

FORMAL OPINION

March 12, 1979

ANGELO R. BIANCHI, *Commissioner*
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 6—1979

Dear Commissioner Bianchi:

You have inquired whether, pursuant to the statutory provisions which establish the Office of Administrative Law, hearings held on branch banking applications will be required to be conducted by administrative law judges rather than by Departmental hearing officers. You are advised that such hearings need not be conducted by an administrative law judge under provisions of that Act.

The hearings at issue are those conducted in connection with applications by banks (commercial banks and savings banks) for full branch offices, N.J.S.A. 17:9A-20A, applications by banks to relocate principal or branch offices, N.J.S.A. 17:9A-22, applications by savings and loan associations for establishment of full and limited facility branch offices, N.J.S.A. 17:12B-26 and applications by savings and loan associations to relocate existing branch offices to a different trade area, N.J.S.A. 17:12B-27.1(4). In each instance, the Commissioner is empowered to conduct such investigation *or* hearing *or* both, as he deems advisable, in order to determine whether the application meets the pertinent statutory criteria for approval. Pursuant to N.J.A.C. 3:1-2.3, an objector may request that the Department hold a hearing. If a request for hearing is granted, the hearing may be held before the Commissioner, or before a deputy commissioner, hearing officer or any employee of the Department authorized by the Commissioner, N.J.A.C. 3:1-2.9(a).

Currently, the vast majority of the hearings are conducted by the Departmental hearing officer. At such hearings, the applicant and the objectors are accorded the opportunity to be heard, to introduce exhibits into evidence and to present and cross-examine witnesses, N.J.A.C. 3:1-2.13(a).

Pursuant to a recent amendment to the Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*

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. [N.J.S.A. 52:14B-10(c).]
[Emphasis added.]

Thus, the key inquiry is whether the Department's branch hearings represent "contested cases" as that term is defined in the Administrative Procedure Act. If so, they will be required to be conducted under the auspices of an administrative law judge. N.J.S.A. 52:14B-2(b) defines "contested case" as:

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a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of *specific parties are required by constitutional right or by statute* to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after *opportunity for an agency hearing*. [Emphasis added.]

As a preliminary matter, it should be noted that the Administrative Procedure Act does not "create a substantive right to an administrative hearing", *In re Application of Modern Industrial Waste Service*, 153 N.J. Super. 232, 237 (App. Div. 1977). Rather, the Act prescribes the procedures to be followed in the event an administrative hearing is otherwise required by statute or constitutional considerations. *Id.* Even if an administrative hearing is required by statute, the nature of that hearing must be examined towards the goal of determining whether the ultimate agency decision or determination disposes of the "legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties. . . ." In such instance, the agency acts in a quasi-judicial fashion and there is a "contested case" as defined by N.J.S.A. 52:14B-2(c). Conversely, if the purpose of the hearing is to provide a forum for the expression of public sentiment on proposed agency action or if the hearing is "informational" in nature, the agency acts in a legislative manner and the hearing is not conducted as a contested case, *Public Interest Research Group v. State*, 152 N.J. Super. 191, 206 (App. Div.) *certif. den.* 75 N.J. 538 (1977); *Wildlife Preserves Inc. v. Borough of Lincoln Pk.*, 151 N.J. Super. 533, 542 (App. Div. 1977); *In re Matter of Public Hearings*, (C.O.A.) 142 N.J. Super. 136, 151-52 (App. Div.) *certif. den.* 72 N.J. 457 (1976).

The courts have examined the nature of the Department's branch application procedures and have concluded that hearings are not mandated by constitutional right, *Elizabeth Federal Savings and Loan Assn. v. Howell*, 24 N.J. 488, 505 (1957). In *First National Bank of Whippany v. Trust Co. of Morris Cty.*, 76 N.J. Super. 1, 8 (App. Div. 1962) the court expressly found that a hearing on a branch banking application is not necessary to comply with constitutional due process requirements. The court stated:

[W]here the Legislature constitutes an administrative official [the Commissioner] as its *alter ego*, it is merely carrying out its exclusive function to establish public policy in fields in which the public interest is the primary object to be served and individual interests are only incidentally affected. *Id.*

The Court noted that in fixing the standards for the processing and approval of branch applications:

[T]he obvious emphasis is pointed at the benefit to the *public* and not at any advantage to a banking institution by the applicant or established objectors. . . . [Emphasis in original.]

The determination of the Commissioner to approve or disapprove a branch application is conceived as primarily benefiting the public and only in-

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cidental of benefit to the applicant or objector. The discretionary hearing, if held, is designed to elicit views of objector institutions or others that might aid the Commissioner in determining whether the public interest will be served by approval or denial of the application.

It is also apparent both from the language of the branching statutes and judicial interpretation thereof, that a statutory right to a hearing is not available to either the applicant or an objector. The relevant statutory sections provide alternatively for Departmental investigation or hearing or both "as the Commissioner may determine to be advisable", N.J.S.A. 17:9A-20A, N.J.S.A. 17:9A-22C, N.J.S.A. 17:12B-26, and N.J.S.A. 17:12B-27.1(4); *In re Application of the Summit & Elizabeth Trust Co.*, 111 N.J. Super. 154, 164 (App. Div. 1970); *First National Bank of Whippany, supra*.

It is therefore clear that in accordance with the decision in *First National Bank of Whippany, supra*, and the branch banking statute a hearing on a branch banking application is neither required by constitutional right nor by statute. As a result, branch banking proceedings are not contested cases within the meaning of the Administrative Procedure Act and need not be conducted by administrative law judges.*

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: MARK S. RATTNER
Deputy Attorney General

* It is noteworthy, however, that in any instance where the Commissioner requests and the Director of the Office of Administrative Law approves, an administrative law judge may be assigned to conduct such hearings. N.J.S.A. 52:14F-5(o) provides the Director of the Office of Administrative Law shall "[a]ssign an administrative law judge or other personnel to any agency to conduct or assist in administrative duties and proceedings other than those related to contested cases or administrative adjudications, including but not limited to rule-making and investigative hearings, if so requested by the head of an agency and if the director deems appropriate".

March 16, 1979

ANGELO R. BIANCHI, *Commissioner*
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 7—1979

Dear Commissioner Bianchi:

You have asked for an opinion as to whether the Commissioner of Banking has the authority to inquire into and/or investigate certain lending practices of a depository institution under the New Jersey Home Mortgage