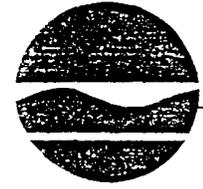




MEMORANDUM FROM
THOMAS C JORLING, Commissioner



New York State
Department of Environmental Conservation

February 13, 1990

TO Executive Staff, Division and Regional Directors
FROM Thomas C. Jorling *Thomas C. Jorling*
RE ORGANIZATION AND DELEGATION MEMORANDUM #90-04
Policy Governor's New Executive Order on
Administrative Adjudication

The memorandum is intended to supplement and modify Organization and Delegation Memorandum #84-10, Adjudicatory Hearings - Avoiding Ex Parte Communications within the Department to incorporate the requirements of recently issued Executive Order No 131 (copy attached) The Governor's purpose in issuing the Executive Order was to ensure the highest standards of fairness in administrative hearings as well as to require all State agencies to conduct business in such a manner as to avoid even the appearance of unfairness

Fortunately, because of the independence of the Office of Hearings, our agency's practices already conform in most respects to the requirements of the Governor's Order

There are, however, a few modifications to our procedures that will need to be incorporated and which I wish to bring specifically to your attention

First, the Executive Order expands the prohibition on ex parte communication beyond what is provided for under law Under the new Order, with limited exceptions not relevant here, the Administrative Law Judges may not consult off the record with uninvolved agency staff in order to help interpret technical evidence or agency policy It is crucial therefore, that all aspects of the Staff's case be fully explained on the record If there are policy memos or interpretive materials that would help support Staff's case, make sure that such materials are introduced into the record of the proceeding.

Also, when you or any member of your Staff is contemplating contacting an Administrative Law Judge ex parte, I would ask you to think twice about whether such a contact is permissible Although ex parte contacts that don't relate to the merits of the

case (scheduling being the most often used example) are proper, be conservative in deciding whether the matter sought to be discussed could be portrayed as inappropriate. There are cases where the timing of a case is so crucial that even scheduling should be done on notice to all parties. To help with the logistics of expediting matters that must be handled on notice, the Office of Hearings has recently acquired its own telecopier machine ((518) 485-7714)

Please keep in mind, that the stakes at risk in the implementation of the Governor's Order are no less than the integrity and credibility of the administrative hearing process. If you have any questions regarding this Order, don't hesitate to contact your program or regional attorney or Bob Feller

Attachment



No 131

E X E C U T I V E O R D E R

WHEREAS, administrative adjudication was developed to provide expert, efficient, timely and fair resolution of claims, rights and disputes before state agencies;

WHEREAS, administrative adjudication often addresses complex scientific, technical, financial, medical, legal and related issues under the jurisdiction of state agencies with specialized knowledge;

WHEREAS, administrative adjudication should be a more flexible alternative to, rather than a duplication of, the civil and criminal court system,

WHEREAS, administrative adjudication must meet due process standards and should resolve disputes in a manner that is fair and appears fair to the public;

WHEREAS, the fairness of administrative adjudication and the appearance of fairness are particularly important when a state agency is a party to the administrative proceeding, and

WHEREAS, to assure expert, efficient, timely and fair adjudications, hearing officers who preside at administrative hearings should be knowledgeable, competent, impartial, objective and free from inappropriate influence,

NOW, THEREFORE, I, MARIO M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and Laws of the State of New York, do hereby order as follows:

I Definitions

A The term "agency" shall mean any department, board, bureau, commission, division, office, council, committee or officer of the state authorized by law to make final decisions in adjudicatory proceedings but shall not include the governor, agencies created by interstate compact or international agreement, the Division of Military and Naval Affairs to the extent it exercises its responsibility for military and naval affairs, the Division of State Police, the identification and intelligence unit of the Division of Criminal Justice Services, the Division for Youth, the State Insurance Fund, the Workers' Compensation Board, the State Division of Parole, the Department of Correctional Services, the State Ethics Commission, the State Education Department and the Division of Tax Appeals.

