Administrative Law

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SECTION SHARES TENTH ANNIVERSARY WITH OAH


AdministrativeLaw

NEWSLETTER

AG Candidates Face-off on Administrative Law

Ad Law Section Holds Its First Annual Business Meeting

The Administrative Law Section shares the year 2010 with the Office of Administrative Hearing for its tenth anniversary. The centralized hearing office, then a pilot project called the Hearing Officer Panel, and the Administrative Law Section both became operational in 2000. As part of our tenth anniversary celebrated in this issue of the newsletter, we have included a link to one of the section's earliest newsletters, which was issued in 2000 as hard copy. Just click on the icon above for a retrospective on some of the "hot" topics that surfaced then and continue to be the focus of administrative law practitioners and law improvement efforts.

This special issue is more than a retrospective. Current efforts and perspectives are also compiled in this anniversary issue. Consequently, this issue not only reprises articles that capture recent developments in Oregon's administrative justice system, but this issue also contains new articles, including profiles on senior ALJs conducting hearings for the OAH and their practice tips for practitioners.

Still want more history? To see how efforts on the topics addressed in this issue, and many others, have fared through the last ten years, log in to the Oregon State Bar's website as a member and click on the "Section Newsletter Library" button. The section's previous newsletters are archived there.

MODEL RULES

LEITH DRAFTS REPORT ON MODEL RULE CHANGES

David Leath

In his 33-page draft report, David Leith, Associate Attorney General, provided the following executive summary of the recommendations from the Department of Justice that he is considering as amendments to the model rules. Leith, Chief Counsel of the General Counsel Division, chairs the Attorney General's advisory group on the model rules for the Office of Administrative Hearings. In regard to the draft, Leith stated:

> *"I want to stress that the draft represents the current status of my own thinking as I work through the issues and meet with interested parties. It does not represent even my own solidified final perspective on the matters addressed, and it has not received the Attorney General's review at this point."*

The Executive Summary follows on the next page. To review a complete copy of the 33-page draft report, click on the image below:

newsletter.pdf

EXECUTIVE SUMMARY

I. Assessment Process

Administrative procedures are used by state agencies to make decisions that affect the interests of Oregonians every day. Agencies apply legislative commands, implement legislation through administrative rules, and apply statutes and rules in ways that may significantly affect people and property. Administrative law structures how agencies may exercise their authority to carry out authority given them by the Legislative Assembly.

Attorney General John Kroger directed the Department to assess what changes, if any, should be made to Oregon's administrative law and procedures. The touchstone for that assessment was achieving good government – government that is effective, efficient, and fair – with the ultimate goal of serving the best interests of Oregonians.

The assessment began with meeting and listening to the stakeholders, including the private administrative law bar, administrative law judges (ALJs), state agency representatives[1], other officials within the executive branch, and attorneys from the Department of Justice. The assessment also included reviews of what other jurisdictions are doing to ensure that their procedures are fair and effective, existing Oregon administrative law statistics, and model rule changes proposed by the DOJ Administrative Law Work Group (DOJ Committee).

II. Focus of concerns and comments – A philosophical disagreement

The focus of most concern and comments from stakeholders were Oregon's contested-case procedures before the Office of Administrative Hearings (OAH). There is a fundamental disagreement among stakeholders about the function of a contested case. One view holds that the contested case provides a tool for the agency to gather and assess pertinent facts. Under that view, the ALJ's role should be limited to conducting the hearing, finding the facts, and making recommendations to the agency head.

The competing view holds that a hearing is really an appeal of an agency decision because agencies already have formed a position prior to the contested-case hearing. Agencies, they say, are more properly viewed merely as a party to the case. Under that paradigm, the process is fairer if the agency that prosecutes the action does not render the final decision.

Both constructs reflect the practical reality of the current process to some extent. Another reality of the process is that parties are unrepresented in the vast majority of OAH cases. Hearings generally are conducted by telephone, last only one to two hours, and are concluded within a few weeks of the request. The orders generally issue no later than 45 days from the close of the record. According to the OAH, ALJs issue final orders in 97 percent of cases.

The major issues that the stakeholders are concerned about arise primarily in the three percent of OAH cases where both the agency and the party are represented by attorneys and the agency issues the final order. Those cases include DEQ, forestry, water resources, and occupational and professional licensing cases.

In thinking about those issues, we accept the core premise that the agencies properly are delegated responsibility to decide matters within their expertise. But we also conclude that agencies' party-like role in contested case proceedings contributes to concerns about the inherent fairness of the process. Therefore, we propose solutions that attempt to preserve the agencies' policy-making responsibilities while ensuring a process that both is fair and seems fair.

III. Summary of recommendations

- Require hearing notices to state the sanction or penalty that the agency intends to impose;
- Require hearing notices to state that some corporations and other non-corporeal entities must be represented by an Oregon attorney;
- Eliminate the right of agencies to review the Chief ALJ's discovery order and make other changes to simplify the discovery rules;
- Do not at this time assign different Assistant Attorneys General to handle the presentation of contested case and the advice to final decision-maker;
- Require case presenters to file written exceptions when recommending changes to an ALJ's proposed order;
- Require agencies to send copies of final orders to the OAH;
- Hold further discussions about whether to propose legislation requiring agencies to publish final orders;
- Impose timelines for emergency license suspension cases;
- Establish criteria for exercising discretion to allow late filings and amendments of documents and motions and for admitting evidence that was not disclosed in response to a discovery motion or request;
- Require agencies and parties to tell each other who represents them and to report changes in representation;
- Adopt the DOJ committee's recommended clarifying amendments to the model rules.

[1] We refer to agencies, boards and commissions collectively as "agencies" for simplicity.

OAH RESPONDS TO DRAFT AG REPORT

Karla Forsythe, Chief Administrative Law Judge for the Office of Administrative Hearings, provided an assessment of administrative law and procedures to the Attorney General's advisory group. Forsythe is a member of the advisory group. Below are the comments she provided from the Office of Administrative Hearings on June 8, 2010, in response to David Leith's draft report on changes to the model rules and hearing procedures. (Emphasis provided in the original document by Forsythe.)

Purpose of the project

Assess what changes, if any, should be made in Oregon's administrative law and procedures, with the goal of achieving good government that is effective, efficient and fair.

A fairly representative cross-section of ALJs commented

ALJ 1: Richard Davis (UI); Linda Lohr (UI); Charles Smith (DMV).

ALJ 2: Cathy Coburn (CCB); Steve Elmore (DHS); Jim Han (CCB); Terrence Murphy (Child Support, UI Tax).

ALJ 3: Rick Barber, Ken Betterton, Bernadette House (agencies, boards and commissions)

Presiding Judge: David Gerstenfeld.

The draft proposals were circulated to ALJs for comment in mid-May. Comments received were discussed at a telephone conference on May 26, 2010, with an opportunity for further comment. This document represents the views of participating ALJs which the CALJ will carry forward at the Model Rules Advisory Group meeting scheduled for June 9, 2010. This document also includes OAH suggestions for further revisions to the recommendations which will enhance effectiveness, efficiency and fundamental fairness.

Issues of concern not addressed in the recommendations

Current rules focus on contested cases in which parties are represented. Simplified rules should be adopted for the majority of contested cases in which parties are not represented. Suggestion: form a working group to propose rules which are functional for programs such as DCS and DHS and/or consider simplification of current rules to work for all types of hearings.

