

ATTORNEY GENERAL

March 1, 1979

HOWARD H. KESTIN, *Director and  
Chief Administrative Law Judge*  
Office of Administrative Law  
234 East State Street  
Trenton, New Jersey 08608

FORMAL OPINION NO.4—1979

Dear Judge Kestin:

You have asked for an opinion as to the effect of the Act which establishes an independent Office of Administrative Law on the existing positions of Hearing Officers and/or Examiners in the respective agencies of State government. Also, you inquire as to the effect of the State Agency Transfer Act on these positions, as such Act is expressly mentioned in the Act creating the Office of Administrative Law. For the following reasons, it is our opinion that the functions and responsibilities of Hearing Officers-Examiners in the respective state agencies, insofar as they pertain to presiding over contested cases as are required by the Administrative Procedure Act, have now been abolished and placed exclusively by the Legislature in the Office of Administrative Law. As a result, the Chief Examiner and Secretary of the Civil Service Commission should conduct an investigation in accordance with civil service laws and regulations to determine the continuing need for such positions and the tenure, seniority and demotional rights of employees serving in those capacities.

In order to properly evaluate the implications of this Act, Laws of 1978, c. 67, N.J.S.A. 52:14F-1 *et seq.*, it is necessary to briefly review its operative provisions. In its most pertinent aspect, the Act provides:

All hearings of a state agency required to be conducted as a contested case under this act or any other law shall be conducted by an administrative law judge assigned by the Director of the Office of Administrative Law, except as provided by this amendatory and supplementary act. [Laws of 1978, c. 67, subsection 8(c).

In order to implement this legislative purpose, the Director of the Office of Administrative Law shall, among other things, assign an administrative law judge to any agency empowered to conduct contested cases to preside over such proceedings in contested cases as are required by sections 9 and 10 of P.L. 1968, c. 410 (C. 52:14B-10). Section 5n. In addition, the Director may assign an administrative law judge to any agency to conduct or assist in matters other than the conduct of contested cases or administrative adjudications, including rule-making and investigative hearings, as requested by the head of an agency. Section 5o. The full-time administrative law judges referred to in the Act shall be appointed by the Governor and serve for terms of five years and until the appointment and qualification of their successors. Section 4. The Director of the Office of Administrative Law may, in addition, appoint additional administrative law judges on a temporary or case basis as may be necessary for the proper performance of the duties of the office. Section 5m.

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From this statutory framework, it is clear that the responsibility for the hearing of a contested case other than those heard by the head of the agency itself<sup>1</sup> and heretofore presided over by persons employed by the respective state agencies has now been centralized and placed by the Legislature under the supervision of a new single state agency. Typical of the hearings<sup>2</sup> that would be transferred from the departments to the Office of Administrative Law are: (1) hearings conducted by the Department of Environmental Protection required to be held "before the commissioner or a member of the department designated by him," N.J.S.A. 13:1G-13, for persons charged with violations of codes, rules and regulations of the Department, N.J.S.A. 13:1G-11; (2) hearings by the Department of Health to be held before the "commissioner or a member of the department designated by him," N.J.S.A. 26:1A-45; and (3) hearings under N.J.S.A. 18A:6-9 giving the Commissioner of Education "jurisdiction to hear and determine all controversies and disputes arising under school laws, excepting those governing higher education."

It is significant to note, however, that although the responsibility to conduct and preside over hearings of a state agency required to be conducted as a contested case has been placed by the Legislature in administrative law judges in the Office of Administrative Law, there has been no express or implicit legislative indication from the terms of the Act to transfer existing hearing officer-examiner positions or their occupants employed in the respective state agencies to the Office of Administrative Law. In fact, the general tenor of the statute providing for the selection of administrative law judges by the Governor for terms of five years suggests a legislative intent to abolish the responsibility heretofore assumed by hearing officers-examiners and place the same in the newly created Office of Administrative Law. In the event the Legislature intended to transfer the existing positions of hearing officer-examiners and/or their occupants and/or to preserve employment rights arising under Title 11, where applicable, it could have stated its intention in unmistakable terms. Therefore, it can reasonably be concluded that the Act does not provide any authority to transfer existing positions as hearing officers-examiners and their occupants employed in the operating state agencies to the Office of Administrative Law.

1. Under section 10b of the Act, it is provided that unless a specific request is made by the agency, no administrative law judge shall be assigned by the Director to hear contested cases with respect to any matter where the head of the agency, a commissioner, or several commissioners, are required to conduct, or determine to conduct, the hearing directly and individually. Moreover, it should also be noted that nothing in the Act shall be construed to deprive the head of any agency of the authority to determine whether a case is contested, or to adopt, reject or modify the findings of fact and conclusions of law of an administrative law judge. Section 9a.

