*, at 48.

²³² Act of June 1, 1981, ch. 346, sec. 2, Minn. Stat. §15.052, subd. 1, 1981 Minn. Laws 1611, 1613-16.

and objective manner. All workers' compensation judges shall be learned in the law, shall have a demonstrated knowledge of worker's compensation laws and shall be free of any political or economic association that would impair their ability to function officially in a fair and objective manner.²³³

The result was creation of a new Workers' Compensation Division within OAH that had its own staff, procedures, and a culture that was separate and materially different from those of what then became the office's Administrative Law Division. That situation created administrative difficulties, many of which persist to this day.

Transfer of the workers' compensation hearing judges in 1981 created another administrative challenge. When the Office of Hearing Examiners was first established in 1975, the five hearing officers transferred to the new organization were members of bargaining units; their compensation was therefore negotiated biennially in collective bargaining agreements. 1979 legislation removed hearing examiners from their bargaining unit.²³⁴ Salary ranges were thereafter established for them in the commissioner of personnel's compensation plan for non-managerial employees who were not represented by bargaining representatives.²³⁵ The chief hearing examiner was given the authority to determine hearing examiner salaries within the ranges established by the commissioner.²³⁶ However, when workers' compensation hearing judges were transferred to the office in 1981, the enabling legislation fixed their salaries at 75% of the salary of state district court judges.²³⁷ Thus, OAH's compensation judges and its hearing examiners (later administrative law judges) received different compensation, a disparity that continued to exist until 1997.²³⁸ The salary disparities created considerable internal difficulties and became a major impediment to development of a cohesive internal organization.

In the late 1980s Chief Judge Harves was confronted with a new organizational challenge. As previously discussed,²³⁹ faced with the continuing loss of federal matching funds, the Department of Human Services contacted him in late 1985 or early 1986 about developing an expedited administrative process for enforcing child support obligations that met the federal requirements. Thereafter, OAH and DHS develop a pilot project for an expedited process with the Dakota County Social Services Department. The pilot

²³³ Act of June 1, 1981, ch. 346, sec. 2, Minn. Stat. §15.052, subd. 1, 1981 Minn. Laws 1611, 1613-14. This legislation also established a requirement that workers' compensation judges, like hearing examiners, be attorneys.

²³⁴ 1979 Minn. Laws ch. 332, § 17, codified as Minn. Stat. § 43.064 (1979 supp.).

²³⁵ That compensation plan is commonly referred to as The Commissioner's Plan. The underlying logic for the change was that it was inappropriate for hearing examiners to be in bargaining units because their duties included conducting personnel hearings for other state employees and their status was therefore similar to confidential employees, who were also excluded from bargaining units.

²³⁶ *Id.* This method for compensating hearing officers remained essentially unchanged until 1990.

²³⁷ Act of June 1, 1981, ch. 346, sec. 7, 1981 Minn. Laws 1611, 1615-16, amending Minn. Stat. § 15A.083 (1980), which established salaries for judicial positions.

²³⁸ See discussion *infra*, at 42-43; see also Act of August 22, 1997 ch. 3, sec. 7-8, Minn. Laws 2nd Spec. Sess. 21, 25-26 (codified at Minn. Stat. § 15A.083, subd. 6a and 7 (Supp. 1997)).

²³⁹ See discussion, *supra*, at 23-25.

project was to begin on August 1, 1987, and continue until June 30, 1989. OAH's role in the expedited enforcement process would be governed by the existing contested case provisions of Minn. Stat. Chapter 14 and Minn. R. Chapter 1400. Chief Judge Harves was intimately involved in creation of that pilot project. But before the program gained much traction, his term expired on June 30, 1988. Rather than seeking appointment to a third six-year term as Chief Judge, he accepted an appointment to the Dakota County district court bench.

B. July 1988—June 1993

On July 1, 1988, William G. Brown was appointed as OAH's second Chief Administrative Law Judge. His tenure was dominated by several challenges—the rapid expansion of the administrative child support enforcement program; merging the office's Administrative Law and Workers' Compensation Divisions and the newly established Child Support Unit into a single cohesive agency; different technology infrastructure for the office's three operating units; and inadequate office facilities for OAH's growing needs.

Chief Judge Brown took office shortly after the legislature had created the pilot project for administrative enforcement of child support obligations. Because the pilot project was limited in scope, OAH conducted child support hearings between August 1, 1987 and June 30, 1989, using its existing staff and organizational structure. One of the Administrative Law Division's supervising administrative law judges was responsible for operational aspects of the pilot project and supervised the delivery of child support enforcement hearing services being provided to Dakota County. The hearings were conducted by existing staff administrative law judges. During FY 1988, OAH issued 335 child support orders.

Because federal matching funds were available in 1988 for only the 335 cases that were adjudicated in Dakota County, the state continued to lose millions of dollars per year in federal matching funds. There was therefore considerable pressure on the Department of Human Services and OAH to expand the program to other counties as soon as possible. A major difficulty in expanding the program statewide were the inefficiencies and costs of having OAH's staff administrative law judges travel to remote locations throughout the state. Plans were therefore developed in 1988 for only a limited expansion of the administrative enforcement program in and around the Minneapolis-St. Paul metropolitan area. In 1990 the Commissioner therefore only designated sixteen additional counties in the metropolitan area to be participants in the program during. As a staffing strategy to meet the expected increase in demand for hearing services, OAH began contracting with family law practitioners living in or near the new participating counties to hear child support cases as part-time contract administrative law judges.²⁴⁰ It also hired support staff to perform docketing and other administrative functions.

²⁴⁰ OFFICE OF ADMINISTRATIVE HEARINGS ANNUAL REPORT—1991 at p. 3. MINN. STAT. § 14.49 (1990) provided:

In 1991 the Commissioner of Human Services determined that beginning in 1992 she would designate twenty-four more counties to participate in the child support enforcement program, for a total of thirty-nine counties.²⁴¹ That increase more than doubled OAH's child support caseload.²⁴² To deal with the resultant increase in caseload, Chief Judge Brown found it necessary to make some organizational and staffing changes. In September 1992 he created a Child Support Unit as a separate OAH operating unit, with its own supervising judge and support staff. By January 1993 permanent staff administrative law judges were no longer hearing child support cases.²⁴³ To compensate for that loss of hearing experience, the new division began providing regular training for its contract administrative law judges.