Response to recommendations

*1. The OAH **supports** the recommended rule revision to require an agency to state the sanction the agency intends to impose, **and recommends requiring a statement of the sanction in the original contested case notice issued by the agency.***

Rationale:

- Encourages settlement.
- Promotes fundamental fairness by disclosing what is at stake so parties can submit mitigating evidence.
- Helps ALJ determine if an agency has exercised discretion, the parameters, and whether the exercise of discretion is consistent with similarly situated respondents.

*2. The OAH **supports** the recommendation to require a statement in the hearing notice that some corporations and other non-corporeal entities must be represented by an Oregon attorney.*

Rationale:

- Helps avoid delay while parties obtain counsel.
- Those who are unlikely to obtain counsel can factor this requirement into their decisions about whether to proceed to hearing.

*3. The OAH **supports** a rule revision to eliminate the right of agencies to review a discovery order issued by the CALJ.*

Rationale:

- Avoids sending message to parties that ALJ judgment is not trustworthy, and avoids appearance of bias.
- Agencies already have the ability to control discovery methods by rule, and the ALJ order must be consistent with the rule.

*The OAH **suggests** consideration of a rule adopting the BOLI approach to depositions.*

Rationale:

- BOLI Administrative Rule 839-050-0200 provides that depositions are strongly disfavored and will be allowed only when the requester demonstrates other methods are so inadequate that participants will be substantially prejudiced by denial of the motion. According to an ALJ previously employed by BOLI, the BOLI experience is that no requests have been granted because information could have been obtained through interrogatories. However, as noted by an ALJ who handles CCB hearings, in cases where expert testimony is frequently presented, depositions are appropriate because interrogatories are inadequate and provide no opportunity for cross-examination.

- Depositions of agency decision-makers are rare, because is it unlikely that employees at this level will be able to provide detailed information.

*The OAH **supports** other changes to simplify discovery rules by reorganizing the rule into four sections: methods, standards, procedures, enforcement.*

*The OAH **agrees in concept** that before filing a motion for a discovery order, parties should make a good faith effort to confer, unless the effort would be futile.* ***The OAH does not support including such a requirement in the rules.***

Rationale:

- OAH matters generally proceed on a tight time frame; an additional requirement before requesting discovery is likely to result in delay. An ALJ notes that a similar requirement in another jurisdiction resulted in form "meet and confer" letters which were faxed or mailed at the last minute with minimal time to respond and no intent to seek informal resolution.
- The ALJ determination about whether the effort was made or whether an effort would be futile would be made early in the matter with minimal evidence to assess good faith or futility. Rather than deciding what evidence is needed for a full and fair hearing, the ALJ will become a referee of whether parties played by the rules.
- Briefing this issue will create extra expense for represented parties.
- In the absence of an enforcement mechanism, this provision is not likely to benefit the process. The need for discovery should be based on whether the evidence exists, whether it is necessary for a full and fair hearing (rather than peripheral or cumulative), and whether there is some statutory or other bar to production (privilege, agency confidentiality requirements, etc.), rather than whether discovery rules have been appropriately navigated. It would be preferable to require "meet and confer" without the caveat "unless the effort would be futile" since it can be anticipated that parties would rely on the caveat to avoid conferring.

*4. The OAH **needs more information** to evaluate whether assigning different AAGs to handle the presentation of the contested case and to provide advice to the final decision-maker is cost-prohibitive.*

- Separation is the best practice.
- **The OAH requests that the AG share the basis for the estimate of three additional FTE** in order to determine if the cost is prohibitive when weighed against the current practice which allows the AAG to override ALJ credibility determination and become the de facto fact finder.
- The OAH suggests determining if there is an agency willing to pilot this approach.

5. The OAH ***does not take a position*** *on the recommendation to require case presenters to file written exceptions when recommending changes to an ALJ's proposed order.*

Arguments in favor:

- Transparency and the perception of fairness
- Allows ALJ to correct a legitimate problem raised by the agency before issuing final order

Arguments against:

- It is meaningless to require written exceptions from DHS reps; agency decision-makers retain authority to change the orders. The requirement to prepare written exceptions will increase their workload but will not make a difference in the process. It will add another layer.
- The basis for exceptions is an internal agency communication which should remain within the agency.

6. The OAH ***supports*** *requiring agencies to send copies of final orders to the OAH.* ***The OAH further suggests setting a reasonably generous standard timeline for agencies to issue the final order (for example, 60 days) or to indicate the date by which issuance is anticipated with reasons for delay; if no such statement is filed, the order becomes final by operation of law.***

7. ***The OAH takes the position that it should not be the entity which is required to publish final orders.*** *While publication promotes transparency and facilitates research to compare case outcomes, many orders are subject to confidentiality requirements set out in various agency statutes and regulations. All orders must be reviewed before publication to determine applicable confidentiality requirements and to redact confidential information when required. OAH staff should not be responsible for undertaking this task, and does not have the resources to do so.*

8. The OAH ***supports*** *a rule revision to impose timelines for emergency license suspension cases. The OAH also suggests establishing specific time frames for agencies to refer these cases to the OAH in order to expedite the process. Since agencies have different timelines, they should be authorized to opt out of a uniform timeline by rule, as long as they adopt a timeline for re*ferral to the OAH.

- It is not fundamentally fair to those whose licenses have been revoked to have to wait indefinitely for a referral to the OAH.

9. The OAH ***opposes*** *a rule revision to establish criteria for exercising discretion to allow late filings and amendments of documents and motions and for admitting evidence that was not disclosed in response to a discovery motion of request.* ***The OAH suggests a rule revision to provide that the time for filing responses should be agreed between the parties. The OAH further suggests adding a requirement that a response filed 14 or more days before the hearing must be filed within 7 days after receipt of the motion, and that if the non-moving party does not have***

seven days left to respond, the ALJ can address it at the hearing and has discretion about next steps (alter response times, hold record open, etc.).

Rationale:

- Decision should be left to the ALJ's discretion (for example, when domestic violence concerns form the basis for non-disclosure in discovery, or federal or state requirements preclude disclosure).
- Flexibility for the ALJ ensures that due process considerations can be met, especially in the event compliance with discovery requests is delayed until immediately before the hearing.
- It is more efficient for the ALJ to make this decision in the ALJ's discretion; adding a showing of good cause or determination that a modification is needed adds a complicating step.
- The proposed additions promote an orderly process,

*10. The OAH **supports** requiring agencies and parties to tell each other who represents them and to report changes in representation but **opposes** requiring agencies to provide more than the names of persons who will appear as representatives. **The OAH suggests limiting the contact information for agency representatives to names, and suggests several additions: including a deadline for submission; including the names and qualifications of any experts; clarifying the stage at which the ALJ becomes involved; and exempting those types of cases which have very short hearing deadlines.***

Rationale:

- Requiring release not only of names but of contact information for DHS case managers and other lay representatives will lead to a deluge of potentially irrelevant documents sent directly to them from some parties, which is inefficient. DHS case managers will be strongly opposed.

11. Several of the non-substantive recommendations to OAR 137-003-0520 should be redrafted.

- Subparagraphs (a) and (b) delete references to the entity where the document should be filed, and contain a duplicative reference to the administrative law judge. This paragraph should be further revised to read:

(2) Unless otherwise provided by these rules, any document filed for the record in the contested case shall be filed:

(a) With the agency before the case is referred to the Office of Administrative Hearings.

