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TESTIMONY BEFORE THE JUDICIARY COMMITTEE IN SUPPORT OF S. 432

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Good afternoon, committee members. I am a staff attorney with New Haven Legal Assistance Association. I regularly represent individuals before or seeking administrative hearings before the Department of Social Services ("DSS"). I am here to testify in support of S. 432, which would create a demonstration project for an independent administrative hearings office to hear appeals from several agencies, including DSS. This bill would address a serious issue of ethics in state government. I testified before you last year in support of a broader bill. That bill was not passed out of this committee. In the interim, things have only gotten worse. Access to a fair appeal process is now effectively blocked for thousands of low-income individuals denied or cut off of subsistence benefits by DSS.

The Problem:

For several years, DSS' "Office of Legal Counsel, Regulations and Administrative Appeals" has taken increasing control over the decisions issued by its hearing officers in appeals of agency actions. It now effectively prevents the hearing officers from acting impartially whenever there is a DSS position involved that the agency wants to have furthered. Its practices of interfering with hearings, and effectively writing the hearing decisions so as to favor the agency, make a mockery of the fundamental constitutional due process right to an "impartial" hearing officer, as held by the United States Supreme Court to be required in administrative appeals of welfare agency action. (*Goldberg v. Kelly*, 397 U.S. 254 (1970)). That right is in fact now codified in both state and federal regulations governing the benefit programs administered by DSS, see, e.g., 42 C.F.R. §§ 431.205(d) and 431.240(a)(3), and is also reflected in the state statute barring state hearing officers from having "ex parte" communications with parties in contested matters before them, C.G.S. § 4-181.

The manner in which DSS has distorted the hearing process is quite straightforward: We have now confirmed in several cases that:

1. The hearing officers routinely consult with their supervisors on decisions (including decisions involuntarily dismissing hearing requests) before the decisions are finalized. Those supervisors, who were not present at the hearing, sometimes rewrite and even reverse the hearing officer's draft decision.
2. In turn, these supervisors routinely consult either with their boss, the head of the "Office of Legal Counsel, Regulations and Administrative Appeals," who also is the Department's chief in-

house counsel, or with other DSS attorneys directly under her, who sometimes even represent DSS before these hearing officers, before giving guidance to the hearing officer on how to rule.

3. Hearing officers also sometimes directly consult with DSS attorneys for “guidance” on how to rule on procedural matters, such as whether to grant essential health benefits to individual claimants pending the outcome of a decision (“aid pending”). Attorneys “instruct” the hearing officer how to rule.

All of this communication occurs without notice to the individual claimant, usually unrepresented, who has requested the hearing, even to advise them that such communication has occurred.

That this is occurring on a regular basis was confirmed in a March 2, 2005 letter I received from a DSS hearing supervisor just a few days after I testified before this committee last year. In that letter, a copy of which is attached, the hearing supervisor wrote in response to my letter to a hearing officer, which had confirmed that the hearing officer agreed to provide notice if he or his supervisor consulted with an attorney regarding the case before him. At that hearing, held on February 9, 2005, the hearing officer acknowledged that his supervisor, Laura Gangi, might consult with the agency’s chief counsel about the case:

“Hearing Officer: I’m not sure what’s her course of action. She may consult with another supervisor in the unit. It’s really – I can’t really anticipate what she would do in such a situation.
* * *

Mr. Toubman: All right. So Laura Gangi might consult with Brenda Farrell, in other words, about some of the legal (inaudible)

The Hearing Officer: It’s Possible. It’s possible.”

The hearing officer supervisor disagreed that any promise by the hearing officer had been made but more importantly stated:

“[Hearing Officer] Linton is under no legal obligation to notify you of communications either of us has with attorneys in this office who provide Hearing Officers with legal advice relating to this case or any other case. Please be advised, therefore, that *you will not be notified if either Mr. Linton or I communicate with Brenda Farrell [now Parrella] or any of the other agency attorneys to seek legal advice in this case or any other case.*” (emphasis added).