2. A partial listing of other examples of the hearing function vested in the commissioners of the various departments may be found at: N.J.S.A. 17:1-8.8, (Department of Banking); N.J.S.A. 10:5-8 (Division on Civil Rights); N.J.S.A. 11:1-20 (Department of Civil Service); N.J.S.A. 55:13A-6 (Department of Community Affairs); N.J.S.A. 30:11-3, 30:11-16 *et seq.*, 30:11A-8 (Department of Human Services).

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The provisions of the State Agency Transfer Act, N.J.S.A. 52:14D-1 *et seq.*, do not alter this conclusion. Section 11 of the Act provides that it shall be subject to the provisions of the State Agency Transfer Act. In order to determine the effect of those provisions, it is important to review the terms and general purpose of the State Agency Transfer Act.

The State Agency Transfer Act was enacted in 1971 and its title indicates that it is

An act concerning the organization and reorganization of the State Government, relating to the transfer of functions, powers and duties from one agency to another by law. . . .

In its operative provision, the Act provides that "[w]henever by law *an agency* of the State Government *is transferred*, the provisions of this Act shall apply unless otherwise provided by the act effecting such transfer." N.J.S.A. 52:14D-3. The Act then provides a means for the transfer of appropriations and other monies available to the transferor agency and the rights of employees under Title 11, Civil Service, and any pension law or retirement system as a result of such transfer.

From its terms and its purpose, the State Agency Transfer Act has no application to the present situation insofar as it bears on hearing officers-examiners in the several state agencies. That Act was principally enacted to deal with the implications of reorganizations in the agencies of State government where the same is effected by law. In this sense, this law would seem to complement the provisions of the Executive Reorganization Act or in instances when substantive governmental reorganization is accomplished by direct legislation. In this instance, there has been no expression of legislative intent to reorganize or transfer any of the agencies of state government to the Office of Administrative Law but merely to place a new function or responsibility in that agency. Therefore, it can be assumed to have been the probable legislative intent in including a reference to the State Agency Transfer Act to refer solely to the rights of those employees heretofore employed by the predecessor agency, Division of Administrative Procedure, now transferred to the Office of Administrative Law.<sup>3</sup>

For these reasons, it is our opinion that the identified functions, powers and duties heretofore exercised by hearing officers-examiners employed by the several state agencies insofar as they pertain to presiding over contested cases has been placed by the Legislature in administrative law judges employed by the Office of Administrative Law. Further, it is also our opinion that the functions of hearing officers-examiners in the respective state agencies insofar as they pertain to presiding over contested cases have been abolished by reason of the enactment of Laws of 1978, chapter 67. The Chief Examiner and Secretary, in accordance with normal

3. "All the functions, powers and duties heretofore exercised by the Division of Administrative Procedure in the Department of State pursuant to the Administrative Procedure Act, P.L. 1968, c. 410 (C. 52:14B-1 *et seq.*) are transferred to and vested in the Office of Administrative Law created by this amendatory and supplementary act." Section 2.

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civil service practices, should conduct an investigation to determine the continuing need for those positions and the appropriate civil service tenure, seniority and demotional rights of occupants of those positions.<sup>4</sup>

Very truly yours,  
JOHN J. DEGNAN  
*Attorney General*

By: THEODORE A. WINARD  
*Assistant Attorney General*

4. In a statement of the Senate, State Government, Federal and Interstate Relations Committee and the Veterans Affairs Committee, it is stated that the application of the provisions of the State Agency Transfer Act would grandfather in present employees of agencies whose functions are being transferred to the new Office of Administrative Law and that "grandfathering" would be inclusive of those employees presently serving as hearing officers. In our judgment, this statement of these Committees has no support in either the terms or purposes of the enactment. We cannot accept the same as conclusive of the overall legislative intent.

March 2, 1979

SIDNEY GLASER, *Director*  
Division of Taxation  
Taxation Building  
West State & Willow Streets  
Trenton, New Jersey 08625

FORMAL OPINION NO. 5—1979

Dear Director Glaser:

You have asked for our opinion as to whether pension income received by a non-resident of New Jersey from a public or private pension plan is subject to the Gross Income Tax Act. For the reasons set forth below, you are advised that such pension income is subject to the Tax Act.\*

N.J.S.A. 54A:2-1 provides for imposition of the tax upon every individual's "New Jersey gross income as herein defined . . ." subject to certain deductions, limitations and modifications set forth in the act. The term "gross income" is defined in N.J.S.A.54A:5-1(j) to include

pensions and annuities except to the extent of exclusions in section 54A:6-10 hereunder, notwithstanding the provisions of [the sections of public pension laws which provide an exemption of such benefits from state taxation]. . . .

\* The particular inquiry which prompted this request concerns non-resident retired teachers receiving pensions from the Teachers Pension and Annuity Fund. The Fund is a public State administered pension plan created pursuant to N.J.S.A. 18A:66-1 *et seq.*