(b) With the Office of Administrative hearings after a case is referred to the Office of Administrative Hearings but before issuance of an order.

(c) With the agency after issuance by the administrative law judge of a proposed order.

- Paragraph (3) should be deleted and completely rewritten as follows:

If the agency or the Office of Administrative hearings receives a document which is improperly filed under this section, the agency or the Office of Administrative hearings shall refer the document to the correct entity.

12. Additional ALJ suggestions for rules revisions

Move recusal rule from OAR 471-060-0005 (Employment) to OAH contested case rules (OAR 137-003).

Rationale:

- Past fears that including this rule with other contested case hearing rules would lead to a high number of recusal requests have not been realized.
- The rule should be included with the underlying subject to which it applies, i.e. contested case hearings; at least one claimant has argued that the rule does not apply to contested case hearings other than unemployment because that is the only section in which it appears.

Allow ALJs to determine the location of hearings.

Under OAR 137-003-0525, the Office of Administrative Hearings or the assigned administrative law judge shall, **subject to the approval of the agency**, determine the location of the hearing. Some agencies have taken the position that hearings must occur at the physical location of the agency and will override the administrative law judge's selection of a hearing location.

Since fall 2007, the OAH has maintained hearing rooms in Salem and Tualatin which are designed to ensure that hearings will be conducted in a professional manner, including adequate space for all participants, the ability to create a clear and accurate record, and physical separation from the agency. The Salem and Tualatin offices are easily accessible from I-5, and there is sufficient parking. These rooms can be readily scheduled. Agencies fund this space through overhead charges calculated into actual costs for which they are invoiced.

In contrast, rooms used in agency locations have raised issues with size, parking availability, and ability to create a clear and accurate record. Additionally, there are often scheduling delays because the room serves multiple purposes and in some instances, multiple agencies. Agencies understandably are concerned about time-efficient scheduling of hearings. However, agency insistence on its preference for location can significantly limit the ability to schedule a hearing expeditiously.

Additionally, while convenience for board and commission members and witnesses is an important consideration, the same holds true for participants, their witnesses, the AAG and the administrative law judge. Agency override can give the agency an unfair advantage over other parties who also can incur higher costs and potential inconvenience.

The administrative law judge should be given discretion to determine the hearing location, after weighing the potential cost to all the parties, the potential for delay, and the suitability of the proposed hearing facility.

Revise OAR 137-003-0530 (4), which allows an agency to amend the notice at any time as a matter of right, even after close of the record and issuance of a proposed order. Revise to provide that for amendment after close of the evidentiary record, the administrative law judge may permit the amendment upon a determination that permitting the amendment will not unduly delay the proceeding or unfairly prejudice the parties (similar to the standard in section (5) for permitting filing of an amended document).

Rationale:

- Raises perception of unfairness and undue advantage for the agency, since other parties do not have the opportunity to go back and change pleadings as a matter of right.
- Agency can request amendment following the same standard as with other amendments, which would address technical defects.

Amend OAR 137-003-0580(1) (Motion for Summary Determination) to require the moving party to provide a copy of the rule along with the motion if the respondent is not represented.

Rationale:

- A party who will need to respond should be informed at the earliest opportunity about how to respond, and this information should be included in the notice of hearing provided by the moving party.
- In the absence of information about how to respond, an unrepresented party may not respond or may respond inappropriately, particularly if an agency files a large volume of motions and documents. This may result in an unfavorable determination for the pro se party because of process rather than substantive considerations.
- Administrative law is intended in part to create a simpler, more informal process.

In light of this goal, the availability of summary determination when the respondent is unrepresented warrants further review.

Adopt a rule providing for determinations on the record.

Rationale:

- Parties sometimes determine that the record will suffice and that a hearing is not necessary. At the request of the parties, ALJs make rulings based on the written record. This practice, which can result in significant cost savings for parties in appropriate circumstances, is neither allowed nor prohibited by the current rules. Since it is an increasingly common practice, it should be documented by rule.

13. Minor corrections to the draft memo

- The spelling of Andrea Sloan's name should be corrected (footnote 8, page 18).
- On page 20, the memo states that "OAH has inaccurate data on the fate of proposed orders . . . ." OAH data are incomplete, but the data we have are accurate. The sentence should be revised to state that data are incomplete.

MUSSELL COMMENTS ON DRAFT MODEL RULES

Frank Mussell, Chair of the Administrative Law Section, provided his observations to the advisory committee considering David Leith's draft report on the proposed changes to the model rules for hearings conducted by the Office of Administrative Hearings. Mussell's comments to Leith are provided below.

Sanctions

Virtually all agencies have plenary authority to thoroughly investigate licensees. Consequently, at the conclusion of the agency investigation and at the time that disciplinary action is initiated, the agency should have a pretty clear idea of the appropriate sanction it intends to impose. I support the recommendation that the Model Rules require agencies to specify in the contested case notice the sanction sought prior to the hearing. Such a requirement is not meaningful, however, when the rules, as they currently provide, authorize an agency to amend the "notice"[the term now having lost all meaning] after the hearing is concluded, the record is closed and a proposed order has been issued. The rule authorizing amendment of the notice after the hearing has closed should be repealed. Otherwise, this recommendation is pointless.

Representation of non-corporeal parties

I support the recommendation that the contested case notice notify non-corporeal parties of the requirement that they be represented by an Oregon licensed attorney. In order for that rule change to be meaningful it should also contain the requirement that the notice explain that the required representation includes filing a request for hearing and that a request for hearing submitted on behalf of the non-corporeal party by anyone other than an Oregon licensed attorney is a nullity and will result in a default order. Further, as a general matter, the time period within which agencies require that a request for hearing be filed is too short which disadvantages licensees seeking the assistance of counsel. The Model Rules should specify a time within which requests for hearing must be filed that is

applicable to most, if not all agencies, and that is longer than 21 days from the date that a notice is mailed by the agency to the licensee and the request for hearing is received by the agency. Most cases don't involve an emergency that requires a hearing request to be filed within such a brief period of time and most agencies have the authority to suspend a license without hearing if a true emergency exists.

Discovery

As noted above, virtually all agencies have plenary authority to thoroughly investigate licenses. This includes investigative subpoena power that reaches both the licensee and third parties. The agencies don't need discovery. Licensees need discovery. I believe it is a mischaracterization to refer to members of the private bar as contending that the lack of "wide-ranging" discovery undermines their ability to represent their clients. What is needed is not wide-ranging discovery, but reasonable discovery controlled by an impartial administrative law judge subject to review by the chief administrative law judge. For that reason, I support the recommendation to eliminate the agencies' authority to change an ALJ discovery order. I also note that no one can seriously contend that an ALJ would authorize a respondent's request to subpoena or depose an agency decision-maker.

However, this important improvement is not meaningful if the agencies continue to have the authority to promulgate discovery rules for their own cases pursuant to ORS 183.425, and this provision is interpreted by the Attorney General as giving agencies the power by rule to place limits on the ALJ's discovery authority. Agencies will remain in complete control of discovery. The draft suggests as much when it states "if an existing agency rule governs discovery, the ALJ's and CALJ's orders must be consistent with [any such rule adopted by the agency]." This view is confirmed by the draft's statement in the discussion about interrogatories and requests for admission. The draft states that the rules should provide for interrogatories and requests for admissions, "so long as the agency has not limited or prohibited discovery by rule . . . ." It is also confirmed by the proposed amendment to OAR 137-003-0570 that provides "the agency may by rule . . . prohibit or limit discovery."

