The NAALJ News

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LOUISIANA COURT AFFIRMS LEGALITY OF CENTRAL PANEL

On January 19, 2005 the Supreme Court of Louisiana issued its long-awaited decision in *Wooley vs. State Farm, et al,* No. 04-CA-0882. The Court denied an agency-head's challenge both to the legality and constitutionality of the Division of Administrative Law ("DAL",) the State's central panel of Administrative Law judges.

In *Wooley*, an ALJ from the DAL had conducted an adjudication to review the decision by the Acting Commissioner of Insurance ("Commissioner") that a proposed State Farm Insurance Company policy form failed to comply with the Insurance Code. The ALJ issued a final decision ordering the Department of Insurance to approve the form as submitted.

The Commissioner was unhappy with this decision, and attempted to appeal to the Nineteenth Judicial District Court for the Parish of East Baton Rouge. This appeal was denied, as an agency has no legal right to seek judicial review under state law. The Commissioner then filed a Petition for Preliminary and Permanent Injunctive Relief and Declaratory Judgment with the district court. The petition challenged both the legality and the constitutionality of the Louisiana central panel system. After various hearings to consider the Petition, the Honorable Janice Clark granted permanent injunctive relief and entered declaratory judgment in favor of the Commissioner. The decision was appealed to the Supreme Court of Louisiana.

In 1995, the Louisiana legislature enacted Act 739, which created the DAL within the Department of State Civil Service. It required the DAL to commence and handle all adjudications in the manner provided in the Louisiana Administrative Procedure Act ("LAPA".) Unique among central panels, the Act provided that the ALJ shall issue a final decision or order. No agency was granted the authority to override such decision or order. The Governor appoints, subject to Senate confirmation, a director for the DAL. The Director is responsible for employing the individual ALJs.

The second statute challenged, Act 1332 of 1999, reaffirmed the existing law and provided that no agency or official thereof shall be entitled to judicial review of the decision rendered by a DAL ALJ.

In his Petition, the Commissioner urged that the DAL was unconstitutional in that it: (1) violated the separation of powers article by vesting judicial power in executive branch employees; (2) violated the Louisiana Constitution which mandated an elected judiciary by providing for the hiring of non-elected judges; (3) divested the district courts of original jurisdiction by creating a new and independent judiciary within the executive branch, and further divested the judicial branch of its inherent power to decide matters involving questions of law; (4) resulted in the unfettered transfer of judicial power to the executive branch; (5) created a court which was not authorized by the constitution; (6) conferred power vested in an elected official of a constitutionally created office to a non-elected ALJ; and (7) usurped powers belonging to the judicial branch and transferred those powers to the executive branch.

WHILE THE ADJUDICATIVE AND FACT- FINDING POWERS EXERCISED BY THE ALJ MIMIC THOSE EXERCISED BY ARTICLE V COURTS … WE CONCLUDE THAT THEY OCCURRED IN THE REGULATORY CONTEXT AND WERE A QUASI-JUDICIAL FUNCTION RATHER THAN A STRICTLY JUDICIAL FUNCTION. THEREFORE, WE FIND THE ACT DOES NOT CONFER JUDICIAL POWER ON AN EXECUTIVE BRANCH AGENCY.

The Commissioner further alleged that Act 1332 of 1999 is unconstitutional because it: (1) violated the separation of powers article by vesting judicial power in executive branch employees; (2) did not provide for a check on the powers exercised by the executive court; (3) diminished the power of the judicial branch to decide matters involving questions of law; (4) stripped the judicial branch of its inherent power to issue writs of cert and review if the person seeking review is the agency; and (5) denied citizens and insurance consumers, through the elected Commissioner, access to the courts.

After analyzing the case law and evaluating the positions of both parties, the Court unanimously found that Act 739 authorized the ALJs employed by the DAL to exercise quasi-judicial power, and, that in the particular adjudication at issue, the ALJ exercised quasi-judicial, rather than judicial, power. The Court explained that a quasi-judicial function involved the use of some discretion, but that the discretion is ministerial in nature, and thus differs from that used in a judicial decision. Adjudicatory functions vested in the ALJs under Act 739, the court found, have traditionally been vested in the executive branch and are not solely judicial branch functions. The ALJ's exercise of quasi-judicial functions is therefore constitutional.

The Court found that Act 739 did not divest district courts of original jurisdiction, as the approval of insurance forms is not a traditional "civil matter" within the meaning of the courts' constitutional grant of original jurisdiction. The Court concluded that the Commissioner had not satisfied his burden of proving that the legislature's enactment of Act 739 of 1995 was in violation of any constitutional provision.

The legislative history of Act 1332 was reviewed. The statute was enacted to promote fairness to prevailing private litigants and prevent them from having to compete against the power and financial resources of the State, which allow the State to appeal cases for years. The Court stated that the Louisiana Constitution's Declaration of Rights was not fashioned to protect government entities against unjust government action. Consequently, unlike a "person," the state agency/Commissioner has no due process rights, no constitutional right to property, and no constitutional right of access to the courts. Such rights must be granted by statute. This lack of right to appeal was viewed by the Court not as a usurpation of judicial power by the ALJ, but as a lack of procedural capacity on the part of the agency/Commissioner.

The Court concluded that the Legislature could define the appeal rights of state agencies from decisions made by other state agencies. The lack of a right to appeal did not change the nature of the ALJ's power from quasi-judicial to judicial, and did not violate separation of powers.

The Supreme Court determined that the district court judgment declaring these Acts unconstitutional was null and void, and ordered that the judgement be "reversed, vacated, and set aside."

