

THE OMBUDSMAN AS AN
ADMINISTRATIVE REMEDY

By: Mr. Kent D. Anderson
Graduate Student in the Masters Program
University of Dayton, Ohio, U.S.A.

OCCASIONAL PAPER #41

ISSN 0711-6349

This publication is the property of The International Ombudsman Institute, and cannot be reproduced in any manner whatsoever without the express written consent of the Executive Director of the International Ombudsman Institute, Edmonton, Alberta, Canada.

The views expressed in OCCASIONAL PAPERS are those of the authors, and not necessarily those of the Board of Directors, or, Officers of the I.O.I.

I. The Ombudsman As An Administrative Remedy

A. Introduction

The concept of the ombudsman as an interface between citizens and administrative agencies of government in situations of disputes is one widely recognized in both tradition and law throughout the world.

The historical tradition of ombudsman-like functions is particularly rich, ranging from the Roman Republic's censors through an elaborate administrative control system - the "Control Yuan" developed during the Han Dynasty in ancient China to intercessions of the medieval Christian Church between subject and feudal lord.

Direct organizational ancestors of the modern ombudsman were created during the early 18th century. This period saw Peter the Great appoint a Procurator General for the Russian empire in 1722. This "eye of the Czar" was charged not only with ensuring the enforcement of laws and edicts, but also with protecting the population from excessive official action.

In 1713 Charles IX appointed an "Ombudsman" for his Swedish kingdom for the same basic reason, to be a legal safeguard against over zealous state administration. This office evolved through the 1809 Swedish Constitution into the model for today's ombudsman offices world-wide.¹

The first ombudsman's office in North America was established in the Canadian province of Alberta and was largely patterned after the New Zealand Ombudsman office. The first United States effort to implement this concept was undertaken in Nassau County, New York, where the County Executive, a political officer, appointed a "Public Protector" with ombudsman-like functions. However, because this officer lacked the independence essential to effective oversight of administrative functions he was not considered a true ombudsman. The credit for first creating such an office goes to the State of Hawaii in 1968.²

¹Ferris, Charles, et al, p.4-5.

²Rowat, Daniel C., p.12-13.

B. Legal Status

The legal concept of the ombudsman also enjoys widespread acceptance and agreement world-wide. The International Bar Association defines the ombudsman as "an Office established by constitution or statute, headed by an independent, high-level, public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employers, or who acts on his own motion, and has the power to investigate and recommend corrective action and issue reports."³

This official nature of the ombudsman's status is reflected in its American form as defined by the American Bar Association's Administrative Law Section as "an independent governmental official who receives complaints against government agencies and officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints."⁴

Many organizations, of course, seek to intercede with governmental administrative entities in situations of disputes. Professional and trade associations, 'citizen' lobbying organizations, unions and political organizations are only a few of many groups which relay the dissatisfaction of their members and/or public constituencies with governmental administrative actions and seek redress for their perceived injustices. One of the principal factors which distinguish the ombudsman from these organizations is the former's official status within the governmental jurisdiction it serves, a status usually codified in the statutory law of the jurisdiction. This legal status varies from formal constitutional provisions - such as those which govern the Swedish Ombudsman - to state statute or municipal ordinances such as those creating the Nebraska state ombudmsan (officially the Public Counsel) or the Detroit Ombudsman's Office.

An organization based in statutory law enjoys considerable official status and perceived public authority. In many instances this perceived authority is indeed fact and the jurisdiction's legislative body has granted the ombudsman full powers to investigate all executive departments, make unfettered recommendations for corrective actions and generally conduct their affairs with a great deal of independence. In some instances this authority extends to the subpoena power, a potent but seldom used tool to encourage

³Ferris, Charles et al, p.2

⁴Frank, Bernard, p.1.

cooperation. Most of the world's leading ombudsman agencies, such as those in Scandinavia, New Zealand, and the Canadian provinces share similar broad statutory grants of authority.

There are, however, several other examples of this statutory foundation being used by legislative authorities to narrowly define and restrict activities of ombudsmen. For example, the British Ombudsman - officially the Parliamentary Commissioner - is restricted by law as to which agencies and types of actions he may investigate, and from who he may receive complaints.⁵ A similar truncation of power is often found where the ombudsman is the creation of the jurisdiction's executive authority, the least desirable of legal foundations.⁶ The executively created ombudsman is often a political appointee whose principal mandate is the protection of his patron and the generation of good public relations among the electorate.