I note in this regard that agencies don't just one day decide to adopt discovery or other procedural rules. These rules are the product of recommendations and advice of the agencies' assigned assistant attorneys general. Thus, the Attorney General can adopt Model Rules that appear to reform the administrative justice system while through his assistants he advises the agencies about how to adopt agency rules to undermine the reforms to the end that agencies remain in complete control.

Proposed Amendments to the Discovery Rule

As noted above, the agency doesn't need discovery, respondents need reasonable discovery that is flexible, that fits the circumstances of a particular case and is under the control

of the Office of Administrative Hearings, not the agency. There is no need to provide for requests for admissions and interrogatories in the rules applicable to every case. In cases where respondents are not represented by counsel, the use by agencies of requests for admissions and interrogatories is obtuse and oppressive. Their use by the agency is also obtuse and oppressive in any event. It also might be suggested that this is an improper judicialization of the process, a criticism that might be leveled at the majority of the current model rules.

The proposed amendments to the discovery rule include a requirement that when making a public records request a respondent must make the request in writing and provide a copy to the agency's attorney or agency representative. The Attorney General cannot by rule burden the public records statute.

Publication of Agency Final Orders

The Oregon State Bar and the Administrative Law Section is currently exploring the option of the publication of agency final orders in a searchable data base through Fastcase®. This would reduce the burden on the Office of Administrative Hearings. As chair of the Administrative Law Section, I would welcome the Attorney General's collaboration on this project. Please let me know your thoughts on this initiative.

Emergency License Suspension

The recommendation to require that a final order regarding an emergency license suspension order be issued within a fixed period of time is an important improvement. The time frames in the proposed rule are much too long. The only issue at such a hearing is whether the licensee's continued exercise of the license privilege poses a serious danger to the public health or safety.

I also note that under the proposed amendment the event that begins the time period within which a final order must be issued is the referral of the case by the agency to the Office of Administrative Hearings. Thus, if the agency wants to extend the time within which the ex parte emergency suspension order remains in effect, it need only delay making the referral to the hearing office. I suggest the proposed amendment include the requirement that the agency must refer an emergency license suspension matter to the Office of Administrative Hearings for hearing within one or two business days from the day a request for hearing is received by the agency.

Conclusion

I hope that you, the advisory group and the Attorney General find my observations useful in the work of the project. They are based on 17 years of administrative law practice during a 21 year career at the Oregon Department of Justice, 8 years of administrative law

experience in private practice and a commitment to achieving good government-government that is effective, efficient, and fair-with the ultimate goal of serving the best interests of Oregonians.

Frank Mussell divides his time between Portland and Central Oregon. His administrative law practice focuses on representing professionals before their licensing boards. Before entering private practice he was counsel to the Board of Pharmacy, the Board of Nursing, the Board of Dentistry and numerous other boards and commissions. He can be contacted at: Frank@Mussell.biz

KREM RECOMMENDS CHANGES TO MODEL RULES

As the Oregon State Bar's representative on the Attorney General's advisory group for the model rules, Janice Krem has provided the Attorney General's office with extensive analysis regarding the procedural rules for the Office of Administrative Hearings. Her focus has been on the need for more user-friendly and even-handed model rules for the conduct of contested case hearings. Her article, "Improving the Model Rules," published in the summer 2010 newsletter, Volume 11, No. 2, provides a more complete analysis. Below is a summary of her suggested rule changes.

Proposed Model Rules Changes

CREATE NEW RULE: Purpose, ALJ Discretion, AG Approval of Agency Hearing Rules

(1) These rules and any rules promulgated by an agency for contested case hearings shall be construed to secure just determinations, simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay. Any procedural rule may be relaxed or modified by the administrative law judge in the interest of fairness or justice. In the absence of rule, an ALJ may proceed in any manner compatible with these purposes. [1]

(2) No rule promulgated by an agency pursuant to OAR 137-003-0501 shall become effective until it has been approved by the Attorney General after its review pursuant to the procedures established in ORS 183.630.

CREATE NEW RULE: Review by Chief ALJ

(1) Before issuance of a proposed order, or before issuance of a final order if the administrative law judge has authority to issue a final order, the agency or a party may seek immediate review by the chief administrative law judge of the

administrative law judge's ruling on any of the following:

(a) A ruling on a motion to quash a subpoena under OAR 137-003-0585;

(b) A ruling refusing to consider as evidence judicially or officially noticed facts presented by the agency under OAR 137-003-0615 that is not rebutted by a party;

(c) A ruling on the admission or exclusion of evidence based on a claim of the existence or non-existence of a privilege.

(2) The agency or a party may file a response to the request for immediate review. The response shall be in writing and shall be filed with the agency within five calendar days after receipt of the request for review with service on the administrative law judge, the agency representative, if any, and any other party.

(3) The mere filing or pendency of a request for immediate review, even if uncontested, does not alter or extend any time limit or deadline established by statute, rule, or order.

(4) The chief ALJ shall rule on all requests for immediate review in writing and the request and ruling shall be made part of the record of the proceeding. The chief ALJ's ruling supersedes the ALJ's ruling in the matter.

REVISE Depositions and Discovery Rules (See OAR 137-003-0570 & 137-003-0572)

Depositions

(1) On petition of any party to a contested case, or upon the agency's petition, the ALJ may order that the testimony of any material witness be taken by deposition in the manner prescribed by law for depositions in civil actions. Depositions may be taken by the use of audio or audio visual recordings. The ALJ is not required to issue an order for a deposition unless a deposition is necessary to obtain the information and alternative informal means for obtaining the information are not sufficient.

(2) The petition shall set forth the name and address of the witness whose testimony is desired, a showing of the materiality of the testimony of the witness, an explanation of why a deposition is necessary in lieu of informal or other means of discovery, and a request for an order that the testimony of such witness be taken before an officer named in the petition for that purpose. If the witness resides in this state and is unwilling to appear, the agency or ALJ may issue a subpoena as provided in ORS 183.440, requiring the appearance of the witness before such officer.

Discovery

(1) Upon a party's request for discovery, an agency must disclose to the party in a contested case hearing all investigative information in the case or cases related to the party, as well as any information requested by the party that is likely to assist the party in obtaining a full and fair hearing, including relevant prior agency decisions and policy statements.

(2) If the agency, party, or witness objects to discovery determinations by the ALJ, immediate review by the chief ALJ may be requested pursuant to OAR 137-005-0640.

CREATE NEW RULE: Ex Parte Communications

(1) An ALJ assigned from the OAH who is presiding in a contested case proceeding or final agency decision maker who receives an ex parte communication described in subsections (3) and (4) of this section shall place in the record of the pending matter:

(a) The name of each person from whom the ALJ or final agency decision maker received an ex parte communication and the date of the communication;

(b) A copy of any ex parte written communication received by the ALJ or final agency decision maker;

(c) A copy of any written response to the communication made by the ALJ or final agency decision maker;

(d) A memorandum or oral statement reflecting the substance of any ex parte oral communication made to the ALJ or final agency decision maker; and

(e) A memorandum or oral statement reflecting the substance of any oral response made by the ALJ or final agency decision maker to an ex parte oral communication.