By Ann Wise, Director, DAL

Editor's note: See the CorkBoard on the NAALJ webpage for a link to the full decision

"SPRINGTIME IN SAVANNAH" THE 2005 NAALJ MID-YEAR CONFERENCE

Enjoy Spring in Savannah, Georgia, at the **2005 Mid-year NAALJ Conference** from May 8th to 10th. Stay at the world-class resort Westin Spa and Golf Resort Hotel, located on its own island across from Savannah's Historic District. (**www.westinsavannah.com**). Reserve your room directly by contacting the Westin **by April 7, 2005**, and mention the "National Association of Administrative Law Judges Mid-Year Conference" to receive the special and unbelievably low rate of $103 per night (plus applicable taxes and fees).

The Registration fee for the conference is $275 per person. Take advantage of a special offer and register by March 15, 2005 to get a reduced registration fee of $235 per person. A registration form is attached, and one will also be sent to all members.

The conference educational program is designed to change the way in which you project yourself as an adjudicator and discern the evidence that is proffered. The conference program captures the best information that social science has to offer and presents it to you in a novel and entertaining manner. This program can help improve the way adjudicators project themselves by:

- Projecting a neutral and detached judicial demeanor
- Discerning and attending to their perceptions
- Challenging and enhancing their view of judicial ethics
- Learning to respect the fallacies of photographic evidence
- Insuring their safety and that of others in their daily interactions with the public

You will be instructed by an impressive faculty of presenters and will learn from your fellow conference attendees in small group encounters. The faculty includes persons with an impressive
array of credentials and experience. You will be instructed by law professors and professors of social science, as well as respected members from the law enforcement community, the media and the bench. Last, but not least, you will be entertained with stories of Savannah's most colorful characters and learn first-hand the power of the printed word.

For your "downtime," and for those of you with a taste for adventure, the Westin Resort has host of leisure activities. At The Westin Savannah Harbor Golf Resort & Spa, golf and tennis are just a few of the luxurious options. Imagine swims in a waterfront pool, kayaking along quiet marshes, and spa treatments that make you feel reborn. Or if you are so inclined, enjoy a fishing expedition from our 400ft deepwater dock that takes you into the waters off the Georgia coast**!**

The city of Savannah has more than 20 tour companies with a wide array of tours to meet anyone's interests, be they architectural, Civil War, eco-tourism, or Savannah's haunted history. Visit Wormsloe Historic Site and re-live the first days of the colony at one of Georgia's only surviving examples of plantation life. Take a picturesque drive up the Avenue of the Oaks to journey back in time to see how Savannah's first settlers tamed the new wilderness. Track battles from the War of 1812 and the Civil War at Old Fort Jackson, Fort Screven and Fort Pulaski. Go back in time and visit eighteenth and nineteenth-century architectural excellence at the King-Tisdell Cottage, Juliette Gordon Low Birthplace, Andrew Low House, Davenport House and Owens-Thomas House. Discover the contributions of Africans to the American tapestry at the Ralph Mark Gilbert Civil Rights Museum or visit one of the South's oldest art museums, the Telfair Museum of Art (www.telfair.org). You also may want to visit the Savannah Chamber of Commerce website which is located at www.savannahchamber.com to help plan for your free time. There are several other useful websites to help plan your visit, including: www.riverstreetmarketplace.com, www.savcvb.com, www.savannah-visit.com and www.tybeevisit.com

For additional information, please contact Ana Kennedy, president of GAAJ, at (404) 651-9643.

31st ANNUAL MEETING IN BALTIMORE FEATURES SPECTACULAR DRAMA

The 31st Annual meeting of the National Association of Administrative Law Judges was held in Baltimore, Maryland, from November 3, 2004, through November 7, 2004. The conference featured many informative sessions, as well as a few new "twists" not seen in previous conventions. The first of these was a presentation of an original drama written by NAALJ member Paul B. Handy, an Administrative Law Judge with the Washington D.C. Office of Administrative Hearings**.**

The production, entitled simply *"Merryman,"* was based on several true incidents during the Civil War. The action begins on May 25, 1861, when John Merryman is arrested and imprisoned at Fort McHenry Garrison in Baltimore. Merryman, a Baltimore County landowner and politician, is held on suspicion of treason because of his participation in a confrontation with federal troops passing by train through Baltimore to defend Washington on April 19, 1861. Merryman was a known Southern sympathizer and led a group of men to blow up train bridges leading into Maryland. The federal troops stationed at Fort McHenry held Merryman without charges or access to counsel.

A petition for writ of *habeas corpus* was filed in the federal Circuit Court, and Chief Justice of the U. S. Supreme Court Roger B. Taney sat in circuit and presided over the case. When Taney found good cause in the petition, he issued an order to the federal garrison to produce Merryman for a trial as to the legality of his detention. The commanding officer, General Cadwalader, refused to do so, because President Lincoln had suspended the writ of habeas corpus. Taney then issued an opinion declaring that the president had no power to do so.

It is particularly significant that Chief Justice Taney presided over this case. Taney, a native of Frederick, Maryland, was appointed to the United State Supreme Court by President Andrew Jackson in 1837 as the successor to Chief Justice John Marshall. Taney receives high marks by Court historians; but, unfortunately, his reputation remains sullied by his decision in the Dred Scott case, which is generally considered as one of the provocations for the civil war. Concerning the Merryman decision, Justice Robert H. Jackson wrote, "Had Mr. Lincoln scrupulously observed the Taney policy, I do not know whether we would have had any liberty."