Chief Judge Brown continued to wrestle with the problem of merging the Administrative Law and Workers' Compensation Divisions and the office's newly established Child Support Unit into a single cohesive agency. The three operating units received separate funding streams, had different hearing processes, and maintained separate support staffs and technology infrastructures. The judges in the three units also had separate experience requirements. All that the three operating units really had in common were a single chief judge, office administrator, and accounting supervisor.²⁴⁴

Another major impediment to office cohesion was technology. The state's workers' compensation system required claimants to initiate their claims for benefits by filing a claim petition with the Department of Labor and Industry. That agency then used its own staff and resources to attempt to resolve claims without scheduling an administrative hearing. Only if a claim petition could not be resolved within that department was a case referred to OAH's Workers' Compensation Division for hearing and adjudication. One aspect of the symbiotic relationship between the two agencies was that the Department of Labor and Industry operated and controlled a single case management system for both. On the other hand, the Administrative Law Division had developed and was operating its own case management. Moreover, the rapid growth of the child support enforcement program made it impossible to fully adapt the Administrative Law Division's case management system to support those operations. Ultimately, required Chief Judge Brown had to create a third case management system for that function. It was therefore virtually impossible to coordinate operations among the three operating units and to shift staff in response to fluctuating caseloads.²⁴⁵ None of this contributed to agency cohesion.

When regularly appointed administrative law judges or compensation judges are not available, the chief administrative law judge may contract with qualified individuals to serve as administrative law judges or compensation judges. Such temporary administrative law judges or compensation judges shall not be employees of the state.

²⁴¹ OFFICE OF ADMINISTRATIVE HEARINGS ANNUAL REPORT—1992 at 3.

²⁴² *Id.* at 2.

²⁴³ With the increase in the number of contract child support administrative law judges, the number of child support cases assigned to permanent staff administrative law judges has been steadily declining

²⁴⁴ The primary responsibility of Chief Judge Brown's single Assistant Chief Judge was managing the Workers' Compensation Division.

²⁴⁵ This continues to be a problem for the office.

The issue of judicial compensation further complicated Chief Judge Brown's effort to create office cohesion. As previously discussed, the 1981 legislation which transferred the workers' compensation hearing judges to the office also set their salaries at 75 percent of the salary of state district court judges.²⁴⁶ Their compensation was therefore higher than that of administrative law judges whose compensation was set by the commissioner of personnel. Moreover, because they were temporary contract judges, the administrative law judges conducting child support hearings were compensated at a lower rate than either group of permanent judges. In 1990 the legislature created further compensation difficulties. In that year the legislature linked the salaries of administrative law judges to the salaries of district court judge by specifying that:

[t]he maximum salary of an administrative law judge in the classified service employed by the office of administrative hearings is 90 percent of the salary of district court judges set under section 15A.082, subdivision 3.²⁴⁷

On the other hand, the 1990 legislation did not address the compensation of workers' compensation judges, which remained at 75 percent of the salary of a district court judge.²⁴⁸ As a practical matter, there was a statutory cap that limited the compensation of any judge to no more than the compensation of the Chief Administrative Law Judge, and that reduced the potential for significant salary disparities between administrative law judges and workers' compensation judges. But from 1990 to 1997, 75 percent of a district court judge's salary was almost always less than the Chief's salary and 90 percent of a district court judge's salary was almost always more. So, some actual disparity between workers' compensation judge and administrative law judge salaries continued to exist during that period.²⁴⁹

Finally, a challenge that all three of OAH's operating units shared was inadequate facilities. When Chief Judge Brown took office in July 1988, OAH was housed in a hundred-year-old building in Minneapolis with inadequate and poorly arranged space, antiquated services, few amenities, and inconvenient and expensive available parking, particularly for members of the public. Addition of the Workers' Compensation Division in 1981 had severely strained the office's ability to function in the facility. The growing child support docket strained that ability to the breaking point. In 1991 Chief Judge Brown was able to identify a nearby modern building with a floor plan that lent itself for occupancy by a court system. However, moving to the better facility turned out to be no simple matter. A long-term lease had to be cancelled, that resulted in litigation which delayed the move by several months. Finally, In the late fall of 1991 Chief Judge Brown

²⁴⁶ Act of June 1, 1981, ch. 346, sec. 7, , § 15.083, subd. 7, 1981 Minn. Laws 1611, 1615-16.

²⁴⁷ See Act of May 3, 1990, ch. 571 sec. 4, § 15A.083, 1990 Minn. Laws 2082, 2084. It is important to note that this legislation did not *fix* the salaries of administrative law judges at 90 percent of district court judges. Rather it gave the Chief Administrative Law Judge the discretion to set salaries that high, with the approval of the commissioner of personnel. As a practical matter, the top of the range for administrative law judges under the Commissioner's Plan was well below 90 percent of the salary of a district court judge.

²⁴⁸ See MINN. STAT. § 15A.083, subd. 7 (1988).

²⁴⁹ The potential for greater disparity was reduced by the fact that the legislature failed to give any increase in compensation to executive branch agency heads, including the Chief Administrative Law Judge between July 1, 1987, and July 1, 1997.

was able to move OAH into new offices with adequate space for all three operating units and parking and amenities that were suitable not only for OAH staff but also for participants in the agency's hearings.

C. July 1993—September 1997

On July 30, 1993, Kevin E. Johnson was appointed to be OAH's third Chief Administrative Law Judge. Although Chief Judge Johnson's tenure was relatively short, it was characterized by some very important developments.

Shortly after Chief Judge Johnson took office, legislation more than doubled the scope of the child support enforcement program. In 1994 the legislature expanded the program's scope from 39 to 87 counties, which, in turn, produced more organizational and staffing changes within OAH. Between 1993 and 1997, the number of contract child support administrative law judges increased from 23 to 44, along with an increase in Child Support Division support staff from four to fourteen. In Fiscal Year 1992, approximately 4,000 cases had been referred by participating counties to OAH's Child Support Division.²⁵⁰ By Fiscal Year 1999 the number of child support cases referred grown to approximately 11,000 cases. An important contribution of Chief Judge Johnson was able to negotiate to negotiate a lease addendum that provided sufficient space for the expanding Child Support Division, thereby alleviated the crowding that was already beginning to occur in OAH's new facility.