(2) Upon making a record of an ex parte communication under subsection (1) of this section, an ALJ or final agency decision maker shall advise the agency and all parties in the proceeding that an ex parte communication has been made a part of the record. The ALJ or final agency decision maker shall allow the agency and parties the opportunity to respond to the ex parte communication.

(3)Except as otherwise provided in this section, the provisions of this section apply to communications that:

(a) Relate to a legal or factual issue in a contested case proceeding;

(b) Are made directly or indirectly to an ALJ or final agency decision maker while the proceeding is pending; and

(c) Are made without notice and opportunity for the agency and all parties to participate in the communication.

(4) The provisions of this section apply to any ex parte communication made directly or indirectly to an ALJ or final agency decision maker or to any agent of an ALJ or final agency decision maker by:

(a) A party;

(b) A party's representative or legal adviser;

(c) Any other person who has a direct or indirect interest in the outcome of the proceeding;

(d) Any other person with personal knowledge of the facts relevant to the proceeding; or

(e) Any officer, employee or agent of an agency.

(5) The provisions of this section do not apply to:

(a) Communications about information in the hearing record to a final agency decision maker by other final agency decision makers during deliberations in the matter, unless the communications are indirect communications by persons identified in subsection (4) and would otherwise be ex parte communications to a decision maker;

(b) Communications to a final agency decision maker by the attorney advising the final agency decision makers, if the attorney was not also advising or being advised by those prosecuting the case;

(c) Communications to an ALJ by a person employed by the OAH, unless the communications are indirect communications by persons identified in subsection (4) and would otherwise be ex parte communications to the ALJ; or

(d) Communications made to the OAH about the procedural status of the case, case scheduling, and other matters not related to any legal or factual issues or the merits of the case.

(6) An agency may have rules requiring the disclosure of communications to ALJs or agency decision makers that exceed the disclosure requirements contained in this rule.

CREATE NEW RULE: Motions (Compare OAR 137-003-0630)

(1) If the party or agency wants the ALJ to rule on an issue prior to the hearing, the requestor may file a motion.

(2) The motion must be provided to any other parties and to the agency. Parties and the agency may file a response to the motion.

(3) A prehearing teleconference may be held to facilitate a ruling on the motion. The ALJ may require that responses and supporting documents be filed in order to rule on the motion.

(4) The ALJ may decline to issue a ruling before the hearing if there is insufficient information provided by the requestor to rule on the matter or the ruling will not increase the efficiency or effectiveness of the hearing.

REVISE: Late Hearing Requests (See OAR 137-003-0528)

The determination to deny a request for hearing because it was untimely is an order in a contested case, which requires evidence, findings of fact, and conclusions of law. Accordingly, justification for having the agency make this decision outside the hearing process is not apparent or consistent with law. *See Sayers v Employment Division*, 59 Or App 270, 650 P2d 1024 (1982). The rule must be changed to authorize the ALJ to determine whether a request for hearing is timely under the applicable rules.

The applicable rules should provide a fair opportunity for the party to receive a hearing, particularly since the party is relying on the agency for information about its process and how to properly file the request. Good cause for a late filing should be revised to reflect a better standard that recognizes this reality. S*ee Meritage at Little Creek v Employment Dept*, 232 Or App ___, ___P3d ___ (2009) for an illustration of this kind of problem. Good cause should not be limited, as it is now, to the issue of the party's "control." Good cause should also include consideration of the conduct by the agency, as well as excusable neglect, inadvertence, reasonable mistake, and whether there was a good faith effort to comply. The rule should be tipped in favor of allowing the party to be heard and the agency to correct any mistakes it has made by allowing an impartial review of its proposed decision. Compare the more liberal standard for good cause--which applies to agencies' failures to comply with the rules--in OAR 137-003-0501(4).

DELETE: Transmittal of Questions to the Agency (OAR 137-003-0635)

OAR 137-003-0635 allows agency staff to sidestep the hearing and refer the matter to the "agency" to develop its policy in the case. In effect, OAR 137-003-635 allows agency staff and the attorney assigned to the agency, ***not*** the responsible final agency decision makers, to create policy that is likely to determine the outcome of the case. This external "proceeding" avoids both rulemaking and contested case hearings, the proceedings allowed under the Administrative Procedures Act for establishing agency policy by final agency decision makers.[2] Decision makers need to hear countervailing arguments in the context of a complete record when making policy choices. OAR 137-003-635 is unnecessary, violates the Administrative Procedures Act, and should be repealed.

DELETE: Immediate Review by Agency (OAR 137-003-0640)

The issues that can be presented for immediate review by the agency under OAR 137-003-0640 are complex legal issues. These issues include quashing subpoenas, taking official notice, and applying privileges. These issues require expertise in fact finding and applying law to these facts. This is the bailiwick of trained adjudicators. Furthermore, these procedural issues can determine the outcome of the case. An impartial ALJ, not agency staff or their attorney, should determine these important procedural issues to ensure that a fair and full record is developed. *Shank v Board of Nursing*, 220 Or App 228, 185 P3d 532 (2008) is an example of the unfairness of interim review allowed by this rule and "agency" control of record development during the hearing process.

If there is a need for interim review of the ALJ's determination on these matters, these issues should be "appealed" to the Chief ALJ to ensure that procedural decisions are impartial, as provided in the recommended rule.

DELETE: Unfair Pleading Requirements (OAR 137-003-0501)

By allowing the agency to specify the content of a hearing request and response to its notice, the model rules allow an agency to require responsive pleadings. Concerning its own allegations, the agency only has to provide a notice that contains "[a] short and plain statement of the matters asserted or charged."[3] Nevertheless, an agency will require that a party file an answer at the time the party requests a hearing and also provide sanctions against the party if the pleading is not deemed sufficient. For instance, agency rules provide that a general denial is not sufficient, any fact not denied is admitted, any defense not raised is waived; any new matters raised by the party are presumed to be denied by the agency; and no evidence can be taken on any issue not raised in the response.

In complicated cases, it makes sense to convene a prehearing telephone conference to ensure that the parties are aware of the issues in the case--what is and is not disputed. Efficiency certainly has an important place in the proceedings. However, the routine requirement of filing responsive pleadings puts unfair burdens on parties, who do not know what defenses may be available to them and have not had time to investigate the matter before they have to request a hearing and file an answer. It is not unusual for a party to have to file the request for hearing within 21 days of the date the notice of the agency's allegations is **mailed** to a party. If the party is a corporation, it must hire an Oregon attorney before it can file its hearing request and response. The rules should not allow agencies to create additional pleading requirements that are procedural hurdles to fair record development and the party's ability to effectively participate in the hearing process. The goal is to make the right decision, not provide limited access to record development.

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[1] Section (1) of this rule is based on the American Bar Association's model rules.

[2] See also procedures for declaratory rulings, OAR Chapter 137, Division 2.

[3] ORS 183.415(3)(d).

SECTION APPLAUDS EWING'S CONTRIBUTIONS

Thomas E. Ewing

As part of its tenth anniversary celebration, the Executive Committee of the Administrative Law Section will formally recognize the important contributions that Thomas E. Ewing has made to the section and to Oregon's administrative justice system. The section will present Ewing with his award at 4 p.m., September 30, 2010, at the Oregon State Bar Center.

