Council for Court Excellence
Improving Justice for the Community

Statement
of the Council for Court Excellence
before the
Committee on Public Safety and the Judiciary
Council of the District of Columbia

FY 2012-2013 Performance Oversight Hearing
on the
Office of Administrative Hearings

February 14, 2013

Good morning, Chairman Wells and members of the committee. My name is James H. Hulme, Court Improvements Committee Chair of the Council for Court Excellence. With me today is Peter M. Willner, a Senior Policy Analyst at the Council for Court Excellence who served as the DC Council's appointee on the Commission on Selection and Tenure of ALJs from January 2004 to April 2008. Our testimony today is on behalf of the Council for Court Excellence ("CCE") regarding the FY 2013 performance of the District of Columbia Office of Administrative Hearings. No judicial member of CCE participated in the formulation of this testimony. I appear today as volunteer board member of the Council for Court Excellence and not on behalf of any client or in any other paid capacity.

The Council for Court Excellence is a local nonpartisan civic organization founded in 1982 to improve the administration of justice in the courts and related justice agencies in the District of Columbia. For 31 years, CCE has been a unique resource that brings together members of the civic, legal, business, and judicial communities to work in common purpose to identify and promote justice system

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reform, improve public access to justice, and increase public understanding and support of our justice system. CCE has worked closely with the DC Council on many issues, including the Office of Administrative Hearings Establishment Act of 2001 and subsequent amendments.

Our testimony will offer some perspectives on the performance of the DC Office of Administrative Hearings as reported in their Fiscal Year 2012 Annual Report. However, we will comment briefly on the rationale for OAH's creation, especially since in recent years there have been efforts to remove some of its case jurisdiction through the budget process.

As we have stated in previous OAH hearings before this committee, it is important to recall the serious problems that existed in the District's administrative adjudicatory system prior to OAH's establishment in 2002, and the high level and serious efforts made in the mid to late 1990's by the District of Columbia government and then-DC Corporation Counsels Charles Ruff and John Ferren – who both endorsed and supported CCE to undertake a thorough review of the administrative adjudicatory system with the goal of examining areas of improvement. The result was the CCE 1999 report, *A Final Report on Creating a Unified Administrative Hearings Agency in the District of Columbia*.

Among other important findings, the CCE 1999 report found that, prior to OAH, there was little certainty that litigants, including residents and businesses, would receive prompt, efficient, and consistent decisions perceived by them to be fair. Also at the time, there was wide variance in the qualifications for administrative hearing officers; in fact, some District agencies did not require a hearing officer to have passed a state bar exam. The administrative hearing units of most DC Government agencies were seriously underfunded and undersupported, in terms of hearing officer pay, availability of support staff, and case management systems and

office technology. Several agencies reported difficulties in attracting and retaining hearing officers because of very low pay, according to documents from an earlier DC Government effort in the mid-1990s to centralize the administrative hearings function.

In addition, in the 1990's there were reports of high backlog at many of the DC agencies whose function was later folded into the OAH jurisdiction. While there have been occasional reports of isolated, case-specific backlog at OAH, it does not appear to be the widespread delay that existed at the time of the CCE study. As suggested above, economies of scale at OAH means that it can devote resources to promote public understanding and transparency, such as performance measures and meaningful time to disposition standards, while smaller, understaffed offices do not have the resources to devote to this important function.

Taken together, the underlying premise of our 1999 study and of the central hearing panel movement generally, is that when certain adjudication functions are embedded within an Executive Branch agency, the adjudication function takes a back seat to the agency's broader, regulatory and enforcement functions. When this happens, it is the litigants – residents and businesses – and the administration of justice that suffer the ill effects.

All this is not to suggest that OAH is without challenges. But these challenges are indicative of a system that is far more transparent, accessible and has far greater capacity than during the earlier, fragmented scheme.

We have two comments on the statistics presented in the OAH FY 2012 Annual Report, which overall we believe is a very good description of the office's organization, mission and how it accomplishes its work. Our first comment concerns the FY12 Administrative Law Judge Statistics chart offered at page nine of the report. This chart lists the ALJs by name and provides

the volume of cases assigned, open and closed cases, and hearings held. It is refreshing to see judge-by-judge statistics provided in a public report, which is not often the case in other court annual reports. However, we suggest that in future annual reports, OAH should indicate that the reader should not draw comparative conclusions about ALJ performance based on the chart, and perhaps briefly describe that some ALJs caseloads are predominantly high volume while others are low volume, and that ALJs in management positions may have very small caseloads.

Our other comment concerns how OAH reports on mediation, a topic that CCE has commented on before. At page 13 of the annual report, OAH provides a Key Performance Indication of being the "percentage of hearings reduced due to mediation." The target rate is 2.5%; the cumulative rate is 8.3%, with a quarterly range varying from 24.7% to 1.8%. We are interested in why the rates may have varied so significantly quarter-to-quarter, and why the cumulative rate has dropped from prior OAH statistics on mediation. For example, in FY 2008 OAH was achieving an almost 25% reduction in hearings due to mediation.

The reduction in percentage of hearings raises a further question about the structuring of mediation at OAH. We understand that mediation is conducted by ALJs, a method different than that used in Superior Court, where the mediator is a private attorney and not a judicial officer. The utilization of private attorneys for mediation reduces the workload on judicial officers; in OAH, the question becomes to what extent the mediation program exacerbates the workload of judicial officers? Much depends on whether mediation is voluntary or mandatory and the amount of time it takes a judicial officer to prepare for and conduct a mediation. A possible solution would be for OAH to explore a partnership with the Superior Court's Multi-Door Program panel of pro bono mediators or perhaps with law school clinics.

This concludes the testimony of the Council for Court Excellence. The Council for Court Excellence stands ready to assist the DC Council, the Mayor and the Office of Administrative Hearings going forward.

We would be happy to address any questions that you may have.

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