Another major development for the office occurred in 1995. Legislation enacted in 1945 had required that all agency rules be approved by the attorney general.²⁵¹ When OAH was established in 1974, its hearing examiners were given some responsibilities for overseeing the agency rulemaking process, such as conducting public rule hearings, but the responsibility for final approval of rules remained with the attorney general.²⁵² In 1995 the legislature enacted a change in OAH's rulemaking responsibilities when it transferred the authority and responsibility to give final approval of agency rules from the attorney general to OAH.²⁵³ Initial responsibility for rule approval now lies with an administrative law judge assigned by the chief administrative law judge. If that administrative law judge approves the rule, no further action by OAH is required, and the rule is transmitted to the secretary of state for filing. However, if the assigned administrative law judge disapproves the rule, that decision is subject to review by the chief administrative law judge,²⁵⁴ Rule approval has since become an important part of

²⁵⁰ *Office of Administrative Hearings Annual Report—1992* at p. 6.

²⁵¹ Act of April 21, 1945, ch. 452, sec. 1, subd. 4, 1945 Minn. Laws 869, 869-70.

²⁵² Act of June 4, 1975, ch. 380, sec 2, § 15.0412, subd. 4, 1975 Minn. Laws 1285, 1287-88.

²⁵³ Act of May 25, 1995, ch. 233, art. 2, sec. 24, § 14.26 subd. 1, 2, 1995 Minn. Laws 2085, 2097-98. The only central panel that has direct responsibilities in overseeing the agency rulemaking process is the Michigan Office of Administrative Hearings and Rules. *See* M.C.L. § 24.245 (2010). The North Carolina Office of Administrative Hearings provides houses and provides staff to the North Carolina Rules Review Commission, which has oversight responsibilities over the adoption of agency rules in that state. *See* N. C. GEN. STAT. 143B-30.1 (2009).

²⁵⁴ *See* MINN. STAT. § 14.26 (2009 Supp.).

the Administrative Law Division's operations. In Fiscal Year 2009, forty-one agency rule proposals were referred to OAH for review and approval.

Improving the office's technology infrastructure was a major concern for Chief Judge Johnson. As previously discussed, because both OAH and the Department of Labor and Industry²⁵⁵ performed related functions in the state's workers' compensation system, the two agencies had an integrated case management system that the Department operated and controlled. An integral part of the system was a document management system in which all documents relating to a claim petition had to be scanned into an imaging system by DLI staff. A major impediment to smooth operation of the system was the fact that the Department of Labor and Industry was located in St. Paul and OAH was located a dozen miles away in Minneapolis. Because of that, documents received in the mail at OAH had to be physically delivered to DLI in St. Paul for scanning. There were often delays in making imaged documents available to OAH for use in pending workers' compensation hearings. An imperfect solution was for OAH to create paper files of hearing documents for use by its compensation judges before transmitting the originals to DLI for scanning. That, of course, largely defeated the advantages for OAH of an imaged document management system. Another major problem was delays by DLI staff in entering case management data into the system in a form that was useful to OAH. Chief Judge spent a great deal of time in largely unsuccessful effort to resolve those problems.²⁵⁶

As previously discussed, the legislature had enacted Minnesota's Community Notification Act in 1996, which had created an administrative appeal for Department of Correction's determinations of risk level determinations of sex offenders who were being released from incarceration.²⁵⁷ That legislation became effective almost immediately on August 1, 1996. Those cases required an understanding of the inner workings of the state's criminal justice and corrections systems and processes with which most of the office's administrative law judges were largely unfamiliar. Because Chief Judge Johnson had previously served as a Hennepin County prosecutor before coming to OAH, he took the lead in developing internal processes for handling that new inflow of cases.

One of Chief Judge Johnson's most important and enduring contributions to OAH came in 1997. In that year, largely through his efforts, the legislature enacted a comprehensive overhaul of the state's system for compensating upper level executive branch employees. The overhaul included a more consistent and rational way of addressing the compensation of administrative law judges, workers' compensation judges, and the chief administrative law judge. The salaries of both administrative law judges and workers' compensation judges were fixed statutorily at 90 percent of the salary of a district court judge, the salaries of supervising judges at 95 percent, and the salary of the Chief Administrative Law Judge at 100 percent.²⁵⁸ Thus ended sixteen

²⁵⁵ Hereinafter sometimes "DLI."

²⁵⁶ Many of these problems remain.

²⁵⁷ Act of April 2, 1996, ch. 408, art. 5, sec. 4, 1996 Minn. Laws 605, 660-63.

²⁵⁸ Act of August 22, 1997 ch. 3, sec. 7-8, Minn. Laws 2nd Spec. Sess. 21, 25-26 (codified at Minn. Stat. § 15A.083, subd. 6a and 7 (Supp. 1997)). Those percentages were reduced slightly in 1998 when the legislature gave district court judges a small raise to offset increases in the contributions to the judicial

years of salary disparities that had impeded efforts to unite the office's operating units and establish a greater sense of interdepartmental collegiality.

D. October 1997 – February 2004

On October 31, 1997, Kenneth A. Nickolai was appointed as OAH's fourth Chief Judge. Again, although another important appointment prevented Chief Judge Nickolai from completing his full six-year term,²⁵⁹ his tenure was extremely eventful and filled with notable challenges and contributions.