The remainder of the play cut between the increasing desperation of the men who are imprisoned at Fort McHenry and the debate between Lincoln and Taney over the

methods that may be used to fight the war. Merryman is joined in prison by Francis Key Howard, the grandson of Francis Scott Key (an historical aberration since Howard was arrested after Merryman was released). Key of course had been imprisoned on a British warship in Baltimore harbor when he wrote "The Star Spangled Banner" in 1814. Key actually would have been looking toward the spot where his grandson was imprisoned. The debate between Lincoln and Taney extended to the virtues of slavery and the nature of the republic. It was resolved only because Lincoln has the troops and Taney does not. However, Lincoln quietly releases Merryman after the crisis in Maryland passes.

This play was directed by Peter Toran of the University of Baltimore. It featured six characters, all male: Merryman, played by Marc Nachman, ALJ from the Maryland Office of Administrative Hearings; the jailer, Sgt. Wilkens of the Pennsylvania Volunteers, played by Patricia Smith, Maryland Office of the People's Counsel; Justice Taney, portrayed by Richard Bourne, Professor of Law from the University of Baltimore; Colonel Lee the adjutant of General Cadwalader, played by Joan Davenport, Hearing Officer with the D.C. Commission on Human Rights; President Lincoln, portrayed by John Hardwicke, NAALJ Executive Director; and Howard, played by Stacey Anderson of the Office of the People's Counsel. The presentation lasted a little less than one hour, and was followed by a panel discussion about the Civil War in Baltimore and the use of power to suppress rebellion in a democracy.

The play was a resounding success, and plans are underway for the Administrative Law Section of the Maryland State Bar Association to present the play again at the Association's annual convention in June.

NYSALJA'S VOICE HEARD BY GOVERNOR AS IT SPEAKS OUT FOR BETTER ADMINISTRATIVE PROCESS

By Michael S. Danziger

In September 2004, Hon. Catherine Bennett, immediate past president of the New York State Administrative Law Judges's Association (NYSALJA), corresponded with New York State's Governor George Pataki concerning legislation being presented to him for executive action.

The proposed legislation would have amended the New York State Public Health Law provisions concerning New York State's disciplinary hearing process for physicians, physician assistants and specialist assistants. NYSALJA requested the Governor's consideration of a Chapter Amendment of the provision of this Legislation which would have allowed immediate appeals from any ruling by the presiding administrative officer during the hearings. The appeal could have effectively halted the hearing until the challenged ruling's fate had been decided. This provision was referenced in the legislation as Public Health Law § 230(10)(f), as renumbered.

By way of background, New York Public Health Law § 230(10) sets out the procedures for the hearings, providing that three member Hearing Committees from the Board for Professional Medical Conduct will make findings of fact, conclusions and a determination on physician disciplinary charges. Public Health Law § 230(10)(e) authorizes administrative officers to make rulings on all motions and objections at the Hearings and to draft the Hearing Committee's determination. The statute provides that the Commissioner of Health shall designate as administrative officers persons admitted to practice as attorneys in New York. Currently, a physician aggrieved by any rulings by an administrative officer can appeal those rulings, following a hearing, pursuant to Civil Practice Law and Rules Article 78, in the same manner that any licensee or party facing disciplinary action may challenge a decision in any State administrative proceeding. The proposed legislation would have amended the Public Health Law to provide, in part, that:

"Any ruling by an administrative officer may be immediately appealed to a senior administrative officer."

The Legislation provided no definition for what "immediately appealed" meant and no definition for the term senior administrative officer. The Legislation also failed to specify any appeal process. The sponsor's bill memo did not provide for a definition or appeal procedure and indicated only that current law requires that an administrative hearing must conclude before an appeal may be made to a judicial court.

No other administrative proceedings under New York Law provide for immediate appeals from rulings by administrative officers, administrative law judges or hearing officers. The Legislation and the memo provided no explanation about the need for immediate appeals in these hearings. NYSALJA expressed concern that the legislation would greatly delay such hearings by allowing an appeal from any ruling by an administrative officer, no matter how routine or innocuous. An obstructive litigator could use that appeal system to delay hearings interminably. An appeal at the moment a party objects to an officer's ruling would also cause logistical problems, may place the administrative officer in the role of a litigant to defend his/her ruling and would deny the senior administrative officer a transcript, and record necessary to making an informed decision. The wording in the memo also raised the possibility that the immediate appeal may have meant an appeal to the courts prior to a hearing's conclusion. This would represent a radical departure from the traditional method for reviewing New York administrative decisions, with no explanation in the legislation or the memo as to the need for the radical departure. NYSALJA believed that the immediate appeal for every ruling would have undermined an administrative officer's ability to control the hearing and conduct it expeditiously. This provision could have been so disruptive as to result in a virtually unworkable process. NYSALJA 's Executive Committee determined that NYSALJA would take all actions it felt necessary and proper to convince the Governor that this proposal would be extremely detrimental to the administrative process. NYSALJA officers met with various parties in regard to the proposal in order to gain support of NYSALJA's position in opposition thereto.

On December 16, 2004, Governor George Pataki, expressing concern that the bill could result in unnecessary and inappropriate delays in the process of disciplining medical professionals, and impede efforts to protect the public against such misconduct, vetoed the legislation.

In the Governor's official "Veto Message" NYSALJA was prominently listed (the only other association from the legal profession mentioned was the New York State Trial Lawyers Association-also an opponent of the legislation) among the interested parties who voiced opposition to the proposed legislation. NYSALJA was extremely gratified by the positive response from the Governor to its involvement and sees its voice in "political" matters such as this evolving into one of some importance. NYSALJA will continue to express its opinions in the political arena with force and confidence.