Ewing guided the fledgling Hearing Officer Panel through its earliest years to its successful establishment as the Office of Administrative Hearings. As Chief Administrative Law Judge, Ewing continued to lead Oregon's corps of administrative law judges until the fall of 2008. Ewing deserves credit for the success of the office despite the early entrenched opposition of many state agencies to the creation of a centralized hearing panel. Conventional wisdom held that he had taken on an impossible job. In spite of the nay-saying, Ewing's endeavors were an impressive success.

Ewing served on the section's Executive Committee from 2000 until 2009. Ewing was the section's treasurer for most of time he served on the committee. He brought to his work on the committee his characteristic commitment and enthusiasm, as well as large doses of savvy and self-deprecating wit.

Certificate of Appreciation

This Certificate is Awarded by the
Administrative Law Section of the Oregon State Bar
to

Thomas E. Ewing

in Recognition of
His Outstanding Leadership on the Executive Committee
and His Important and Enduring Contributions
to Oregon's Administrative Justice System

Q&A: ALJ PROFILES

Office of Administrative Hearings Website
http://www.oregon.gov/OAH/index.shtml

As part of a series of articles profiling administrative law judges, the ALJs handling agency, board, and commission cases at the Office of Administrative Hearings have graciously agreed to answer questions about their backgrounds, experience, and their perspectives on our administrative justice system. These ten senior ALJs also give some very good advice for practitioners appearing in contested case hearings.

The responses are in the ALJ's own words. Brackets have been added to clarify the context of the answers and the endnotes have been added to clarify acronyms.

Here are the responses from ALJs Rick Barber, Ken Betterton, Bernadette House, Robert Goss, and Alison Webster.

Q: What piece of advice would you give an attorney appearing for the first time in one of your hearings? Do you have any quirks or pet peeves that participants should consider when appearing before you?

ALJ Barber: As in any forum, check with other practitioners or with ALJs that you might know who can tell you about the hearing process. Know your case well, and have a theory of the case (if you can't explain how to get from the issue to the desired result, don't expect me to get there!). Finally, this is "real" court, albeit less formal than circuit court. You still must present evidence to win—and this is true for agency lawyers as well.

ALJ Betterton: I have a paperweight with the following inscription: "A good lawyer knows the law. A great lawyer knows the judge." I start my hearings on time. Be organized and ready to go. Have your exhibits properly marked.

ALJ House: Attorneys who do not usually practice in administrative law should become familiar with the differences between the judicial process and the Administrative Procedures Act and the Models Rules for Contested Cases. It is very frustrating to have an attorney present arguments that are inapplicable to administrative law, especially in the area of the applicable standards of evidence. I truly appreciate attorneys who are prepared for presenting their client's case and know the applicable agency laws and rules, as well as the general APA and model rules.

ALJ Goss: Be courteous and professional to all participants in a hearing (including the ALJ), and if you are going be appearing in many hearings involving a particular agency, take the time to be well versed in the agency law and APA hearing procedures. I have found that the most successful attorneys that appear before me are those that have learned to adapt to the peculiarities of administrative law, meaning that the attorney has learned what works in this forum and what doesn't. For example, a confrontational or aggressive

style that might be effective before a jury in a criminal or civil case is often totally inappropriate, besides being ineffective, in a contested case before an experienced ALJ.

ALJ Webster: Be prepared, be organized and be professional. Be familiar with the applicable rules and regulations. Stick with the facts and the law, and remember this is not a court of equity. Put on a first-rate case for the ALJ rather than a show for your client.

Q: How long have you been conducting contested case hearings? What were you doing before you became an ALJ?

ALJ Barber: I have been with the OAH since 2001 (with a short break in 2004-5). My practice for 20 years prior was in workers' compensation, hearing and appellate, including two years as a workers' compensation ALJ as well.

ALJ Betterton: [ALJ] since 1991. I was in private practice in Salem for about 12 years before becoming an ALJ. Before private practice, I was a deputy district attorney in Oregon for about four years.

ALJ House: I began with Office of Administrative Hearings in December 2001 in a limited duration position and was hired to a permanent position in July 2002. I began my legal career as an assistant attorney general in Georgia, and after relocating to Oakridge, Oregon with my family, I took time off to raise a family while living on a farm. During that time, I raised angora goats and llamas, and learned other novel (to me) skills, such as canning and weaving. I eventually became appointed, then elected, to the position of Justice of the Peace/Oakridge Municipal Judge for the Justice Court of Lane County, Upper Willamette District. I briefly practiced in Lane County as an assistant district attorney and in private practice before joining the OAH.

ALJ Goss: I have been conducting contested case hearings for the State of Oregon since 1984. Before that I was an associate at a small law firm in Salem from 1980 to 1984.

ALJ Webster: I've been conducting contested case hearings since 1999. I was hired as an ALJ with ODOT/DMV[1] and moved to the Hearing Officer Panel/Office of Administrative Hearings upon its inception on January 1, 2000. Before I became an ALJ, I was a staff attorney for the Oregon Workers' Compensation Board. Before that, I spent several years in private practice in both Oregon and California.

Q: For which agencies do you now hear cases? Have you been previously employed by any of these agencies?

ALJ Barber: I preside over the following hearings: Insurance Division (premium audit and enforcement), Water, the "ABC" cases (agencies, boards and commissions) of every type, Portland Police and Fire Disability cases, and DHS[2] cases. I will occasionally do unemployment or implied consent cases, but I am not regularly scheduled for them. When I was an ALJ for the WCB[3] , I was technically an employee of DCBS[4], the same agency that includes the Insurance Division.

ALJ Betterton: Many of the health licensing and professional boards and commissions, DEQ[5], State Lands, Agriculture, other natural resource agencies, Department of Education, etc. No [as to employment by these agencies].

ALJ House: As a senior administrative law judge, I am responsible to hear cases from almost all of the agencies who refer matters to the OAH. The majority of my caseload is in the area of professional licensing boards but I am also one of a small group of ALJs trained and qualified to hold due process hearings for the Department of Education under the Individuals with Disabilities Education Improvement Act. I am also assigned to a variety of other agency referrals, including Department of Environmental Quality, Department of Human Services, Department of Transportation Division of Motor Vehicles, and the Employment Department. I have not worked for any of the involved agencies prior to working as an ALJ.

ALJ Goss: As a senior administrative law judge, I hear cases from a broad range of agencies. In looking through my files, I have been assigned hearings from approximately 30 different state agencies over the last few years and have been loaned out for hearings involving other governmental agencies, such as municipalities. My hearings are usually contested cases under the APA[6], but I have also heard many CCB[7] arbitrations. Before the OAH, I worked for ODOT (DMV) as a hearings officer, before being swept up in the organization of the OAH, which is currently under the Employment Department.

ALJ Webster: I now hear cases for a wide variety of agencies, including: the Oregon Liquor Control Commission; Public Employees Retirement System; Board of Medical Examiners; Board of Nursing; Teachers Standards and Practices Commission; Pharmacy Board; Department of Environmental Quality; Division of State Lands; Department of Fish and Wildlife; Department of Consumer and Business Services Insurance Division; Department of Transportation/DMV; Department of Human Services; and the City of Portland Police and Fire Disability Fund.

Q: When and where did you receive your legal training? Are you a member of the Oregon State Bar?