Six months after Chief Judge Nickolai was appointed, the legislature added another complication to the problem of merging OAH's three operating units into a single cohesive agency when it transferred a fourth operating unit to the agency. When the workers' compensation hearing function was transferred from the Department of Labor and Industry to OAH in 1981, that department still retained another function that was quasi-judicial in nature. It continued to employ a cadre of compensation judges, known as "settlement judges," who presided over settlement conferences and certain other related pre-hearing proceedings. Matters were only referred to OAH's "hearing judges" if those efforts at pre-hearing resolution failed to dispose of a claim petition. The two quasi-judicial functions continued to be done in the two different state agencies until 1998 when the legislature created a Settlement Division within OAH and transferred all of the quasi-judicial settlement functions to OAH, along with the settlement judges who had been performing them.²⁶⁰ The legislation contained an explicit directive to OAH to integrate both groups of judges into a single cadre of specialists.²⁶¹ Carrying out that directive was complicated by the fact that each division had its own organizational culture and by the fact that OAH was not immediately able to co-locate the two staffs.²⁶² Nonetheless, Chief Judge Nickolai began making cross-assignments of the two groups of judges between the Workers' Compensation Settlement and Hearing Division, and that practice continued until Chief Judge Nickolai's successor combined the two divisions into one in 2010.

retirement plan, which is a defined contribution plan. Since, as classified employees, OAH Judges make no such contributions but are covered by a defined benefit retirement plan, the legislature thought it inequitable to give them the benefit of the increase. *See* 1998 Minn. Laws ch. 390, art. 5 §§ 2-3.

²⁵⁹ On September 22, 2003, the Governor appointed Chief Judge Nickolai as a member of the Minnesota Public Utilities Commission. The author assumed the caretaker function of Acting Chief Administrative Law Judge until Judge Nickolai's successor took office on February 2, 2004.

²⁶⁰ Act of April 6, 1998, ch. 366 §§ 80-82, 1998 Minn. Laws 622, 662-64.

²⁶¹ The legislation specifically provided:

The seniority of a workers' compensation judge at the office of administrative hearings, after the transfer, shall be based on the total length of service as a judge at either agency. *

* * [A]ll compensation judges at the office of administrative hearings shall be considered to be in the same employment condition, the same organizational unit and qualified for work in either division.

²⁶² Because of the lack of available space in OAH's Minneapolis Office, the Workers' Compensation Settlement Division continued to be located in offices in St. Paul. It was not until 2001, when space became available after OAH had transferred the child support hearing function back to the state court system, that OAH was able to move the Settlement Division into its Minneapolis facility.

The biggest challenge that Chief Judge Nickolai faced during his tenure were the aftereffects of the decision in *Holmberg v. Holmberg*²⁶³ in which the Minnesota Supreme Court held that the legislation creating OAH's administrative child support enforcement program violated the doctrine of separation powers and was therefore unconstitutional.²⁶⁴ The legislative response to the *Holmberg* decision was to repeal the legislation creating and administrative enforcement process and to create a child support magistrate system within the state court system.²⁶⁵ OAH staff cooperated fully with the state court system in effecting the transfer of functions, and that transfer turned out to be remarkably smooth under the circumstances. However, the internal disruption that the *Holmberg* decision created within OAH was profound. Chief Judge Nickolai had to eliminate the Child Support Unit, along with one permanent administrative law judge and fourteen support staff positions. The office also had to discontinue its contractual relationships with forty-four contract child support administrative law judges. The fiscal aftereffects were equally severe. The office lost revenues of about \$3,450,000 per fiscal year and a \$436,000 annual contribution to general office overhead and indirect expenses. Its revolving fund balance dropped from \$1,219,199 in FY 1999 to \$395,562 in FY 2001, causing real concern that OAH's ability to provide hearing services to its remaining governmental clients would be impaired. In short, OAH's second experience with high-volume cases turned out to be considerably less positive than its first.

In addition to Chief Judge Nickolai's efforts to co-locate the workers' compensation settlement judges and assimilate them into the organization, he introduced a legislative initiative in 2000 that was designed to break down some of the distinctions between administrative law judges and compensation judges by allowing cross-training:

The appointment of individuals as workers' compensation judges or as administrative law judges does not preclude the chief administrative law judge from establishing a system of training to enable them to acquire demonstrable knowledge and to become qualified to conduct hearings in the area other than the area of their original appointment.²⁶⁶

This cross-training provision was part of the ongoing effort to improve collegiality within the office and to improve the office's ability to manage caseloads. It was also prompted by a desire expressed by several judges for opportunities to expand their skills and to introduce variety into their professional lives.²⁶⁷

However, the challenges that Chief Judge Nickolai was compelled were offset in a large part by several notable successes. One of those contributions was a successful

²⁶³ 588 N.W.2d 720 (Minn. 1999).

²⁶⁴ See discussion *supra*, at 25.

²⁶⁵ See Act of May 24, 1999, ch. 196, 1999 Minn. Laws 1055, 1055-75. Since the federal regulations providing for matching funds still specified that "expedited processes" could not be processes over which a *judge* presided, it was necessary to create a replacement "magistrate" system rather than simply transferring the function back to the district courts.

²⁶⁶ Act of April 10, 2000, ch. 355, § 1, 2000 Minn. Laws 375 (codified as amended at MINN. STAT. §14.48, subd. 3(c) (2009 supp.)).

²⁶⁷ A regular program of cross-assignments now exists with campaign complaint cases.

legislative proposal to correct a significant weakness in the administrative hearing process. Previously there had been no statutory deadlines for issuing administrative law judge reports or agency final decisions. OAH had an internal policy that in the absence of an extension from the chief or assistant chief judge, administrative law judges had to issue their proposed or final decisions within 30 days after the record in a case closed. That policy was rigorously applied, but state agency heads were bound by no such policy. In 2001 it came to light that one state agency had been compelled to dismiss several dozen fine proceedings because no final agency action had been taken on the administrative law judge recommendations for over two years. Other state agencies had not taken action on proposed decisions for well over a year. In 2002 OAH proposed a legislative initiative that resulted in statutory deadlines for deciding contested case proceedings. Minn. Stat. § 14.62, subd. 2a (2009 Supp.) now provides:

Unless otherwise provided by law, the report or order of the administrative law judge constitutes the final decision in the case unless the agency modifies or rejects it under subdivision 1 within 90 days after the record of the proceeding closes under section 14.61. When the agency fails to act within 90 days on a licensing case, the agency must return the record of the proceeding to the administrative law judge for consideration of disciplinary action. In all contested cases where the report or order of the administrative law judge constitutes the final decision in the case, the administrative law judge shall issue findings of fact, conclusions, and an order within 90 days after the hearing record closes under section 14.61. Upon a showing of good cause by a party or the agency, the chief administrative law judge may order a reasonable extension of either of the two 90-day deadlines specified in this subdivision.