EXECUTIVE DIRECTOR ANNOUNCES EXTENSION OF UB/NAALJ JOINT VENTURE

At the annual meeting, the NAALJ Board of Governors acknowledged the excellent service rendered by John W. Hardwicke as the Association's Executive Director throughout the year, and voted to continue the agreement through the calendar year 2005.

In other news, the University of Baltimore has elected to extend the joint venture with NAALJ until at least February 1, 2006. This assures the Association of a home and the services of support staff in its upcoming activities.

US DISTRICT COURT UPHOLDS IMMUNITY FOR ADMINISTRATIVE LAW JUDGES/HEARING OFFICERS

By Hon. Ann Breen-Greco

The U.S. District Court, Eastern District of Michigan, on October 8, 2004, ruled that a Hearing Officer ("HO") was entitled to quasi-judicial immunity because the role as hearing officer entitled the HO to preside over hearings, take evidence, oversee proceedings and use discretion to issue final decisions. Accordingly, because claims against the HO were based on discretionary judgments issued while in the adjudicative role, the HO was immune from liability and the claim was dismissed as to the HO. *WALLED LAKE CONSOLIDATED SCHOOLS, Plaintiff/Counter-Defendant, V. Jane DOE, A Minor, And Her Parents, John DOE And Mrs. DOE, Defendants/Counter-Plaintiffs/ Third Party Plaintiffs, V. MICHIGAN DEPARTMENT OF EDUCATION..., 104 LRP 46275.*

This ruling was issued shortly after a Special Education Hearing Officer was allowed to be deposed, in a different matter. In this unrelated matter, neither the agency nor State Attorney General filed a Motion to Quash the Subpoena. The deposition was taken as part of administrative review of one of his decisions. The complaint for review had alleged "bias" and that he lacked training and qualifications to do hearings. The agency did not file a Motion to Quash the Subpoena because the agency's legal staff determined that, based on research, HOs had a "quasi judicial" function and did not enjoy full immunity as did judges. Also, the legal staff indicated that they only allowed the ALJ to be deposed regarding his "qualifications and training."

In a case involving the federal Social Security Administration, there was a similar issue of an ALJ's qualifications, *Ward v. Shalala*, 898 F. Supp. 261 (D. Del. 1995). The court prohibited discovery, determining that ALJs are independent adjudicators. The complainant argued that applicants for disability benefits have no way of knowing if the ALJ is qualified to make the decision, and that the ALJs are not independent adjudicators. The complainant asked the court to rule that the Secretary must require ALJs to provide a curriculum vitae showing the ALJ's "education, work experience, years as an ALJ, favorable versus unfavorable decision record, decision record based on various types of conditions, and his/her record in Federal Court cases." (D.I. 10 at 26.) The Court cited *Butz v. Economou*, 438 U.S. 478, 513-14, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978), a landmark decision for ALJ judicial independence:

> This Court finds that as a group ALJs are independent adjudicators and that sufficient safeguards exist to protect applicants from unqualified ALJs. Specifically, the process of agency adjudication is currently structured so as to assure that the ALJs exercise independent judgment on the evidence before them, free from pressures by the parties or other officials within the agency.

ALJs may not be assigned duties that are inconsistent with their responsibilities as an ALJ, 5 U.S.C. § 3105, and they may not communicate ex parte with anyone inside or outside of the agency about the facts of a particular case, 5 U.S.C. § 557(d)(1). The Court, accordingly, found that the complainant's claim that ALJs are not independent adjudicators was not supportable, nor in light of the multiple levels of review, including the District Court, was there a necessity for ALJs to present to claimants a curriculum vitae.

Another case addressed the issue of alleged ALJ bias. In a class action suit involving the DHEW, the district court allowed discovery including the deposition of the Judge's law clerk. The Third Circuit reversed. Generally agencies try to set up an administrative process to resolve bias complaints so that the courts review the record only. An inspection of the decisional process of an ALJ occurred in an earlier ruling in the same case. Reviewing the denial of disability benefits, pursuant to the Social Security Act, 42 U.S.C. § 405(g), the district court of the middle district of Pennsylvania certified a class consisting of all claimants for Social Security disability benefits who received adverse decisions from ALJ Russell Rowell since 1985. *Grant v. Sullivan*, 131 F.R.D. 436 (M.D. Pa.1990). Class action plaintiffs were permitted significant discovery into the ALJ's methods. For example, they deposed an opinion-writer who assisted ALJ Rowell in writing opinions for five years. During her deposition, under questioning by plaintiffs' counsel, the opinion-writer gave evidence concerning, among other things, ALJ Rowell's instructions concerning opinions that she was assigned to draft, his use of "stock" language in opinions, differences between his work procedures and views and those of other ALJs, the length of his opinions and the number of revisions he made, her evaluation of aspects of his work, his consultation of law books, his familiarity with and views about particular rules of law, whether she thought his opinions were principled or result-oriented, how often she disagreed with his decisions, whether she believed that his decisions discriminated against certain groups, how he viewed his role as a Social Security ALJ, whether he ever uttered racial or ethnic epithets, complaints about him from typists and secretaries, how he evaluated certain types of evidence, the number of hours he worked, his views regarding particular physicians in the area, his views regarding alcoholism and obesity, and many other matters. Id. The court noted that "Such efforts to probe the mind of an ALJ, if allowed, would pose a substantial threat to the administrative process." *Grant*, 989 F.2d at 1345.