B The term "hearing officer" shall mean a person designated and empowered by an agency to conduct adjudicatory proceedings as defined in this Order including but not limited to hearing officers, hearing examiners and administrative law judges; provided, however, that such term shall not apply to the head of an agency or to members of a state board or commission

C The term "adjudicatory proceedings" shall mean any activity before an agency in which a determination of legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a formal adversarial hearing, provided, however, that such term shall not apply to (1) a rule making proceeding, (2) an employee disciplinary action or other personnel action pursuant to article five of the civil service law or (3) representation proceedings conducted by the State Labor Relations Board and the Public Employment Relations Board.

II. General Principles

A Every agency that conducts adjudicatory proceedings shall insure that such proceedings are impartial, efficient, timely, expert and fair.

B. 1 Unless otherwise authorized by law and except as provided in paragraph two of this subdivision, a hearing officer shall not communicate, directly or indirectly, in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending before the hearing officer with any person except upon notice and opportunity for all parties to participate.

2 A hearing officer may consult on questions of law with supervisors, agency attorneys or other hearing officers, provided that such supervisors, hearing officers or attorneys have not been engaged in investigative or prosecuting functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding. Hearing officers may also consult with supervisors, other hearing officers, support staff or court reporters on ministerial matters such as scheduling or the location of a hearing. The head of each agency shall strictly enforce the prohibition set forth in this paragraph 3.

3. Subdivision one of this paragraph shall not apply (a) in determining applications for initial licenses for public utilities or carriers or (b) to proceedings involving the validity or application of rates, facilities, or practices to public utilities or carriers.

C No agency shall consider whether a hearing officer's rulings, decisions or other actions favor or disfavor the agency or the State in establishing the hearing officer's salary, promotion, benefits, working conditions, case assignments or opportunities for employment or promotion. The work of hearing officers shall only be evaluated on the following general areas of performance: competence, objectivity, fairness, productivity, diligence and temperament.

D. No agency shall establish quotas or similar expectations for any hearing officer that relate in any way to whether the hearing officer's rulings, decisions or other actions favor or disfavor the agency or the State.

E. In any pending adjudicatory proceeding, the agency may not order or otherwise direct a hearing officer to make any finding of fact, to reach any conclusion of law, or to make or recommend any specific disposition of a charge, allegation, question or issue, except by remand, reversal, or other decision on the record of the proceeding, provided, however, that such provision shall not preclude a supervisor from giving legal advice or guidance to a hearing officer where the supervisor determines that such advice or guidance is appropriate to assure the quality standards of the agency or to assure consistent or legally sound decisions.

F. If the head of an agency, or a designee, issues a decision that includes findings of fact or conclusions of law that conflict with the findings, conclusions or recommended decision of the hearing officer, the head of the agency, or the designee, shall set forth in writing the reasons why the head of the agency reached a conflicting decision.

III. Administrative Adjudication Plans

A. Every agency responsible for administrative adjudication shall develop an administrative adjudication plan. No later than February 1, 1990, each agency shall make its proposed plan available to the public for comment and shall publish a notice of the availability of such plan in the State Register at the first available date. No later than March 30, 1990, each agency shall conduct at least one public hearing to solicit comments on the plan. Each agency shall give full consideration to the comments received from the public and shall issue a final administrative adjudication plan no later than April 30, 1990. Notice of the availability of such final plan shall be published in the State Register and shall address the comments received from the public. All such plans shall be fully implemented no later than July 1, 1990 except to the extent

appropriations necessary to implement the plan are not available. An agency may amend such plan as necessary following notice of a proposed amendment and an opportunity for public comment.

B. The administrative adjudication plan shall, at a minimum, include the following:

1. An attestation by the head of the agency that the plan adheres to the principles of administrative adjudication set forth in section two of this Order.

2. a. An organization of administrative adjudication that ensures that hearing officers do not report with regard to functions that relate to the merits of adjudicatory proceedings to any agency official other than the head of the agency, a supervisor of hearing officers or the general counsel. Wherever practical, hearing officers shall be assigned to an administrative unit made up exclusively of hearing officers, supervisors and support staff. The unit may be part of the agency counsel's office but may not be part of any agency bureau, office or division with programmatic functions unless such functions are not the subject of adjudicatory proceedings within the agency nor may it include attorneys responsible for prosecutions or other adversarial presentation of agency position. Unless otherwise proscribed by law, hearing officers may be assigned duties in addition to serving as a hearing officer provided that (1) such duties do not conflict with the hearing officer's responsibilities as a hearing officer and (2) such duties do not involve functions related to prosecutions or adversarial presentations of agency positions. Hearing officers may be assigned to conduct investigatory hearings provided that the standards of independence and objectivity specified in this Order are adhered to.