When OAH was established in 1975, there was no statutory code of ethics that applied generally to its hearing examiners. The Chief Hearing Examiner's status as an agency head with rulemaking authority brought him within the definition of public official and therefore within the coverage of the state's Ethics in Government Act.²⁶⁸ Other hearing examiners were not considered to be public officials and were therefore not covered by that Act. The only enforceable ethics constraints on hearing examiners arose from their status as attorneys subject to the Rules of Professional Conduct adopted by the Minnesota Supreme Court. In 1981, as part of a major overhaul of the state's civil service system, the legislature enacted a Code of Ethics for Employees in the Executive Branch.²⁶⁹ The scope of that ethics legislation was limited. It only dealt with conflicts of interests, placed limits on acceptance of gifts and favors, the use of confidential information, and the use of state property.²⁷⁰ Since all OAH judges were members of the executive branch as well as public officials,²⁷¹ they then became subject to the statutory

²⁶⁸ See MINN. STAT. § 10A.01, subd. 18 (c) (1974).

²⁶⁹ Act of May 15, 1981, ch. 210, sec. 38, 1981 Minn. Laws 702, 739-42 (codified at Minn. Stat. § 43A.38 (1981 Supp.)).

²⁷⁰ Act of May 15, 1981, ch. 210, sec. 38, § 43A.38(3)-(7), 1981 Minn. Laws 702, 739-42

²⁷¹ Minn. Stat. § 43A.38, subd. 8 (Supp. 1981) provided that "[w]here specific provisions of chapter 10A apply to employees and would conflict with this section, the provisions of chapter 10A shall apply."

ethical standards and the Rules of Professional Conduct for Attorneys.²⁷² Later, OAH also adopted an internal code of ethics based loosely on the Model Code of Judicial Conduct for State Administrative Law Judges.²⁷³, but that only had the status of an office policy.

By contrast, the legislature had begun acting in the late 1970s to tighten ethical restrictions on other judges in the executive branch. In 1977 the legislature amended the Tax Court's enabling legislation to prohibit its judges from concurrently holding other federal and state offices,²⁷⁴ to make them subject to the Code of Judicial Conduct,²⁷⁵ and to place them under the jurisdiction of the Commission on Judicial Standards for disciplinary purposes.²⁷⁶ In 1981 the legislature had established the Workers' Compensation Court of Appeals as an independent agency within the executive branch.²⁷⁷ That legislation imposed the same ethical standards on the judges, officers and employees of the Workers' Compensation Court of Appeals that the legislature had previously placed on judges of the Tax Court.²⁷⁸

Finally, on Chief Judge Nickolai's initiative the 2000 legislature brought the ethical standards for OAH judges into conformity with the standards that the legislature and the Minnesota Supreme Court had already established for all other judges in the judicial and executive branches, by enacting the following amendment to Minn. Stat. Ch. 14:

The chief administrative law judge is subject to the provisions of the Minnesota Constitution, article VI, section 6, the jurisdiction of the board on judicial standards, and the provisions of the code of judicial conduct.²⁷⁹

* * *

Administrative law judges and compensation judges are subject to the provisions of the code of judicial conduct. Administrative law and compensation judges may, however, serve as a member of a governmental board when so directed by the legislature. The chief administrative law

²⁷² As is usually the case, the Minnesota Supreme Court regulates the legal profession as part of its inherent jurisdiction. *See* MINNESOTA RULES OF PROFESSIONAL CONDUCT, as amended, (1999).

²⁷³ Endorsed by the American Bar Association's Judicial Administration Division in August 1995.

²⁷⁴ The legislature accomplished that by making judges of the Tax Court subject to MINN. CONST. Art. VI § 6, which prohibits judges in the judicial branch from holding other offices, other than military reserve commissions. *See* Act of May 27, 1977, ch. 307, sec. 2, 1977 Minn. Laws 606-07, amending Minn. Stat. § 271.01, subd. 1 (1976).

²⁷⁵ *Id.* The Code of Judicial Conduct is promulgated by order of the Minnesota Supreme Court. The current Code became effective on January 1, 1996. *See* No. C4-85-697 (Minn. Nov. 1, 1995).

²⁷⁶ The legislature had created the Commission, now the Board on Judicial Standards, in 1971, empowering it to hear complaints of misconduct by judges in the judicial branch and to make recommendations about appropriate disciplinary actions. *See* 1971 Minn. Laws ch. 909, § 1, currently codified at Minn. Stat. § 490.15 – 490.18 (2000).

²⁷⁷ Act of June 1, 1981, ch. 346 sec. 42-51, 1981 Minn. Laws 1611, 1638-41. (codified at MINN. STAT. ch. 175A, (Supp. 1981)); *see* discussion *supra*, at 9.

²⁷⁸ *Id.* at § 44, codified at Minn. Stat. §. 175A.03 (Supp. 1981).

²⁷⁹ Act of April 10, 2000, ch. 355, sec. 1, 2000 Minn. Laws 375-77. (codified at MINN. STAT. § 14.48, subd. 2 (2009 Supp.)).

judge shall provide training to administrative law and compensation judges about the requirements of the code and shall apply the provisions of the code to their actions. Only administrative law judges serving as temporary judges under a written contract are considered to be part-time judges for purposes of the code. Reports required to be filed by the code must be filed with the chief administrative law judge. The chief administrative law judge shall apply the provisions of the code of judicial conduct, to the extent applicable, to the other administrative law and compensation judges in a manner consistent with interpretations made by the board on judicial standards. The chief administrative law judge shall follow the procedural requirements of the commissioner's plan for state employees if any adverse personnel action is taken based in whole or in part as a violation of the code of judicial conduct.²⁸⁰