The recent ruling of the Eastern District follows a longstanding tradition of courts which has defined ALJs as judicial officers entitled to the same protections with respect to decision writing as judges in the constitutional branch of government. It is noteworthy that the 7th Circuit has upheld the same prohibition against deposing arbitrators. ("Like judges, arbitrators 'have no interest in the outcome of the dispute between (the parties to the contract), and they should not be compelled to become parties to that dispute'." *Caudle v. American Arbitration Association*, 230 F.3d 920, 922 (7th Cir., 2000).

Since 1941 United States Supreme Court's rulings have equated federal administrative proceedings to judicial proceedings, with immunity for ALJs. The United States Supreme Court in *United States v. Morgan*, 313 U.S. 409 (1941) held that the U.S. Secretary of Agriculture should not be required to testify concerning his thought processes in issuing an order. This principle has been extended to prohibit the depositions of judges and other judicial officers. The same reasoning which applies to judicial branch judges should also apply to ALJs; they should never be subject to a deposition regarding their reason for reaching a particular decision in a case. *See State ex rel. Kaufman v. Zakaib*, 207 W.Va. 662, 535 S.E.2d 727 (2000) (in which the Supreme Court of Appeals of West Virginia issued a writ of prohibition preventing a circuit judge from being deposed) for an excellent discussion of the case law on this issue.

In 2002, the United States Supreme Court in *Federal Maritime Commission v. South Carolina State Ports Authority et al.* (certiorari to the United States Court of Appeals for the fourth circuit , No. 01-46. Argued February 25, 2002--Decided May 28, 2002) upheld its previous determination of immunity for administrative law judges.

In another case asking whether an immunity present in the judicial context also applied to administrative adjudications, this Court considered whether administrative law judges share the same absolute immunity from suit as do Article III judges. See *Butz* v. *Economou*, 438 U. S. 478 (1978). Examining in that case the duties performed by an ALJ, this Court observed:

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge ... is `functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Id.*, at 513 (citation omitted). Beyond the similarities between the role of an ALJ and that of a trial judge, this Court also noted the numerous common features shared by administrative adjudications and judicial proceedings:

"[F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitutes the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record." *Ibid.* (citations omitted).

This Court therefore concluded in *Butz* that administrative law judges were "entitled to absolute immunity from damages liability for their judicial acts." *Id.*, at 514.

In *Federal Maritime*, the Supreme Court had granted the FMC's petition for certiorari, 534 U. S. 971 (2001). The SCSPA filed a petition for review, and the United States Court of Appeals for the Fourth Circuit reversed. Observing that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment," the Court of Appeals reasoned that "[s]uch an adjudication is equally as invalid today, whether the forum be a state court, a federal court, or a federal administrative agency." 243 F. 3d 165, 173 (CA4 2001). Reviewing the "precise nature" of the procedures employed by the FMC for resolving private complaints, the Court of Appeals concluded that the proceeding "walks, talks, and squawks very much like a lawsuit" and that "[i]ts placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication." *Id.*, at 174. The Court of Appeals therefore held that because the SCSPA is an arm of the State of South Carolina,[6] sovereign immunity precluded the FMC from adjudicating Maritime Services' complaint, and remanded the case with instructions that it be dismissed. *Id*., at 179." The USSC affirmed. The Court's review of its 1978 ruling in this 2002 case clearly reflects its very strong position that ALJs are "functionally equivalent" to (judicial branch) judges and accordingly entitled to the same protections.

ALJs and judges serving on the BRB (Department of Labor Review Board) are entitled to absolute immunity for performing judicial acts. *See Butz v. Economou,* 438 U.S. 478, 513-514 (1978) (holding persons performing adjudicatory functions within a federal agency are entitled to absolute immunity: the role of an administrative law judge is "functionally comparable" to that of a judge). The BRB is itself a quasi-judicial body. *See Kalaris v. Donovan*, 697 F. 2d 376, 382-83 n.15, 393-94 n.70 (D.C. Cir. 1983) (noting that BRB is defined as 'quasi-judicial' by regulation); 20 C.F.R. §§ 801.103-801.104. Congress, in amending the LHWCA in 1972, intended to vest in the BRB the same judicial power to rule on substantive legal questions as was previously possessed by the district courts. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984). The quasi-judicial immunity available to federal officers is not limited to immunity from damages, but extends to actions for declaratory, injunctive, and other equitable relief. *See Moore v. Brewster*, 96 F.3d 1240, 1243 (9th Cir. 1996).

Quasi-judicial immunity is overcome in only two situations. *See Mireles v. Waco*, 502 U.S. 9, 11 (1991). First, a judge is not immune from liability for non-judicial actions. Id. Second, a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction. Id. at 12; *Tanner v. Heise*, 879 F.2d. 572, 576 (9th Cir. 1989) (holding judges enjoy absolute immunity even when their actions are erroneous, malicious, or in excess of judicial authority," unless they act in the clear absence of all jurisdiction).

The same protections apply to state ALJs. In *Perry v. McGinnis*, 209 F.3d 597(6th Cir. 2000), the ALJ argued that he was fair and impartial in his disposition of disciplinary cases, and that each of his decisions was a communicative act protected by the First Amendment. He further argued that in disciplining and terminating him for that expression, the MDOC infringed upon his freedom of expression. The 6th Cir. held that a Michigan Administrative Law Examiner's decisions in inmate discipline cases are protected free speech under the First Amendment, barring the judge's dismissal for failure to maintain a 90-percent guilty rate in decided cases. In *Harrison v. Coffman*, 35 F. Supp.2d 722 (E.D. Ark. 1999), U.S. District Court Judge Howard F. Sachs held that a state at-will hearing officer has a First Amendment free-speech right to decisional independence protected by the U.S. Constitution.