ALJ Barber: I graduated from Willamette University College of Law in 1981, and have been a member of the Oregon State Bar since September 1981.

ALJ Betterton: Willamette University, College of Law, graduated in 1974. Member of Oregon State Bar since 1974.

ALJ House: I graduated *cum laude* from Georgia State University College of Law and am a member in good-standing, inactive status, of the State Bar of Georgia, as well as an active member of the Oregon State Bar.

ALJ Goss: J. D. from Willamette University School of Law in 1980. Member of the Oregon State Bar since 1980, inactive member since 1985.

ALJ Webster: I received my J.D. from Loyola Law School, Los Angeles in 1987. I'm a member of the State of California Bar and the Oregon State Bar.

Q: What is the toughest part of your job as an ALJ? What do you find the most rewarding part of your job?

ALJ Barber: The toughest part of my job and the most rewarding part are the same—trying to take the evidence provided, integrating it with the complexities of the law and of agency interpretation, and preparing a written order that (hopefully) makes the complex easier to understand and arrives at the correct answer to the issues raised.

ALJ Betterton: Shifting gears from one agency to another, and trying to stay on top of the different laws, procedures and agency cultures. Trying to master the same.

ALJ House: The types of cases that I hear as a senior ALJ often result in multiple day hearings. Developing the record through a full and fair hearing can be difficult at times, particularly if a party is appearing *pro se*. The hearing is followed by research and writing what I hope to be thoughtful, thorough, and well-written, legally-correct, and sometimes lengthy orders. Maintaining the intense concentration and coming up to speed on a variety of areas of law can be exhausting but is also one of the most rewarding aspects of my work. The most rewarding of all is to complete a case and know that I provided the parties with the most professional, fair, and complete hearing that I am able and to have, in many instances, provided an objective, attentive forum for individuals who do not always feel as though their concerns are truly heard when they are involved with government systems.

ALJ Goss: One of the things I wrestle with the most is balancing a party's opportunity to be heard with the need to keep the hearing focused on the relevant issues. Unfortunately, this means I sometimes have to cut a party off that wants to raise a strongly and sincerely held issue that in my judgment is not an actual issue in the hearing. As to the rewarding part of the job, I have enjoyed learning about the many and varied state agencies that have appeared in my hearings and the work they do.

ALJ Webster: The biggest challenge is the breadth of subject matter areas and the variety of agency practices and procedures that I need to be familiar with and, ideally, well-versed in, to conduct full and fair hearings and make reasoned determinations. Although I do not hold up to 24 hearings a week like some of my peers, I have that many or more open files to contend with at any given time in various stages of the contested case process. As an example, in any given week, I may deal with an OLCC[8] licensing matter, a licensed nurse facing revocation of his or her nursing license for alleged patient abuse, a teacher facing license suspension or revocation for alleged misconduct, a PERS[9] retiree challenging PERB's recalculation of retirement benefits, and an outdoor advertising sign company challenging ODOT's notice of violation and order of removal.

The most rewarding part is finishing (what I hope is) a complete, well-reasoned and well-written order. Being affirmed by the Court of Appeals is also rewarding.

Q: If you were able to change one thing in the current administrative hearing system, what would it be and why?

ALJ Barber: Without a doubt, the main thing I would change is to make it a "two party" system, where the agency, board or commission is a party, where the ALJ has final order authority, and where either side (citizen or agency) may appeal the decision. If that is not possible, then I would change the discovery requirements to give the ALJ, and not the agency, the right to control the extent of discovery (and to not require citizen "answers" before discovery has taken place).

ALJ Betterton: Change the motion for summary determination rule, so it applies only where the parties have signed written stipulated of facts and reaches truly legal issues. I see too many cases where the parties attempt to try their cases through motion practice with affidavits and documents. Unrepresented parties are usually overwhelmed by this process and can't respond effectively. I prefer to try cases more and shuffle papers less.

ALJ House: I believe that the OAH should be independent and not placed under the Employment Department. The OAH needs to be in substance, not just in appearance, truly independent to provide a fair and impartial forum, for all of the parties who appear before us in contested case matters.

ALJ Goss: If I was able to change one thing in the current administrative system it would be to reverse or at least slow down the current trend to "judicialize" the system. The APA in Oregon started out as a template to quickly hear and decide agency actions with less formality than in a court proceeding, but in recent years I have seen more and more movement towards a less flexible and more judicial model.

ALJ Webster: There are times when I wish that ALJs had final order authority for more of the agencies, boards and commissions for which we conduct hearings, but I understand the policy reasons why this is not the case. I would also like to see Office of Administrative Hearings as a stand-alone entity that is not established within, or managed by, another agency.

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[1] Oregon Department of Transportation (Driver and Motor Vehicle Services Division)

[2] Department of Human Services

[3] Workers' Compensation Board

[4] Department of Consumer and Business Services

[5] Department of Environment Quality

[6] Administrative Procedures Act, ORS chapter 183

[7] Construction Contractors Board

[8] Oregon Liquor Control Commission

[9] Public Employees Retirement System and Public Employees Retirement Board

SHETTERLY'S VIEW FROM 2003

In the July 2003 summer issue of the Administrative Law Section's newsletter, Lane Shetterly, former Oregon State Representative and then section Chair, wrote an article about the arduous task it was to establish the Office of Administrative Hearings. As part of our retrospective, here is a reprise of that article, which was entitled, "The Long Journey of HB 2526." The color photo is courtesy of the Office of Administrative Hearings.

Governor Kulongoski signing House Bill 2526. From left to right, Thomas E. Ewing, Chief Administrative Law Judge, Rep. Lane Shetterly, Governor Kulongoski, and Judge David Schuman.

On May 22, 2003, Governor Kulongoski signed HB 2526 into law and made permanent the Office of Administrative Hearings (formerly the Hearing Officer Panel).

It has been a long journey. Beginning in the early 1980s, there were repeated but unsuccessful attempts to create an independent central panel to hear state agency contested cases. These efforts gained new momentum in 1997 when Senator Neil Bryant and I sponsored House Bill 2948, which would have created an office of administrative hearings as a separate and independent state agency.

That bill, although it was passed overwhelmingly by both chambers of the legislature, was vetoed by Governor Kitzhaber. Nevertheless, the Governor authorized a work group to study the idea. David Schuman of the Department of Justice (now a member of the Court of Appeals), Chip Lazenby of the Governor's Office, and I worked to craft new legislation, HB 2525. That bill created the Hearing Officer Panel as a pilot project, due to sunset on January 1, 2004. It proved to be a solid compromise between the aspirations of citizens and legislators for fairness on the one hand and the fears of agencies for loss of control on the other.

HB 2525 also established an Oversight Committee to review Panel operations and to make recommendations to the Legislature and the Governor. The Committee is composed of legislators, representatives of the Department of Justice, and private practitioners appointed by the Governor. The Committee met occasionally between 2000 and 2002 and reviewed the implementation and operation of the panel. In December 2002, after considering an audit by the Legislative Fiscal Office (LFO), it engaged in closer discussions on the Panel's future.

