Testimony Submitted to the Senate State Government Committee

Public Hearing on Senate Bill 413: Amending the Administrative Agency Law and Establishing the Office of Administrative Hearings

Submitted by:

P. Kevin Brobson, Judge
Commonwealth Court of Pennsylvania

June 14, 2016

Good morning Chairman Folmer, Chairman Williams, and members of the Senate State Government Committee. My name is Kevin Brobson. I currently have the honor of serving the people of Pennsylvania as a Judge on the Commonwealth Court. As you know, the Commonwealth Court is a unique court of statewide jurisdiction. Our primary role is to ensure that state and local governments follow the laws written passed by the General Assembly, our sister branch of government. In exercising that important role, the Commonwealth Court's appellate jurisdiction includes review of decisions rendered by state administrative agencies.

Prior to my election to the bench, I was a shareholder with the law firm of Buchanan Ingersoll & Rooney PC, where I served as Chair of the firm's Insurance and Reinsurance Practice Group. During my 14 years in private practice, I had the opportunity to represent clients before state administrative agencies, including the Pennsylvania Insurance Department, the Department of State's Bureau of Professional and Occupational Affairs, the Pennsylvania Gaming Control Board, and others. It is from this background and experience that I recommend the Committee's favorable consideration of Senate Bill 413. I want to emphasize that I offer this testimony on my own accord and not as a representative of the Commonwealth Court or the judiciary in general.

The Pennsylvania Administrative Agency Law (2 Pa. C.S. §§ 101-754) is one of the oldest in the United States. It was first approved in 1945, to take effect in 1946. Much has been learned as a result of experience with administrative adjudication since 1945. SB 413 proposes to update and refresh Pennsylvania's current statutory scheme in three distinct ways. First, it amends Subchapter A of Chapter 5 of the current law, which governs practice and procedure before

Commonwealth agencies. Second, it adds a new Chapter 6, creating an independent Office of Administrative Hearings within the Executive Department. Third, it amends Subchapter B of Chapter 7, governing judicial review of Commonwealth agency actions.

For the most part, the amendments to Subchapter A of Chapter 5 are intended to incorporate lessons learned nationally and in the Commonwealth with respect to administrative practice. In my assessment, no rights existing under current law are diminished by the proposed changes. The proposed changes are based off of the most recent Model State Administrative Procedure Act (Model Act) drafted by the Uniform Law Commissioners so far as consistent with case law, developed primarily from the Commonwealth Court, dealing with rights and procedures for administrative agency proceedings. In other words, in this regard SB 413 does not propose a sea change; rather, it consolidates and reconciles existing jurisprudence with existing best practices in our current law and best practices in the Model Act. The same can be said for the proposed amendments to Subchapter A of Chapter 7, governing judicial review of Commonwealth agency actions. I view those amendments as codifying over forty years of precedent interpreting current law, marrying that precedent with best practices from the existing law and the Model Act.

For me, the most significant changes proposed by SB 413 are new Chapter 6 and the amendments to Subchapter A of Chapter 5 that aid in the implementation of new Chapter 6. Passage of SB 413 will bring the Commonwealth in line with 27 other states that have established a centralized panel of administrative law judges for the purpose of administrative adjudication. The proposed Pennsylvania Office of Administrative Hearings will be headed by a Chief Administrative Law Judge, among whose responsibilities will be to assure the decisional independence of every

administrative law judge assigned to every matter; to establish and implement a code of conduct for all administrative law judges as well as continuing education for administrative law judges; and to establish uniform procedures for the disposition of matters assigned to administrative law judges. The Chief Administrative Law Judge is also tasked with creating and maintaining a public docket for all administrative proceedings as well as a public, searchable index of adjudications.

Aiding in the implementation of Chapter 6 and the introduction of the centralized panel of administrative law judges to our system are certain amendments to Subchapter A of Chapter 5. These amendments do not take away the ultimate authority of the agency head to hear and decide matters of policy or even adjudications. If the agency head, however, elects not to hear a particular matter, the agency head's only option is to delegate that power to an independent administrative law judge. Under the current system, agency heads can and often do delegate this authority to their employees—*e.g.*, deputy secretaries or agency-employed hearing officers—or hire independent contractors to perform this function. The amendments eliminate the ability of an agency head to select, appoint, and supervise a hearing officer of the agency head's choosing. This change, however, does not remove from the agency its primary policymaking function. This function, including the key role of interpreting and applying agency laws or regulations, remains within the agency head unless delegated by the agency head to the administrative law judge.