A strict grounding in statutory law implies a second major shortcoming in that it almost always limits the ombudsman's authority and jurisdiction to that of its parent legislative body. This poses relatively few limitations in constitutionally based systems such as some Scandinavian ombudsmen but can be considerably more restrictive in the case of state and/or municipal ombudsmen in the United States. Few governmental entities are willing to submit their administrative activities to the review of a body having its legal mandate from another governmental entity, thus one often finds municipal ombudsmen helpless before county welfare agencies and state ombudsmen rebuffed by village councils.

The Dayton Ombudsman's Office - officially known as the Joint Office of Citizen Complaints - has avoided these major weaknesses in a manner quite innovative for its founding period. Organized as a private non-profit corporation in 1972 by the legislative authorities of the area's three principal local governing entities - the City of Dayton, Montgomery County and Dayton Public School District - it is not, strictly speaking, a statutory governmental entity. This joint sponsorship and private status does, however give the Dayton Ombudsman effective access to otherwise potentially competitive governments and had allowed it to develop its own procedures and areas of expertise

⁵ Rowat, Donald C., p.9.

⁶ Miewald & Comer, "The Complaint Function of Government and the Ombudsman," p.25.

with considerable flexibility to alter its activities as appropriate to the times without the incumbrances of political negotiations and legal amendments. Effective as this has proven to be in Dayton, the privately based public ombudsman remains a rare form in contemporary governmental administration. (This public ombudsman should not be confused with the numerous private ombudsman programs established by organizations such as newspapers and other large consumer product companies to service their readers and customers.)

C. Jurisdiction

As discussed in the preceding section, an ombudsman's jurisdiction is almost always officially limited to that of its sponsoring or parent governments. This limitation is often more apparent on the office's organization chart than in its operations. Years of experience with established ombudsmen almost uniformly produces a cooperative attitude in the part of many other public and private organizations to the ombudsman's mediation and problem resolution functions. These agencies soon find the public relations value, improvements in client satisfaction and performance feedback derived from cooperation with ombudsmen greatly offset the potential negative impacts from an outside agency's overview and interjection into their operations. This cooperative attitude is reinforced by the belief of American ombudsmen that the reduction of citizen alienation is a major function of their profession. This attitude prevails today in spite of evidence which "suggests that the ombudsman does not automatically engender positive feelings toward government on the part of the users. In fact, it seems to attract a more alienated group of people who, by their participation, are not persuaded to join the mainstream" Some agencies may indeed look upon the ombudsman as a convenient means of dealing at arm's length with these disenchanting clients.

The Dayton Ombudsman's Office provides a good example of this spreading informal jurisdiction. In 1985 the Ombudsman resolved numerous cases with the local Combined Health District, the federal Housing and Urban Development and IRS agencies, the state Worker's Compensation Bureau, Employment Services Bureau and Attorney General, Dayton Power & Light, several private insurance firms, and many other

⁷Miewald & Comer, "Complaining as Participation," p.489.

organizations apart from its sponsoring city/county/ school jurisdiction. In addition the Dayton Ombudsman has developed a large, formalized program in area nursing homes and related public agencies - as have many other ombudsmen across the country.

Ultimately this spreading informal jurisdiction is mandated by the types of complaints brought to the ombudsman. For instance, studies of the Detroit Ombudsman's complaint intake revealed that approximately half of all problems brought to their attention involved citizen complaints about the actions of other citizens. The major areas of concern generating these complaints were debris and weeds on private property, deteriorating or abandoned buildings, stray animals or abandoned cars.⁸ A similar pattern prevails in Dayton with 80.4% of all cases - as opposed to information and referral contacts - handled in 1985 involved organizations other than the office's three principal governmental sponsors.⁹

In addition to these organizational jurisdiction issues, ombudsmen activities are subject to topical jurisdiction issues. Ombudsmen are almost universally limited to issues involving executive or administrative activities. As creations of legislative bodies one might not expect them to have legislative jurisdiction. They almost never do, and, generally speaking, it is almost never needed given lack of administrative or single impact interface between legislatures and citizens. Jurisdiction over judicial issues is almost as rare. The only example of a judicial interface discovered in research for this paper occurs in Sweden where the national ombudsman is authorized to investigate questions of judicial behavior but not judicial decisions. The ombudsman is not the ultimate arbitrator of all governmental activity but rather a facilitator of the most common administrative interfections between a government and its citizens.