The same March 2, 2005 letter attempted to defend this practice by noting that “when a hearing officer or a supervisor seeks legal advice from an agency attorney concerning issues that arise during a hearing, the Hearing Officer or supervisor is careful not to consult with an agency attorney who advised the Department regarding the eligibility determination *for that case.*” (emphasis added). This ignores basic concepts of due process as well as the reality that often two cases, while involving different individual claimants, involve the identical **legal** issue. It is not possible for the lawyer to split his or her head in two in such circumstances. Moreover, as the Connecticut Supreme Court said in Martone v. Lensink, 207 A.2d 296, 303 (1988), the state

statutory prohibition on *ex parte* communications applies not only to the facts in a case but precludes "ex parte discussion *of the law* with the party or his representative." (emphasis added).

Not surprisingly, claimants at DSS hearings inevitably lose when a DSS interpretation of a statute or regulation against the claimant is involved. It is the inherent structure of the office which creates this opportunity to compromise the hearing process. As long as hearing officers report to the same agency official who is responsible for supporting decisions that are being reviewed by the hearing officers, its lawyers will inevitably be able to improperly interfere in the hearing process. This reality is painfully demonstrated in each of the four examples attached to my testimony.

The Solution

Given the dysfunctional state of affairs as reflected in the attached examples, I am pleased to see that S. 432, which also is being supported by the Connecticut Bar Association, will finally put an end to this denial of fundamental due process rights by creating a separate, professional, central hearings panel, to handle the administrative hearings of several state agencies, such as DSS, on a demonstration basis. Following the lead of a majority of states, the bill will critically take supervision of hearing officers away from an agency which unfortunately has demonstrated itself to be incapable of providing hearings that provide basic fairness.

Myths About Independent Hearing Offices

There are some common myths perpetuated by opponents of creating a central hearings panel: that it will cost more, create another bureaucracy, compromise "expertise" among hearing officers. However, the actual experience of the other states which have gone to central panels rebuts all of these myths, as fully explained in the recent article from John Hardwicke and Thomas Ewing, the latter of whom was the chief administrative law judge in Oregon, which went to a central panel in 1999 over agency objections. ("The Central Panel: A Response to Critics," August 4, 2004). The article notes that, given the resulting efficiencies, when the Oregon legislature was considering making the central panel permanent in 2003, **not one agency objected.**

The Hardwicke/Ewing article fully rebuts the cost concerns, noting "[e]xperience has shown that a central panel is inherently more cost-effective than separate, independent hearings units. There are two reasons: economies of scale and flexibility in case assignment." By allowing the same hearing officers to continue to be housed in agencies, at least initially, Oregon also found that the **start-up costs were a mere \$92,000**, before even factoring in the economies that soon were realized. Oregon's experience was hardly unique:

"Maryland went from a total of 90 [hearing officers] prior to the establishment of its central panel in 1991 to 53 by 1993; there was a corresponding reduction in operational staff. By the second year of its existence, the OAH saved the state of Maryland almost \$828,000. ... Without the panel, New Jersey would have spent \$20 million on hearings;... it spent only \$7.5 million."

Thus, it is not surprising that **not one state that has gone to a central hearings panel has chosen to return to the system of having the agency which issued the decision hear the appeal from it.**

Need for Action This Year

Our citizens deserve a decision-maker who is not biased in favor of upholding the agency's decision -- or worse, in the case of the current DSS practice, subject to his or her decision literally being rewritten by a supervisor under the direct control of the agency's lawyer. Given the importance of ensuring ethical behavioral by state employees, this severe distortion of the hearing process designed to protect our citizens is simply intolerable.

We have recently learned the hard way that, if we don't address unethical conduct at the outset, we end up paying more down the road-- both in actual out of pocket outlays and in lost faith in the government. For these reasons alone, S. 432 should be passed. However, with the savings that will be generated by the transfer of authority to an independent agency, it also makes dollars and sense.

I therefore urge this committee to follow the majority of states and pass favorably on S. 432. Thank you for the opportunity to speak with you this afternoon.