Finally, one of Chief Judge Nickolai's most important accomplishments was creation of OAH's Judicial Development Program, the purpose of which is to identify for judges the things they are doing well, as well as aspects of their performance that could be improved.²⁸¹ The program's general approach is to obtain survey data from attorneys and litigants. Surveys are sent to a random sample of 100 attorneys and litigants who have appeared before each judge during the previous two years.²⁸² A great deal of time and thought was devoted to the questions that would appear on the survey. Questions are generally aimed at obtaining an accurate picture of a judge's strengths and weaknesses.²⁸³ The questions differ somewhat depending on whether the respondent was an attorney or a party.²⁸⁴ Respondents are also given opportunities to include some narrative comments. To assure confidentiality, respondents return their surveys directly to the Department of Administration's Management Analysis Division, which provides organizational development consulting services to other state agencies. Under state law that agency is able to give respondents assurance of the privacy of their responses.²⁸⁵ The division then

²⁸⁰ Act of April 10, 2000, ch. 355, sec. 1, 2000 Minn. Laws 375-77. (codified at Minn. Stat. § 14.48, subd. 3(d) (2009 Supp)). A statutory process already existed for disciplining administrative law judges and workers' compensation judges in the classified service. See Minn. Stat. § 43A.33 (2000). The legislation therefore created a more elaborate process was required for enforcing the *Code's* requirements as applied to them in order to avoid multiple and potentially conflicting disciplinary processes.

²⁸¹ For a discussion of how OAH balanced the competing issues of accountability and judicial independence in developing its program, see Kenneth A. Nickolai, *Strengthening the Skills of Administrative Law Judges*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 263 (2000); see also JOHNSON, *supra* note 94, at 457-461.

²⁸² Surveys are only sent to attorneys and litigants whose cases have been closed in order to avoid any perception that responses might influence case results. Both the rate of response — 45 percent — and the results suggest that the attorneys and litigants who have participated have taken the surveys very seriously and approached them with a remarkable degree of candor and objectivity.

²⁸³ The questions asked can be found in MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS, JUDICIAL DEVELOPMENT PROGRAM: OFFICE-WIDE SUMMARY (Oct. 1999), reproduced in NICKOLAI, *supra* note 281, at App. A. It can also be found at the OAH website. See www.oah.state.mn.us.

²⁸⁴ For example, attorneys, but not parties, were asked certain questions about a judge's legal knowledge and abilities.

²⁸⁵ To further ensure confidentiality, the Division destroyed the surveys after collating, analyzing and aggregating the data they contained.

proceeds to process and analyze the survey data,²⁸⁶ producing three sets of reports—individual reports for each OAH judge, aggregated results for each of OAH’s divisions, and aggregated results for the office as a whole.²⁸⁷ Only individual judges, mentors of their choosing, and their immediate supervisors have access to individual results.²⁸⁸ Only aggregated results are available to the chief administrative law judge and the public. The aggregate survey data for the entire office and each of its Divisions have revealed areas where OAH judges as a group appeared to have some weaknesses. The office has been using that information to design internal training activities. OAH’s Judicial Development Program is unique in the U.S. and Canada. In 2001, OAH’s Judicial Development Program was a semifinalist for the Innovations in American Government Award awarded by the Institute for Government Innovation at the John F. Kennedy School of Government at Harvard University.

D. February 2004 — Present

On February 2, 2002, Raymond R. Krause was appointed as OAH’s fifth Chief Administrative Law Judge. Since his appointment, Chief Judge Krause has continued to build on the foundations established by his predecessors and has brought some important innovations of his own to the agency.

During his tenure Chief Judge Krause has made a number of organizational changes that have reduced the cost and enhanced the quality of OAH’s services. When OAH was initially established in 1975, the Chief Hearing Examiner was authorized to appoint other hearing examiners as were necessary to conduct the business of the office. All hearing examiners except the chief were in the classified civil service.²⁸⁹ In the same 1984 legislation that renamed hearing examiners as administrative law judges, the legislature formally gave the Chief authority to appoint one or more assistant chief administrative law judges, who were in the unclassified service and served at the pleasure of the chief administrative law judge. Thereafter, Chief Judge Harves and each of his successors appointed one assistant chief administrative law judge. The duties and responsibilities assigned to the assistant chief administrative law judge varied with the chief judges.

In addition to an assistant chief, Chief Judge Harves had appointed three supervising hearing examiners to supervise the office’s utilities regulation and transportation unit, environmental unit, and general regulatory unit.²⁹⁰ Another supervising judge position continued to exist within the Administrative Law Division after the Child Support Unit was eliminated in 1999. Those positions were later reduced

²⁸⁶ Using the Division as the analyst also eliminated the possibility of institutional bias that would have been present if OAH had attempted to interpret the data itself.

²⁸⁷ The Management Analysis Division did include the narrative comment of respondents in the reports prepared on individual judges but abstracted and generalized those responses to avoid disclosing the identity of the respondent.

²⁸⁸ Chief Judge Nickolai’s successor has developed a unique way of having judges’ supervisors use individual results in annual performance evaluations. *See* discussion *infra*, at 51.

²⁸⁹ Act of June 4, 1975, ch. 380, sec. 16, § 15.052, subd. 1, 1975 Minn. Laws 1285, 1293.

²⁹⁰ *See* discussion *supra*, at 35-36.

to two when the utilities regulation and transportation unit and the environmental unit were combined. In 1998, two supervising compensation judge positions were created within the Workers' Compensation Division.

In 2002 Chief Judge Krause lowered overhead costs by flattening OAH's organizational structure by eliminating all five supervising judge positions²⁹¹ and transferring their duties to one of two assistant chief administrative law judges—each of them managing, as well as supervising, the Administrative Law and Workers' Compensation Divisions. One positive aftereffect of those organizational changes was an improved quality assurance process within the Administrative Law Division. Since 1976 one of the duties of the supervising judges in that division had been to review the decisions of the staff administrative law judges in their respective units before the decisions were issued. Respecting the decisional independence of judges, supervisor review was confined to matters of clarity, form, thoroughness, and quality of written expression. Concern about encroaching on a judge's judicial independence often meant any criticisms by supervisors were muted. When the supervising judge positions were eliminated, supervisor review was replaced by peer review—that is, review decisions of all administrative law judges, including the chief and assistant chief, would be performed by a peer of the issuing judge's choice. Subsequent experience indicates that peer review has been far more thorough, rigorous, and unforgiving than supervisor review had been, and, as a result, that the quality of decisions has improved.