D. Operations

Administrative law and procedures vary widely from country to country and are not directly addressed in this paper. Most foreign ombudsmen, even those operating at national levels, operate in a complaint and resolution environment similar to American ombudsmen. In addition, some foreign ombudsmen take on a character similar to

⁸Bachelor, Lynn W., p.70.

⁹ 1985 Annual Report (Dayton) Ombudsman's Office.

American administrative law judges in formally resolving substantial disputes, an activity seldom found in this country.

In the United States administrative law, as codified in the federal Administrative Procedures Act and its various state collaries and as developed through related court decisions, provides procedures for promulgating official policies and/or regulations and for resolving issues in dispute between governmental agencies and their various clients. The activities of ombudsmen principally supplement the problem resolution functions of administrative law. In addition, they are almost universally authorized to make recommendations for new or altered policies which may then be promulgated according to the appropriate administrative procedures.

For a client to seek a remedy through administrative law, even in its most informal and flexible procedural form, there must first be a substantial issue in dispute. These issues may be of fact, policy, procedure, civil rights, or property interests. This requirement for an issue of substance may be found in the agency's own regulations but most often results from the practical requirements of litigation. Even at its most informal stage, official administrative procedures require knowledge of potential courses of action, knowledge of organization and personnel factors, substantial time, and often finances, to obtain a remedy. Few citizens have these resources at their command, or would chose to use them when faced with relatively minor errors of bureaucratic operations. Clerical errors, delays, lack of courtesy, arbitrariness, or discretionary disagreements are simply not easily amendable to solution through official administrative procedures. When one mixes into this receipe the natural organizational tendency to defend its own acts and functionaries, and the common reluctance of individuals to trust a self-interested bureaucracy with the resolution of its errors, the need for a supplemental mediation resource is apparent. It is this resource which is provided by an independent ombudsman.

Independence is the most critical determinate of an ombudsman's effectiveness. It is for this reason that an executively based ombudsman is the least desirable of all organizational forms. Statues creating or authorizing ombudsman offices generally clearly remove the ombudsman from the administrative, financial or policy review of its parent government.

In Dayton the Ombudsman's independence is effectively guaranteed by means of a management agreement between the organizations trustees (sponsoring governments) and the Ombudsman, Bonnie Macaulay. Section three of that agreement provides as follows:

LIMITATION ON INTERFERENCE It is understood by and between the parties that the successful performance of the Ombudsman's Functions requires that in the performance of this agreement Mrs. Macaulay be free from any interference in the ordinary course of business of the corporation by the members of trustees of the corporation. It is therefore agreed that neither the trustees nor any other representatives of the members will interfere with the ordinary conduct of business of any office of the corporation. It is further agreed that if Mrs. Macaulay shall breach any of the terms of this agreement or default in the performance of any of her covenants hereunder, the sole remedy of the corporation shall be to terminate this Management Agreement strictly in accordance with the provisions for termination hereinafter set forth...

In addition to this all-or-nothing provision the agreement further prohibits the trustees from failing to extend the Ombudsman's contract unless two-thirds of its entire Board of Trustees memberships so moves. The agreement also contains extensive and specific grants of operational and financial authority.¹⁰

After independence, the next most effective tool available to the ombudsman is the power to investigate, either in response to a client complaint or upon his own motion. This authority is seldom subject to any limitation in the ombudsman's charter. In practice some negotiation is often required to effectively investigate some complaints. For example, the Dayton Ombudsman's investigation of internal practices of the Dayton Police Department was resisted by a former director. Negotiations with the director, the city manager and the director's successor resulted in the department's internal affairs reports being opened to the Ombudsman personally, a major concession reflecting the Ombudsman's record of effective and responsible discharge of her responsibilities. Another negotiation was required with the County's Bureau of Child Support to gain access to client records. Again the Ombudsman's performance record and obvious need to know in order to meet client needs and expectations combined to produce an effective working relationship with the public agency.