b. An agency may establish an organization of administrative adjudication for less complex cases that does not satisfy the requirements of paragraph a of this subdivision provided that any such organization and its justification is set forth in the agency's administrative adjudication plan.

c. In order to comply with the requirement that a hearing officer not report with regard to functions that relate to the merits of adjudicatory proceedings to any agency official other than the head of the agency, a supervisor of hearing officers or the general counsel as set forth in paragraph a of this subdivision, an agency may request the services of a hearing officer from a different agency. No later than January 15, 1990, the Division of the Budget, in consultation with the Office of Business Permits and Regulatory Assistance ("OBPRA"), shall develop a plan under which agencies may share the services of hearing officers where necessary. The Office of Business Permits and Regulatory Assistance shall develop and maintain a register of hearing officers that may be available to conduct adjudicatory proceedings in agencies other than the agency that employs them.

3. Provisions for the hiring of hearing officers that allow, to the extent practical and consistent with the Civil Service Law, opportunities for non-agency personnel to compete for open hearing officer positions.

4. Location of hearing officers that separates, to the extent practical, hearing officers, supervisors and support staff from other agency staff.

5. Duly promulgated procedural regulations governing adjudicatory hearings that include, without limitation, requirements for clear and detailed notices of hearing and statements of charges; permission for answers and responsive pleadings, where appropriate; provisions for discovery to the extent permitted by the agency; and a procedure for any party to request recusal of a hearing officer.

6. A description of continuing education and training programs for hearing officers. Training programs shall include an explanation of the need for objectivity and fairness and the avoidance of a pro-agency bias. The Governor's Office of Employee Relations shall develop training programs to assist agencies in providing continuing education and training to hearing officers.

7. A description of efforts to consult and share resources with other agencies.

8. The use of outside hearing officers, to be paid on a per diem or contract basis, where such outside officers are necessary to implement the provisions of this Order.

9. For agencies that adjudicate 50 or more adjudicatory proceedings per year, a management system intended to affect timely disposition of adjudicatory proceedings.

10 A description of the agency's existing system of administrative adjudication and a discussion of the changes in such system that the proposed plan would effect

11 The summary of the agency's rules governing procedures on adjudicatory proceedings and appeals required pursuant to subdivision three of section 301 of the State Administrative Procedure Act

IV Oversight

A OBPR shall monitor the completion and filing of proposed and final administrative adjudication plans To assist OBPR in this effort, every agency shall send their proposed and final administrative adjudication plan to OBPR

B OBPR shall review any complaints from an individual or organization that an agency's system of administrative adjudication is not consistent with this Order However, OBPR shall have no jurisdiction to review a complaint until a complainant has exhausted all of the complainant's administrative and judicial remedies with regard to the administrative proceeding at issue In reviewing any such complaint, OBPR shall not review the merits of an individual case determination nor shall it review issues that have been ruled upon by a court OBPR's review shall be limited to whether the system of adjudication utilized by the agency is consistent with the provisions of this Order.

C In the event that OBPR's review identifies areas of an agency's system of administrative adjudication that appear to be inconsistent with the provisions of this Order, OBPR shall notify the agency and the complainant Such notification shall be advisory in nature and not binding on an agency

V Reporting

No later than December 1, 1990, and every two years thereafter, every agency shall make public a report that sets forth the steps taken by the agency to comply with this Order Such report shall also include statistics on Article 78 proceedings brought against the agency, including the outcome of such proceedings and the reasons for any reversal or modification of an agency determination

VI Public Authorities and other agencies

Public authorities and corporations and agencies not covered by this Order are encouraged to administer their systems of administrative adjudication in a manner consistent with the principles of this Order

G I V E N under my hand and the Privy
Seal of the State in the City of
Albany this fourth day of December
in the year one thousand nine
hundred eighty-nine.

(L S)

BY THE GOVERNOR

/s/ Mario M. Cuomo

/s/ Gerald C. Crotty
Secretary to the Governor