In September 1988, soon after Chief Judge Brown was appointed, he hired an attorney to assist its administrative law judges with legal research and the drafting of decisions and orders. He immediately realized the value that a staff attorney added to the Administrative Law Division's operations, and within a year he hired a second. During the early 1990s the ratio of staff attorneys to judges was about one staff attorney for every four judges. It was not until the late 1990s that a third staff attorney was created. The addition of a third staff attorney position brought the ratio of staff attorneys to judges to about one staff attorney for three judges. Over the years the time that staff attorneys spend working on specific cases has been billed at about half the rate for judges' time. It is therefore generally less costly for client agencies to have judges to spend more time on the bench rather and less time on the more time-consuming task of writing decisions. During his tenure, Chief Judge Krause has created two more staff attorney positions and has brought the ratio to about one staff attorney for two judges. This has been an important factor in containing hearing costs for referring state agencies in challenging economic times.

Minn. Stat. § 14.49 provides that:

[w]hen regularly appointed administrative law judges or compensation judges are not available, the chief administrative law judge may contract with qualified individuals to serve as administrative law judges or compensation judges.

²⁹¹ The incumbents thereafter continued to serve as staff administrative law or compensation judges.

From the outset, OAH's chief judges have relied on part time, contract administrative law judges to varying degrees to manage fluctuating caseloads. The office's use of contract administrative law judges reached its peak in 1999, when forty-four part-time judges were under contract to staff the Child Support Unit and another six were under contract to support the Administrative Law Division's general caseload. Dissolution of the Child Support Unit in the aftermath of the Holmberg decision resulted in termination of forty-four of those contracts.²⁹² Between 2000 and 2003 there were also declines in the Administrative Law Division's general caseload,²⁹³ and few cases were referred to the remaining six contract administrative law judges. However, since 2004 the Division's caseload has been steadily increasing. Rather than increasing the number of permanent staff administrative law judge positions in response to the changes in caseload, Chief Judge Krause has assembled a cadre of approximately seven contract administrative law judges to handle many of the routine cases. More important, steps have been taken to improve their judicial skills and to integrate them professionally into the Administrative Law Division staff. Chief Judge Krause has established a comprehensive training and mentorship program for contract judges, and their performance is now evaluated, along with staff administrative law judges, in OAH's Judicial Development Program.

For a number of reasons, OAH has experienced chronic difficulties over the years with how the human resource management system for Minnesota's executive branch has served the office's needs. First, with about 80 to 90 employees, OAH is generally considered to be a "small agency". The current civil service system for the executive branch generally assumes that an agency's size necessarily defines the level of expertise and experience it needs to operate effectively. In other words, smaller agencies are assumed to need employees with a lesser degree of experience, expertise, and competence than larger agencies need. That ignores that fact that relatively small agencies, like OAH, may have unique characteristics and operational complexities that in some cases require greater experience, expertise, and competence than counterparts in larger agencies. Second, the civil service system is also based on an assumption is that all employee work experience and functional skills can be generalized in a relatively small set of class specifications that can be applied with equal validity to all state agencies. In other words, it is presumed that Employee A in classification X is interchangeable with all other employees in classification X in other agencies. While this may work in the generality of cases, the relatively rigidity of the system can often result in some very bad classification fits. Finally, a related problem is that OAH's operational needs have very little in common with other executive branch agencies. OAH is unique agency in that it is the only trial-level court system in the executive branch. In fact, OAH is the state's second largest trial level court system.²⁹⁴ It has been difficult to find applicants within the civil service pool who have experience with court operations and administration. Finally, in the civil service system compensation of professional employees is generally based on how many people they supervise. Frequently the only

²⁹² See discussion, *supra*, at 43-44.

²⁹³ From July 1, 2000, to June 30, 2000, the office's revolving fund balance dropped 54 percent to a historical low of \$395,462.

²⁹⁴ The Hennepin County District Court, based in Minneapolis, is the largest with 62 judges. OAH has 39 permanent and part time judges.

way to increase the compensation of professional and technical employees is to make them managers, even if the position is not a good fit for both the agency and the incumbent.

As one case in point, when the compensation of judges was established by the civil service system and limited by its perceived comparability of non-judicial employees in the executive branch, OAH had difficulty attracting high quality applicants for judicial vacancies. That changed when judges' compensation was separated from the civil service system and established by statute as a fixed percentage of the compensation of judges of the district court. The quality of the applicant pools for subsequent vacancies has comparable to applicants being considered for appointment to the district court. As another case in point, although OAH is regarded as a "small agency," its many different revenue streams make it fiscally more complex than many larger agencies. In August 2002, OAH's longtime finance director retired. Between 2002 and 2009 OAH hired two replacements, each of whom left for higher level positions after being trained. As discussed below, that revolving door was only closed with an unconventional solution.²⁹⁵ However, in 2009, Chief Judge Krause was able to make significant progress in having adaptations made to the civil service system in order to meet OAH's unique needs. Starting at the top, the office was given authority to fill two new court administration positions with compensation that was comparable to court administrators in the state court system. Managers of the civil service system also agreed to continue the process of bringing the office's other position classifications more in line with comparable position classes existing in the court system.

Organizational changes within OAH were accompanied by a change in the performance management system for the office's professionals—as system that builds on the Judicial Development Program and a model that Chief Judge Krause had used when he was Dean of the Hamline University Law School. The performance management system in general use in the civil service system focused primarily on whether an employee's performance was satisfactory for purposes of determining whether the employee was eligible for compensation increases under an applicable bargaining agreement or other compensation plan. That system served no useful purpose for judges whose compensation was set by statute and whose breadth of professional skills were a key element in maintaining quality service. It also had little meaning for the office's managers. Chief Judge Krause's new performance management system for office professionals is goal-oriented. Each year the chief or assistant chief judge meets with the professionals under his or her supervision to identify steps that the subordinates can take during the upcoming year to improve their professional skills and accomplish other things that are important to the office. Annual reviews begin with a discussion of results achieved toward accomplishing the previous year's goals. During annual performance reviews of judges, the assistant chiefs and each of their judges also discuss what the judge learned from the previous Judicial Development Survey and any feedback on their performance received from other OAH staff or outside sources. Some of the professional development funding available to each judge or staff attorney is directed toward accomplishment of their performance goals.