The third major means available to the ombudsman for effecting client remedies is the power of persuasion. Few ombudsmen at local or state governmental levels have the direct power to act or order an action in response to a complaint. Based on their

¹⁰ Management Agreement, (Dayton) Joint Office of Citizens Complaints, p. 2.

investigative findings ombudsmen present an objective view of the dispute to the appropriate agency and may recommend a specific resolution. Administrative agencies tend to be responsive to this approach, ideally for reasons of client service and professionalism, but also ultimately to avoid two other tactics available to ombudsmen to effect needed change: the power to recommend systemic, policy or personnel changes to sponsoring governments and the power to bring negative public attention to the agency through press reports. The potential negative impacts from the exercise of either of these tactics is so massive that ombudsmen seldom need recourse to them. Their mere existence is sufficient to assure cooperative relations in all but the most extreme cases.

The final tool available to the ombudsman is the office's credibility and it undergirds and reinforces all the office's other actions. So broad is the public acceptance of the ombudsman concept that an ombudsman of moderate disposition, positive orientation and unquestioned integrity needs few other grants of power. Failing any one of these character traits the ombudsman will fail. That their possession, combined with independence and investigatory authority, will almost always lead to success is the lesson found in The American ombudsman experience.

E. Conclusion

The ombudsman concept world-wide, in this country and in the Dayton community has proven to be an effective resource for remedying the lesser trials experienced by citizens as they routinely interface with administrative agencies of government. They are informal, easily accessible, and user-friendly for clients. They serve agency interests by resolving many petty disputes at low attention and processing costs, improving the satisfaction levels of agency clients and by providing objective feedback on agency performance. Where policy issues are not involved or significant property or personal rights at stake an ombudsman can act quickly, fairly and inexpensively to produce a remedy satisfactory to all parties. Without this alternative, greater public dissatisfaction with government, increased costs and growing administrative backlogs would be reasonably expected consequences.

That administrative government can operate without ombudsmen is amply demonstrated by the many jurisdictions with such agencies. That ombudsmen bring added value to the government/citizen interchange is also demonstrable through the total lack of negative comment or data on the topic in the available academic literature and the great amount of positive data readily available. Given the relatively low investment of administrative time and finances involved, the installation of an ombudsman-type function in any public, or private, organization with extensive and bureaucratic public contact is both highly desirable and practicable.

Bibliography

- Anderson, Kent D., "Interview with Bonnie Macaulay, Ombudsman, Joint Office of Citizen Complaints, Dayton, Ohio," 26 November 1986.
- Annual Report, (Dayton) Ombudsman's Office, 1985.
- Bachelor, Lynn W., "Patterns of Citizen Contacts with a Central Complaint Office: The Case of the Detroit Ombudsman," State and Local Government Review, Vol. 16, # 2: 69 - 74, Spring, 1984.
- Ferris, Charles, Goodman, Brian, & Mayer, Gordon, "Brief on the Office of the Ombudsman," Ombudsman Committee of the International Bar Association, September, 1980.
- Frank, Bernard, "The Ombudsman," American Bar Association, Administrative Law Section, Ombudsman Committee (B. Frank, Chairman), undated.
- Gellhorn, Walter, "Ombudsmen and Others: Citizens' Protectors in Nine Countries," Harvard University Press, 1967.
- Gwyn, William B., "Barriers to Establishing Urban Ombudsmen: The Case of Newark," Institute of Governmental Studies, University of California, Berkeley, 1974.
- Management Agreement, (Dayton) Joint Office of Citizen Complaints & (Ombudsman) Bonnie Macaulay, 1973.
- Miewald, Robert D. & Comer, John C., "Complaining As Participation: The Case of the Ombudsman", Administration & Society, Vol. 17, # 14:481 - 99, February, 1986.
- Miewald, Robert D. & Comer, John C., "The Complaint Function of Government and the Ombudsman", State and Local Government Review, Vol. 16, # 1:22 - 6, Winter, 1984.
- Rowat, Donald C. (editor), "The Ombudsman: Citizen's Defender," University of Toronto Press, Second Edition, 1968.
- Weeks, Kent M., "Ombudsmen Around the World: A Comparative Chart," Institute of Governmental Studies, University of California, Berkeley, 1973.
- Wyner, Alan J., "The Nebraska Ombudsman: Innovation in State Government," Institute of Governmental Studies, University of California, Berkeley, 1974.