The case law, over decades, clearly supports the proposition that ALJs/HOs are neutral decision makers with no stake in the outcome of a proceeding and accordingly may not be made a party to that proceeding. The only purpose for deposing an ALJ is to interfere with the ALJ's independent decision making process, with an implied threat that any time someone disagreed with an ALJ's decision, the ALJ would be deposed, rather than confining the review process to its appropriate forum of having a judge review the decision to determine if it should be upheld, remanded, or reversed. When a subpoena to take the deposition of an ALJ/HO is issued the appropriate response would be first to write the attorney requesting the deposition to remind the attorney that the ALJ/HO is a judicial officer entitled to protection from such probing and being made a party to a case. If the attorney does not withdraw the subpoena, a Motion to Quash should be filed along with a Motion for Sanctions. The Motions should argue that the Motion for Subpoena to take the deposition is frivolous, citing the legal foundation that ALJs/HOs, as neutral decision makers/judicial officers, are immune and cannot be called upon to testify. The Motion can cite the case law contained herein and also remind the court that if a party can seek to depose an ALJ/HO because the party disagreed with the HO's decision then the court itself could be subject to deposition by the party receiving an adverse ruling in this dispute.

(Note: a number of ALJs, both in NAALJ and NCALJ, contributed their thoughts and provided case law for this article.)

CYGAN WINS 2005 ROSSKOPF AWARD

By Ed Schoenbaum

Stanley J. Cygan received the Victor J. Rosskopf Award from President Chris Graham on Friday, November 5, 2004, at the Annual Meeting of the National Association of Administrative Law Judges in Baltimore, Maryland.

Stan, called by some the "institutional memory" of the NAALJ, has served this association is many ways over the 28 years since he joined in 1976 the National Association of Hearing Officers (NAHO), now known as the National Association of Administrative Law Judges. Stan was the person who handled the incorporation of the association in 1979. While he was not one of the founders that organized the NAHO in 1974, he knew those founders from having worked with them as a young administrative hearing officer. He served as Secretary of NAALJ through the eighties and as President of the NAALJ from 1991-1992.

Stan was the first and only person to serve as the Managing Editor since the Journal of the NAALJ began in 1980. He has also written several articles for the Journal and the Newsletter of the association. He was the director of the NAALJ Judicial Salary Survey for a number of years. That survey led to action by the American Bar Association House of Delegates adopting a recommendation calling for states to improve the salaries of administrative law judges. He also chaired the committee that drafted the NAALJ Model Code of Judicial Conduct for State Administrative Law Judges.

Stan also long promoted the title "Administrative Law Judge" for all administrative hearing officers and was an early proponent of independent centralized offices of administrative hearings separate from the agencies over whose hearings they preside.

He recruited me to serve as Chair of the NAALJ Fellowship Committee in its third year. I was fortunate that the Honorable John Hardwicke was the first recipient under my leadership. The Fellowship Committee chair has rotated with the immediate past Fellow being the chair for the next year. The Fellowship Committee is made up of the past Fellows beginning with John Hardwicke.

Stan will be sharing the history of the NAALJ at our annual meeting in Chicago sometime between October 30 and November 2, 2005. His paper will also be published so that all will have a better appreciation of our association.

Stan has served as President of the Illinois Association of Administrative Law Judges and for several years has been its treasurer. He has also served as Chair of the Administrative Law Committee.

JUDGE SAMMIE CHESS HONORED

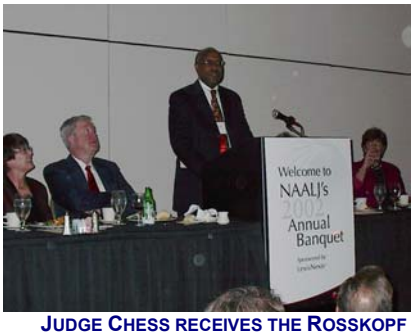
By Julian Mann

Administrative Law Judge Sammie Chess has a long and distinguished legal career that is receiving increasing recognition as he approaches retirement. As a civil rights lawyer in the 1960s, Sammie Chess was responsible for numerous land mark cases that challenged desegregation in the South. He often teamed up with his friend and famed civil rights lawyer, Julius Chambers, to forge a path that dramatically reduced the legal barriers that restricted access to schools, accommodations, and employment. Judge Chess has served as an administrative law judge in the North Carolina Office of Administrative Hearings since 1991.

In 1971 Governor Robert Scott appointed Chess to the Superior Court bench in Guilford County. He was not only the first African American to serve as a Superior Court Judge in North Carolina, but he was also the first African American to be appointed to the trial bench in the entire South. In August of 2004, the National Bar Association, made up of 20,000 minority lawyers, judges, educators and law students, named Judge Chess to the Association's Hall of Fame at its annual meeting in Charlotte. Supreme Court Justice Thurgood Marshall is also a former recipient.

On September 30, 2004 Judge Chess was honored in a formal ceremony in the High Point Courthouse with the unveiling of a commissioned oil portrait that will be permanently and prominently displayed in recognition of his exemplary service as an administrative and superior court trial judge as well as his exemplary service as a civil rights trial lawyer.

