

From: Hanks, Russell (OTDA)
Sent: Thursday, July 09, 2009 9:56 AM
To: otda.dl.hear.aljs
Subject: supervisory changes to decision drafts

Recently a few hearing officers have expressed a lack of clarity regarding OTDA policy involving supervisory changes to draft decisions when the hearing officer doesn't make the suggested changes. This practice was directly addressed in Executive Order 131. Subsequent to the issuance of the order, then General Counsel Susan Demers sent a memo to all hearing officers setting forth the agency's actions to comply with the order, specifically the Executive Order's requirements in those circumstances where a hearing officer fails to comply with the drafting guidance of a Supervising Hearing Officer, necessitating that the changes be made by the Supervising Hearing Officer. Rather than reiterate the contents of General Counsel Demers' memo I have attached a copy of it. The relevant text is found in the next to last paragraph.



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M E M O R A N D U M
DSS-524E

TO: All Hearing Officers

DATE: February 1, 1990

FROM: Susan V. Demers *SD*

SUBJECT: Executive Order No. 131

On December 4, 1989 Governor Cuomo issued Executive Order No. 131 to ensure that the State's administrative hearing system operates in an impartial, efficient and timely manner. The Order requires every agency that conducts administrative hearings to adhere to the general principles enunciated in the Order and to develop an administrative adjudication plan for its hearings process.

The general principles include a strict prohibition against communicating about the merits of pending administrative hearings except upon notice and opportunity for all parties to participate. However, hearing officers may consult on questions of law with supervisors, other hearing officers, or Department attorneys who have not been engaged in the investigation or prosecution of the matters giving rise to the administrative hearing under consideration, or any factually related administrative hearing.

The impact of the Executive Order on the Office of Administrative Hearings is minimal and requires the following two actions on our part.

In order to ensure the separation of hearing and program functions, and to ensure the impartiality of the Office of Administrative Hearings, a new structure will be implemented for the Office of Administrative Hearings. The position of Associate Commissioner for Administrative Hearings has been created, and I will shortly begin recruiting to fill that position. In the interim, the Bureau of Fair Hearings will continue to be supervised by Acting Deputy Counsel Russell Hanks, who will report directly to me effective today. The Bureau of Special Hearings will continue to be supervised by Deputy Counsel Peter Mullany who will also report directly to me. Previously, Russell and Peter had reported through John Robitzek, who was the Acting First Deputy Counsel. A new position of Associate Commissioner for Legal Affairs has been created and John will serve in that capacity. The Executive Order requires that this separation of functions occur and this revised reporting structure satisfies that requirement.

The second change in the Office of Administrative Hearings practice required by the Order concerns the issuance of hearing decisions. In those rare circumstances where a decision is issued which includes findings of fact or conclusions of law which conflict with the findings, conclusions, or recommended decision of the hearing officer, the reasons why a conflicting decision was reached must be set forth in the decision. Nothing in the Order precludes 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 that decisions meet the quality standards of the Department and are consistent and legally sound. The reasons for reaching a conflicting decision must be set forth only in those rare instances where, despite being advised that an error of fact or law or other error has been revealed by a review of the hearing transcript and the recommended decision, the hearing officer fails to make necessary changes to the decision and the Commissioner's designee must make the changes. In all other respects the practices and procedures of our office meet or exceed the requirements of the Order and no other changes in practice or procedure will be implemented.

If anyone is interested in reviewing the plan, it will be available for public review as of today. Requests for copies of the plan should be directed to Sharon Silversmith. Questions about the plan and its impact should be routed through appropriate supervisory staff to Russell Hanks or Peter Mullany.

SVD/RJH:mh

bcc: Commissioner Perales
Barbara Sabol
John Robitzek