

Before the Senate of Pennsylvania, State Government Committee

June 14, 2016

Hearing on SB 413

Testimony of John P. Krill, Jr.

Thank you for permitting me to appear before you today to testify in support of SB 413, PN 363, which would effect substantial changes in the adjudicative process used by agencies of the Commonwealth.

I was a member of the Working Group established by the Joint State Government Commission to study and make recommendations on the practice of administrative law, pursuant to the direction of House Resolution 247 of 2011.

My background in administrative law includes nine years in the Bureau of Litigation in the former Department of Environmental Resources and over five years in the Commonwealth's Office of General Counsel as Deputy General Counsel for litigation. In 1987, after my service in state government, I joined the law firm of K&L Gates LLP (formerly Kirkpatrick & Lockhart), where I remain today, and where I co-chaired the firm-wide Appellate and Governmental Litigation Practice Group. In my law practice, I have litigated administrative law cases involving both state and federal agencies. I hold a J.D. from Harvard Law School and am admitted to the bar of the Pennsylvania Supreme Court, all Pennsylvania federal district courts, the Circuit Courts of Appeals for the Third, D.C. and Ninth Circuits and the United States Supreme Court. In 2015, I was appointed by the Pennsylvania Supreme Court to serve on its Committee on the Rules of Evidence.

The Working Group considered changes in the Commonwealth's Administrative Agency Law and related statutes, using as a starting point the Model State Administrative Procedure Act prepared by the Uniform Law Commission. We soon decided that the structure of the Model, along with some of its concepts and terminology, were incongruous with some of Pennsylvania's long-standing practices and case law. Therefore we drew what we considered best from the

Model and worked it into the existing framework of Pennsylvania administrative procedure.

SB 413 incorporates recommendations of the Working Group, which are also contained in the 2014 Staff Report of the Joint State Government Commission, “Reforming the Administrative Law of Pennsylvania.”

The most notable change that SB 413 would make in administrative law is the creation of an independent Office of Administrative Hearings, headed by a Chief Administrative Law Judge, who would be appointed by the Governor subject to Senate confirmation, for a term of five years. The Chief ALJ would in turn appoint administrative law judges. The ALJs would be removable only for cause.

When an agency matter is headed for an administrative hearing, the agency head would have a choice: either to retain jurisdiction and preside over the hearing personally or to delegate the matter to the Office of Administrative Hearings. In the latter case, the agency head could delegate final adjudicative authority or, if preferable, merely delegate the function of presiding officer. If final adjudicative authority has not been delegated, the ALJ who serves as presiding officer would hear evidence and eventually submit a recommended final order.

Agency heads would no longer be able to appoint employees within their offices to serve as ALJs.

SB 413 also contains a number of provisions designed to improve the transparency and procedural fairness of administrative hearings. It establishes rules on *ex parte* communications, which are prohibited, with few exceptions, which are spelled out and kept within bounds that would prevent prejudice to any party. It creates a right to cross-examination, to submit pleadings and motions and to hear the evidence and be heard. Findings of fact would have to be explained, with a basis shown in the record.

At the same time, SB 413 does not prevent agencies from acting swiftly in cases where there is imminent peril to public health, safety or welfare. It authorizes emergency procedures in such cases, including the issuance of orders with

immediate effect. A party receiving such an order would nevertheless be given an opportunity for a full hearing in due course.

The Chief ALJ would be tasked with preparing a searchable public index of adjudications.

SB 413 contains transition provisions. The Chief ALJ would prepare a Reorganization plan and submit it to the Executive Board of the Commonwealth. I would expect agencies that now employ more or less full-time ALJs would see them transferred to the Office of Administrative Hearings.

The benefits of the changes SB 413 would make in administrative law would be substantial:

- By creating a central, professional and independent cadre of ALJs, public confidence in the administrative process would be enhanced. There are many fine state employees who presently serve competently and honorably as ALJs in their agencies. Nevertheless:
 - Any appearance of “command influence” would be removed from administrative proceedings, because the status of the ALJ presiding over a matter would not depend on pleasing the agency in which the ALJ is employed.
 - Individual members of the public who interact with agencies would have no basis for complaining about the fairness of the process.
 - Businesses in Pennsylvania should likewise have increased confidence in the impartiality of administrative proceedings. I know that my firm’s business clients would appreciate a measure that ensures a level playing field.
- The creation of a central pool of ALJs would expose them to a broader range of administrative law issues. This would be so, even if, as I expect, matters would often be assigned based in part on experience with a particular field of regulation. The index of adjudications alone would be of value when a presiding officer had to decide a non-routine motion. If ALJs are exposed to other fields, their intellectual horizons may expand, to the benefit of the public.

- The performance of ALJs would be guided by a uniform standard. While the ALJs would enjoy independence in their substantive decisions, their work would be subject to uniform policy statements from the Chief ALJ on the hearing process. They would also benefit from common programs in continuing legal education focused on administrative law and procedure.
- Many states are already operating their administrative law processes under similar central-panel arrangements. They appear to have been generally satisfactory.
- The Commonwealth's Office of General Counsel has been providing a voluntary ALJ program for some years. It, too, appears to have been well received. Not every agency has availed itself of this service. SB 413 would replace it with a uniform system.

Some agencies may experience little change in their operations. The members of the Environmental Hearing Board, for example, have always served as individual presiding officers in appeals from agency actions, while the Board as a whole issues adjudications. The EHB would be a multi-member "adjudicative body" under SB 413 and, as previously, one or more of its members may serve as a presiding officer.

The Working Group did not determine whether an exclusively adjudicative body, like the EHB or other appeal boards, is also an "agency head," for purposes of delegating a matter to the Office of Administrative Appeals. SB 413 does not make that determination, either. Potentially, such a board is both. It is unclear that an adjudicative body that has traditionally handled hearings itself will want to delegate matters to the Office of Administrative Appeals. In any event, SB 413 does not create a dilemma for such boards. They make retain or delegate the presiding officer function under either category.

In summary, I urge the Committee to move SB 413 forward. If enacted, it will be an important advancement in administrative law in the Commonwealth.

Respectfully submitted,

John P. Krill, Jr.