Many of Judge Chess' friends and colleagues paid tribute to his impressive career at the dedication ceremony, which was followed by a reception at the High Point Country Club. Judge Chess presides over numerous administrative law trials from his office in the High Point Courthouse.



JUDGE CHESS RECEIVES THE ROSSKOPF

Members of the National Association of Administrative Law Judges, including those in attendance at the ceremony, recalled that Judge Chess was a past member of the NAALJ Board of Directors and that he was also the recipient of the Association's highest honor, the Victor Rosskopf Award, which was bestowed at the dinner banquet held as part of the 2002 Annual Meeting held in Lexington, Kentucky.

NAALJ WEBSITE RECEIVES EXTREME MAKEOVER

The Internet home of the National Association of Administrative Law Judges (http:/www.naalj.org) is in the process of its first "extreme-makeover." The entire website staff is working diligently to implement Executive Director John Hardwicke's vision of the website, wherein the page will serve as an all-encompassing clearing-house of information for the members of the administrative law community.

In addition to Judge Hardwicke, his assistant Keisha Whitehall, and webmaster Mike Nolan, the Association has been fortunate enough obtain the services of James McCarthy, a student in the data information program at Loyola College. Jim is serving an internship for credit, working under the supervision of Dr. George Wright, a professor in the program. The internship was arranged through Phoebe Sharkey, wife of MDCAAA President Bob Sharkey, who teaches at the school.

Jim's first project has been the preparation of and inclusion of the biographies of the speakers at the recent annual meeting. He is also in the process of developing a uniform format for consistent use throughout the website, replacing the current "hodgepodge" of designs, which have resulted throughout the website as the years have passed.

All members are encouraged to visit the website and submit any suggestions to either Mike Nolan, at amnolan@naalj.org or to John Hardwicke, at jhardwicke@naalj.org. Jim can be reached at jmccarthy@naalj.org.

NEWS FROM THE STATES

ARKANSAS:

By David Mackey

Many members of the Arkansas Association of Administrative Adjudicators (ArkAAA) were involved in the preparation for, and presentation of, the 2004 ArkAAA Conference. (42 attended) and the Arkansas Bar Association's Administrative Law Section Conference for 2004 (44 attended). Professor Gregory Ogden of Pepperdine University was the featured speaker at both conferences. ArkAAA members Owen Floyd, David Mackey, Toni White, Tom Clark, Robert DeGostin, Robert Hunt, and Lech Matuszewski were presenters at the ArkAAA Conference.

ArkAAA members Professor Morell E. Mullins, Toni White, Shannon Mashburn, and David Mackey were presenters and program planners at the Bar Association's Conference.

In other activities, ArkAAA member Robert Hunt participated as a Judge for the Mock Trial competition at the Little Rock Parkview High School. The affiliate congratulates Toni White who has been elected to a position on the NAALJ Board of Governors.

IOWA

By Steve Wise

The Iowa Association of Administrative Law Judges has continued its tradition of providing outstanding continuing legal education to judges and administrative law practitioners. On April 20, 2004, Judge Gina Hale from the state of Washington was our focal point presenter at the Spring ALJ CLE on the topic of "Professionalism and Judicial Independence." The Spring CLE also included sessions on using interpreters, handling pro se litigants, scientific and technical evidence, and managing stress. After the CLE, the Association held its annual meeting and elected the following officers for the 2004-2005 term: Steve Wise, president; Lynette Donner, vice president; Maggie LaMarche, secretary; and Phil Deats, treasurer.

The Fall ALJ CLE was held on October 26, 2004, with our focal point presenter, Professor Jim Rossi, speaking about "Contemporary Issues in Administrative Law." Other sessions carrying forward this theme included emerging technology in administrative hearings, ethics for ALJs, and courageous legal writing. We had 65 attendees including federal ALJs, judicial branch judges, an ALJ from Nebraska, and our usual audience of Iowa ALJs, agency board members, and administrative law attorneys. Steve Wise was sent as Iowa's representative to the annual conference and meeting in Baltimore, Maryland, and was elected as a NAALJ board member at the annual meeting.

Everyone should mark their calendars and plan to attend the Spring 2005 ALJ CLE, which is scheduled for April 18, 2004, at the Botanical Center in Des Moines, Iowa. The focal point of our Spring 2005 CLE is "Credibility and Demeanor Evidence" and Professor Gregory Ogden, Pepperdine University School of Law, has agreed to be our focal point speaker. The CLE committee will distribute our finalized Agenda with a registration form as soon as it is available. If you want to be put on our CLE mailing list or have any questions, please contact Steve Wise 274-1830 STEVE.WISE@IWD.STATE.IA .

Finally, the Iowa Association of Administrative Law Judges is honored that the NAALJ site selection committee has picked our association to host the NAALJ 2006 Midyear Conference. We have a conference committee already working on putting together a conference that will be educational and enjoyable for our colleagues and friends across the country. More exciting details to come! Check out our website for updates regarding CLEs and Conferences at http://iaalj.home.mchsi.com .

MICHIGAN:

by Howard T. Spence

The governor of Michigan recently issued an executive order that creates the Michigan State Office of Administrative Hearings and Rules ("SOAHR"), a broad central hearings panel in the Michigan State government. This is a much greater movement towards a unified, independent state agency to conduct administrative hearings than has ever occurred in our state.

Additional information relating to this executive order can be obtained directly from Governor Granholm's office. Particularly noteworthy is the fact that the executive order stresses independence for hearings officers and administrative law judges. Some are probably very aware of contention that has existed in Michigan in the past regarding this issue, and also regarding the issue of whether a hearing officer can disqualify him or herself from hearing a case. That issue, and other related issues, are directly addressed in this executive order.