What do these changes mean? Why should we adopt them? As a lawyer and now judge who has appeared before agency-employed hearing officers and has reviewed the adjudications of the same, I will not stand here and say that these professionals are not doing their jobs well or are behaving in a way that shows bias

in favor of their employer. But I can say that there is no other judicial or quasi-judicial setting in this Commonwealth where one party (the agency) serves as the police officer, the prosecutor, the judge, and jury. We can create barriers and walls, as we have attempted to do in the years since the Pennsylvania Supreme Court decided *Lyness v. Commonwealth, State Board of Medicine*, 605 A.2d 1204 (Pa. 1992), over twenty years ago. But we can never eliminate from the existing patchwork of administrative agency adjudication what, at the very least, is an appearance of bias in favor of government. And you cannot discount the possibility that an agency-employed hearing officer could face direct or indirect pressure to reach a result favorable to the agency.

So why should we move in this direction? Why should we change? For many private citizens who can ill afford protracted litigation and appeals, these administrative proceedings represent the only forum for a fair and impartial determination on questions that may determine where they live, their vocation, or where they educate their child. Therefore, we should embrace any and all changes to the process that seek to eliminate even the appearance of impropriety. By undertaking such measures, I believe we will instill a higher level of confidence in the system. The Commonwealth's citizens expect such a system, and they deserve it.

Moreover, this is where Pennsylvania benefits from being one of the minority of states that have not moved in this direction. The implementation of some type of centralized hearing panel in 27 other states has already proved the anticipated benefits of such a model, while debunking the concerns of skeptics. Reviews have shown that a centralized hearing panel for administrative agency adjudications is more cost-effective than the type of patchwork system under which Pennsylvania

currently operates. Concerns that somehow moving to a centralized hearing system will devalue or eliminate the agency expertise in a particular field have also proven untrue or unfounded. The agency can still press its administrative expertise before an independent administrative law judge. Moreover, there is no reason to believe that as the Commonwealth transitions to a centralized panel, hearing officers who currently specialize in a particular subject matter and who make that transition to the centralized hearing panel will cease hearing those cases. Moreover, their experience will add value to the centralized system where hearing officers can share best practices, cross-train, and enhance the administrative hearing experience for all Pennsylvanians. There will be no loss of experience, only a net gain.

Concerns over the "judicialization" of administrative hearings have also been debunked. In fact, by centralizing all administrative hearings before an independent agency headed by a chief administrative law judge, the goal is to streamline administrative proceedings and make them more affordable and accessible to Pennsylvanians through, *inter alia*, (1) uniform rules of procedure applicable to all proceedings; (2) consistency in the quality of administrative law judges and decisions; and (3) a single source of information, that being the Office of Administrative Hearings.

Finally, opponents of central hearing panels have contended that the creation of a new office with a new administrator and new employees just creates more government at a time when we should be looking at ways of shrinking the size of government. Again, this is a false narrative. The Commonwealth already has as many different systems of hearing officers as we have agencies. A centralized hearing office does not add to existing government, it consolidates existing bureaucracies, reducing the structure and size of government through economies of

scale and other efficiencies. A vote in favor of SB 413 is a vote for leaner, more efficient, and more transparent government.

In conclusion, I could not phrase the choice before this Committee on Senate Bill 413 better than former Chief Administrative Law Judge for the State of Maryland John Harwicke and former Chief Administrative Law Judge for the State of Oregon, who, in their 2004 article in the Journal of the National Association of Administrative Law Judges titled "The Central Hearing Panel: A Response to Critics", wrote:

> Whether or not a state adopts a central panel should not depend on the fears of cost, loss of expertise, judicialization, or bureaucratization. These are groundless. Rather, it should depend on the answer to a fundamental policy question: Is it the function of administrative law judges to independently, truly independently, review agency action, applying the law with the same neutrality and outcome-indifference as does a judicial court? Or is it their function merely to meet the minimal due process requirements of notice and hearing? If the former is true, only a central panel is sufficient. If the latter is correct, agency hearing units will do. Every state must decide for itself.

Thank you for the opportunity to speak to you about this good government measure. I would be happy to respond to any questions from the Committee.

REFERENCE:

1. *Reforming the Administrative Law of Pennsylvania*, Staff Report of the Joint State Government Commission (2014).
2. John Hardwicke and Thomas E. Ewing, *The Central Panel: A Response to Critics*, 24 J. Nat'l Ass'n Admin. L. Judges 231 (Fall 2004).
3. David W. Heyndericks, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for Contested Case Proceedings*, 36 Willamette L. Rev. 219 (Spring 2000).