²⁹⁵ See discussion *infra*, at 52-53.

Another of Chief Judge Krause's goals has been to increase OAH's interactions with Minnesota's other court systems and the broader legal community. In addition to encouraging professional development goals, judges and staff attorneys are encouraged to set goals that advance the interests and visibility of the office, by participating in activities like legal teaching, mentorship programs, and participation in professional legal organizations. They are also encouraged to assist other state agencies in meeting their administrative law needs. Several judges and staff attorneys serve as adjunct faculty at local law schools. Others are very active in bar association activities and programs. Still others serve in leadership positions in committees established by the Minnesota Supreme Court.

Involvement in these activities has been instrumental in several of the recent expansions of OAH's jurisdiction. It was a closer working relationship that the office developed with the Department of Education that resulted in OAH becoming the Department's exclusive provider of special education hearing services in 2003. A request for assistance from the Minnesota County Attorney's Association in handling politically difficult campaign complaint cases resulted in the 2004 legislation that gave OAH jurisdiction over those cases. The quality of services that OAH was providing in municipal boundary adjustment hearing was an important factor in the decision to transfer all administrative boundary functions to OAH in 2005. More recently, it was OAH's reputation for efficient disposition of cases and its interactions with the League of Minnesota Cities that prompted the cities of West St. Paul and South enact administrative processes for handling violations of their municipal codes.

A long overdue technology change came in 2003. Since 1976 administrative law judges had recorded hours worked and functions performed on handwritten "daily time tickets." Support staff then manually collated the entries, calculated the monthly charges for each case, and prepared the monthly bills that were submitted to state agencies and political subdivisions. This labor-intensive process consumed considerable staff time, accounting staff, and office space. In 2003 the Administrative Law Division began using a computer-based system for recording billable hours and processing monthly bills to client agencies. That development reduced operating costs and, despite inflation, was one of the things that enabled OAH to maintain stable hourly charges for several years.

One of Chief Judge Krause's most important contributions involved the relocation of OAH's offices from a commercial location in downtown Minneapolis to a state building in St. Paul's Capitol Complex. In 2005 the lease for OAH's office space in downtown Minneapolis was due for renewal in the following year. A problem with renewing the lease was that the market for prime office space had changed significantly from when OAH had moved to the newer building in 1991. Then, the occupancy rate was relatively low, and Chief Judge Brown had been able to negotiate an attractive lease payment. In 2005, when OAH was considering whether lease renewal, the occupancy rate for office space in downtown Minneapolis was high. It was therefore clear that the per square foot rental payable under a renewed lease would likely be much higher than the rental that agencies were paying for occupancy in state-owned buildings. Before his appointment, Chief Judge Krause had served as Assistant Commissioner in the Department of Revenue. That Department occupied the Stassen Building, a twelve-year-

old building in St. Paul's Capitol Complex. During a meeting with the Commissioner, Chief Judge Krause learned that as a result of increased e-filing of tax returns, the Department's no longer needed several thousand square feet of space for storage of paper files. The space to be vacated was roughly the same amount of space that OAH was renting in Minneapolis at about half the cost. Tentative plans and estimates of build-out costs indicated there would be substantial savings to the state over time. The problem was obtaining a general fund appropriation to cover the build-out costs at a time when the legislature was dealing with budgetary constraints. Working closely together on a mutually beneficial project, the two agency heads were able to persuade the 2005 legislature to include funding in the Department of Administration's facilities budget to pay for OAH's relocation to the Stassen Building. OAH was able to negotiate an extension of its existing lease to leave adequate time for construction, and in September 2007 the office occupied its new facilities.

Although substantial savings of rental costs was the primary objective of the move, the co-location of OAH with the Department of Revenue²⁹⁶ has allowed the two agencies to develop an innovative program of shared services. Cost allocation agreements with the larger agency have provided OAH with access to a much greater range and depth of administrative support services than was possible when OAH was a small, free-standing agency. For example, the continuing problem of a fiscal services revolving door ended when OAH was able to draw on the contracting, accounting, and budgeting expertise of DOR's large Financial Management Division. OAH has been able to replace its two-person information technology unit with service agreements with the larger, more experienced information staffs of the DOR and the state's Office of Enterprise Technology. Merging OAH's small, but high quality, law library with the DOR's law library has benefited both agencies. The Stassen Building is a controlled access state building with a security officer on duty at all times; it also has direct and immediate access to officers of the Minnesota State Patrol. This has significantly improved security in hearing rooms and provided a safe environment for judges, legal staff, and public. Among other things, OAH and the DOR have established a central reception desk in the Stassen building with joint cashier services. The latter measurably improves the office's ability to separate fiscal functions for audit purposes. OAH also shares a number of other facilities with its host agency, including loading docks, mail handling facilities, cafeteria, waiting areas, conference rooms, and audio visual and teleconferencing equipment. The office's employees also benefit from on-site exercise facilities and combined employee events. In short the shared services arrangements with the DOR has enabled OAH to improve its competencies, reduce costs to its clients, and focus attention more on its mission rather than on systems management.

V. CONCLUSION

Minnesota administrative procedure has evolved over the last century and a half in response to changes in the state's social, political, and economic environment. That evolution continues in response to new challenges. In the last thirty-five years the Office of Administrative Hearings has been the focal point for procedural changes. Like any

²⁹⁶ Hereinafter sometimes "the DOR."

government agency, OAH has experienced both setbacks and advances during its existence. But the office has always faced the problems confronting it with a commitment to innovation, and largely because of that, its trajectory has consistently been an upward one. Each of its five chief judges has maintained that upward trajectory by building on foundations established by their predecessors. Because of OAH's commitment to innovation and organizational flexible and agility, the agency is well-positioned to help state government meet the public's expectation of services that efficient and cost effective without compromising quality.