This executive order automatically goes into effect 60 days after the date of issuance, issued unless rejected by a 2/3 majority vote of the legislature. No such "supermajority" is anticipated against this executive order. Stay tuned to watch what is about to proceed here in Michigan in terms of changes in the hearing structure for state agencies.

NEW YORK:

By Michael S. Danziger

NYSALJA membership has grown by 5% since October of 2004. Included in this number are three new associate members. We have been focusing on a drive to increase the number of associate members. All signs point to a successful expansion of that area of our membership. We also gained three regular members. NYSALJA is offering partial scholarships to the NAALJ mid-year and annual conference to our members.

NYSALJA has also agreed to help Judge Gregory Holiday, the Chair of the ABA standing committee on minorities in the judiciary, put together the "Directory of Minority Judges of the United States-4th edition." The affiliate is specifically working on a section regarding the minority ALJs of New York State.

MARYLAND/DC

By Mike Nolan

The Maryland/DC affiliate has been very busy after the conclusion of our Annual meeting this past November, developing a full schedule of activities.

On March 10, 2005, the affiliate, in conjunction with the Administrative Law Section of the Maryland State Bar Association, will hold our annual meet-and-greet dinner with students participating in the Maryland Administrative Law classes at the University of Baltimore. This program has been extremely successful and well attended in past years. Meetings in previous years have been held as luncheons, but this year we are meeting in the evening. The MDCAAA and the MSBA have agreed to pay for the students' meal, and both the students and the professionals agree that the interaction helps the students develop a better understanding of the field.

In addition to these activities, we have again begun holding our regular 3rd Monday monthly luncheon meetings, with local speakers addressing a wide variety of topics. On March 21, 2005, we are meeting at the Office of The Public Service Commission in Baltimore. The April meeting will be at an undisclosed location in DC, and the May back in Baltimore. Also in May, we are having a MDCAAA night at the stadium to watch our own Orioles beat the Philadelphia Phillies. In June, our annual meeting and election of officers will be held at the offices of the D.C. Human Rights Commission.

Plans are also underway for our annual Administrative Law Essay competition. The competition offers cash prizes, and the winning essay will be considered for publication in the NAALJ Journal. In past years we have solicited entries from the five DC law schools as well as the two located in Maryland. Plans for the 2005 contest have not been finalized as of the publication deadline.

NAALJ-NJC CONNECTION ENHANCES ADR IN THE ADMINISTRATIVE FORUM

By Lynda Lee Moser

The National Judicial College (NJC) is again offering its course on Mediation for Administrative Law Judges. The setting for this year's course will be the college campus in Reno, Nevada, from March 13th through March 18th.

ALJs from around the country teach this intense five-day training course that is geared toward mediation in the administrative forum. The faculty for this year will again feature Marshall Snider (CO), Nancy Lynch (TX) and Phyllis Reha (MN). Newer to the faculty is myself. My part is small compared to the offerings from Marshall and Nancy and Phyllis. But I am honored to be among such stellar faculty. These three ALJ mediators are the best of the best!

Last year's course was set in beautiful Atlanta, Georgia. Course participants included ALJs from around the country. Three came from the Administrative Procedures Division for the state of Tennessee. Another three came from the Department of Consumer and Regulatory Affairs in Washington DC. The other ALJs came from Virginia, West Virginia, Ohio and Colorado. Participants included more than ALJs, however. A liquor control administrator came all the way from Hawaii. Three agency attorneys came from the U.S. Merit System Protection Board in Washington, DC, as did one paralegal. Such diverse participation illustrates the growing interest in ADR within the administrative forum.

The advantages of the NAALJ-NJC connection are readily apparent. The ALJ faculty and participants in last year's course are current or past NAALJ members. The NAALJ ADR Training Committee helped create the curriculum for this course offering at the NJC. In turn, the NJC, by increasing its curriculum offerings for the ALJ through courses like this one, fosters the credibility necessary for ALJs and administrative law to become widely recognized in the world of competent court jurisdiction. Together, NAALJ and the NJC are not only increasing the visibility of the administrative process, but also enhancing the role of ADR in the administrative process.

Apart from the NAALJ-NJC connection, NAALJ offers its own curriculum that enhances the role of ADR in the administrative process. The ADR break out session at the NAALJ 2004 annual meeting in Baltimore featured Phyllis E. Bernard. Ms. Bernard is a Distinguished Professor of Law and Director of the Center on Alternative Dispute Resolution at the Oklahoma City University School of Law. Professor Bernard is also the Director of the Early Settlement Center Mediation Program. Many NAALJ members might recall that Professor Bernard spoke at the annual NAALJ meeting in 2001 in Austin, Texas.

The NAALJ Journal published an article by Professor Bernard in its Spring 2003 edition. The article, entitled "The Administrative Law Judge as a Bridge Between Law and Culture," focuses on the role of the ALJ in mediating diverse expectations of persons from diverse backgrounds. This diversity stems from the differences in individual backgrounds and governmental purpose when parties attempt to resolve conflicts between themselves that arise from governmental regulatory oversight and legislative control. In part, Professor Bernard's article focuses on how ADR in the administrative forum can facilitate an informal understanding of norms and expectations between diverse parties.

NAALJ invites you to support ADR in the administrative forum by joining either or both of its two ADR committees or by attending an ADR break out session at an upcoming annual meeting. NAALJ also invites you to take the course in Mediation for Administrative Law Judges through the NJC.

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