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Testimony of Shirley Bergert¹ Before the Judiciary Committee on March 24, 2006 Regarding SB 432, An Act Establishing a Demonstration Project for an Office of Administrative Hearings

Recommended Action: Support bill to ensure independent hearings

Legal services staff throughout Connecticut have handled many hundreds of administrative hearings before DSS, representing destitute individuals in need of subsistence benefits, including essential medical treatment. We are acutely aware of problems with the hearing process that interfere with basic fairness.

A bill creating an independent office of administrative hearings was proposed during the Weicker administration. At that point, the head of administrative hearings for the Department of Social Services (DSS) instituted a series of improvements in the hearing process. As a result of those improvements, legal services did not support the bill.

Over the years, our staff met with DSS representatives regarding improvements in the handling of hearings. Of utmost importance is the maintenance of a fair system that adheres to the principles of constitutional due process as articulated in the Administrative Procedure Act (CGS §4-176e, *et seq.*), the law governing DSS hearings (CGS §§ 17b-60 and 17b-61), and the agency's regulations. This includes an independent hearing officer who prepares decisions based only on the hearing record, with no *ex parte* communication regarding factual or legal matters.² Since the vast majority of individuals who challenge DSS actions are unrepresented, and the population served by that agency is disproportionately disabled relative to the general population, a fair process is critical.

DSS has re-structured its administrative hearings unit in a way that limits the independence of hearing officers, rendering ineffective our advocacy regarding improvements. This unit is subsumed into the "Office of Legal Counsel, Regulations and Administrative Hearings" (OLCRAH) a conglomerate of functions that operate at odds with one another and structurally interfere with the independence of hearing officers, particularly when a DSS policy or statutory or case interpretation is involved.

OLCRAH is supervised by the Commissioner's counsel, and she supervises agency attorney staff, as well as administrative hearings staff, while pursuing the Department's policy positions and interpretations in administrative and

¹ I have practiced law representing low income persons in administrative matters in Connecticut since 1975. The bulk of this practice has been before the Connecticut Department of Social Services and its predecessor agencies.

² Communication with only one party in a case without notice to any other party, essentially secret communications that can affect case outcome. See *Matrone v. Lensick*, 541 A.2d 488, 492 (1988).



court cases. Attorneys in this office advise field and policy staff around the state and the Commissioner. They participate in drafting and interpreting agency regulations and court decisions for the agency. These are legitimate functions. The problem arises because *they also advise hearing officers in appeals challenging the actions of such staff or the Commissioner.*

In a recent proceeding before the Freedom of Information Commission, these attorneys indicated they do not keep records of advice provided and parties involved, to ensure conflicts don't arise when subsequently consulted by a hearing officer, trusting they will notice if this happens. It is not readily discernible when they have advised field staff and, in the context of hearings, whether they represent and advise the hearing officer or DSS staff whose actions are challenged. They can be intimately involved in drafting a hearing officer's decisions, including modifications or reversals, and this too is not readily discernible to the parties involved. We can make available to you correspondence with a hearing office supervisor indicating there are private communications between hearing officers and agency attorneys without notice to individuals appealing DSS actions, confirming this is routine and acceptable within DSS.

State law (CGS § 4-181), as well as basic constitutional due process requirements, prohibit *ex parte* communication between hearing officers and individual parties in a case, including agency staff. However, such communication seems fairly routinely. In addition to situations where the hearing officer is advised by a DSS attorney pursuing its policy positions, we have seen many situations where hearing officers have communication with DSS workers and neither we nor our clients are privy to such communication. Typically its existence surfaces inadvertently.

DSS regulations prohibit anyone other than the hearing applicant from cancelling a hearing (Uniform Policy Manual §1570.10.C.). However, based on *ex parte* communication of workers indicating, not always correctly, that the problem complained of had been resolved, hearing officers cancel hearings without consultation with the hearing applicant. If the individual is unrepresented, s/he has virtually no possibility of countering such a cancellation.

While state law (CGS §17b-60) only requires a hearing applicant to state in simple language why a hearing is sought, and DSS hearing application forms attached to notices to clients regarding action taken on their cases have a unique identifier that allows DSS to trace the challenged action in its computer, the hearing office will sometimes require individuals to submit an additional more complete written statement. If the statement isn't provided, the hearing office does not schedule a hearing. Remember, these hearing applicants are destitute and many are limited by mental health, competency, retardation, literacy, limited English proficiency and learning disability issues. The more complex the hearing process, the greater likelihood individuals will not have their cases reviewed, regardless of merit.

After many years of discussion with DSS representatives, with ongoing and increasing violations of basic principles of due process and fairness, only moving the hearing staff to an independent agency is likely to result in an appropriate process. For this reason, I urge you to support SB 432, and urge you to ensure that DSS is included in this demonstration project.