Out of those discussions emerged the following recommendations for the 2003 session: (1) repeal the sunset provision, and make the panel permanent; (2) change the name

"Hearing Officer Panel" to "Office of Administrative Hearings" (OAH); (3) keep the OAH in the Employment Department, at least for the next two years; (4) change the title "hearing officer" to "administrative law judge," and "chief hearing officer" to "chief administrative law judge;" (5) restructure the position of the chief ALJ from being an appointee at-will of the Director of the Employment Department to an appointee for a four-year term, terminable only for cause. The Committee felt that this protection for the chief was necessary because of the potential conflicts of interest created by the OAH remaining in the Department, which is the largest user of its hearing services; and (6) retain the present number of agencies subject to the OAH.

When the Panel began operations on January 1, 2000, there was a good deal of agency foreboding and skepticism. Many agency heads feared—some perhaps hoped—that this pilot would fail. In retrospect, it may have been good fortune that the Panel began with such low expectations. In the LFO audit at the end of 2002, one agency director said that the Panel "has been more successful than we thought it would be." In 1999, agency heads and trade associations lined up either to oppose HB 2525 or, at a minimum, to request to be exempted. In 2003, by contrast, there was not a single voice of dissent in testimony before the House or the Senate Judiciary Committees. Indeed, LFO's audit reported that agencies had seen significant improvement in the quality of hearings over the last three years. It is no surprise, then, that the House passed HB 2526 by a vote of 53 to 2 and the Senate by 21 to 1.

Looking to the future, the Oversight Committee will continue to play an important role. Much work has yet to be done. For example, the OAH was left in the Employment Department; however, some Committee members expressed concern that this creates a continued perception of a lack of independence. There is the question whether other agencies should be included in the OAH, and whether some agencies now in it should be exempted. There is also the question whether agencies should have to meet a tougher standard when changing OAH proposed orders.

This has been a difficult legislative session on several fronts. But, for me, one of the brightest moments was the signing into law of HB 2526. After three years of operation, the OAH has proven itself. Citizens of our state now have a much more level playing field in their disputes with state agencies. The OAH is significantly more efficient, and less costly, than the previous system of separate agency hearings units. There has been new emphasis on training and professionalism for administrative law judges.

I want to recognize the substantial contributions of the Administrative Law Section and Janice Krem to the success of the OAH. On the passage of House Bill 2525, Ms. Krem pushed for the creation of the Section. Over the last three years, its executive committee has provided valuable counsel both to me and to the Chief Administrative Law Judge Thomas Ewing. I hope that the section will continue to promote the objectives of the OAH and of administrative law in Oregon generally.

SHETTERLY'S VIEW FROM 2003 – *Continued from page 27*

Finally, I want to extend my thanks to Chief ALJ Tom Ewing, for his skilled leadership of the OAH through its formative years, and to the ALJs who proved that the Panel (now the OAH) could work. Without their good efforts, the success we attained with the passage of HB 2526 would never have been achieved.

WHY AGENCIES NEED FAIR HEARINGS

By Janice Krem

Regulatory agencies are indispensable to protecting the public from unqualified, unscrupulous, or otherwise inappropriate licensees. A fair and objective hearing process is equally necessary. A good hearing process enhances an agency's effectiveness in properly carrying out its mission, and ultimately, protects the agency's credibility with the public. An effective hearing program provides a quality control system that can alert those responsible for an agency's performance about problems within their regulatory programs. For Oregon's boards and commissions, which are led by part-time, citizen volunteers, the hearing process is particularly crucial for these decision-makers, who are not engaged full-time in the operations of these agencies and need objective feedback.

Janice Krem

Here's a "ripped from the headlines" example. An agency has recently been the subject of front-page news because its regulatory program was called into question when one of its investigators turned out to be, *apparently*, a master of misinformation, who used a false identity when the agency hired him as an investigator. Frankly, it's understandable that agencies can be fooled by very clever people during the job application process. In this particular case, authorities had to spend a great deal of time and effort trying to figure out who the guy really was, once they realized who he was not. Much of the news coverage focused on how he managed to get hired by the agency. But, that really was not the most interesting aspect of this news story. Rather, the most interesting aspect was that this investigator's "credibility" problem surfaced in a conspicuous way in a contested case hearing, well before the recent brouhaha.

It seems this investigator's testimony conflicted with the licensee's surveillance videotape that had recorded the incident, which was introduced into evidence at the hearing. In this case, the licensee asked for a hearing. Based on the evidence presented at the hearing by a licensee who was represented by an attorney, the charges were dismissed because the videotape evidence significantly contradicted this investigator's testimony. The agency did the right thing after a contested case hearing revealed problems with the agency's case. The hearing process worked--at least for the licensee--in identifying a serious agency

problem. Unfortunately, the agency did not fare as well from its response to the information it received about the investigator from this hearing.[1]

This example leads one to consider why some agencies undervalue the hearing process or fail to appreciate the potential for improving an agency's performance that a good hearing process provides. Is the hearing really an annoying legal obstacle that interferes with an agency's mission, serves no *important* agency purpose, and just costs the agency money, as we have been so often told? The answer is: Only if agencies *want* it to be that way and agency heads are content to live in the sure and certain hope that their agency is doing everything right, all the time. Agency heads can hope that they won't have to endure front-page scrutiny and public derision. Or, they can ensure that we have an effective quality control system that provides an objective and impartial hearing process with fair procedures that facilitate the creation of a reliable record.

Agencies really do not need a hearing process designed to virtually ensure that a board or commission member will conclude an agency investigation is unassailably correct and agency rules are flawlessly written and unerringly applied. Instead, agencies need a hearing process that is fair and objective enough, without requiring irrefutable videotape evidence, to catch the weaknesses and mistakes in an agency's regulatory efforts that do occur--even if only occasionally. Let's have a process that, if used effectively, helps an agency correct its errors at the point when errors can be most easily and painlessly corrected. Most importantly, let's have a fair and professionally conducted hearing that can *objectively* reassure those entrusted with guiding the agency that the agency *really is* doing a good job and is creating public policy that is responsive to changing regulatory challenges. Let's not mistake "truthiness"[2] for reliable and objective assessment, especially when an aggrieved person is saying that something is wrong. Agencies do not need a *pro forma* hearing process with unfair procedures that interfere with an impartial review of issues. Agencies need and deserve better.

Agency heads, including board and commission members, usually find out what is happening in agency programs based on internal communications from agency staff. Small boards and commissions, like most agencies these days, cannot afford expensive management consultants and external audits to objectively assess performance. However, agencies must provide due process and contested case hearings.[3] Agencies should get their money's worth from these hearings. These hearings can and should be valued as an independent review that can provide important, reliable management information.

The law may require that agencies provide contested case hearings, but it is good management that supports a high-quality, impartial hearing process with fair procedures. Hearings are a check and balance on the work that is entrusted to agencies, boards, and commissions--work that is very important to the people of Oregon. A fair and impartial hearing process is just good management, plain and simple. The hearing process should

be valued, not just tolerated or marginalized. However, unless the hearing process really is fair and impartial, including its hearing procedures, contested case hearings will serve more often as a rubber stamp than an effective tool to ensure quality decision-making. Let's improve the likelihood that that an agency will benefit from the quality control system it already has at its disposal. A fair hearing can provide an early warning system that signals problems that should be corrected. Creating a fair system and valuing an objective process can avert embarrassing headlines, and ultimately, the loss of public confidence in government.

Janice Krem was formerly an administrative law judge and an agency executive. She is currently in private practice representing clients before various Oregon agencies, boards and commissions. Janice has served as chair of the section and of the section's Legislation and Rules Committee. Obviously, she also has watched more than a few episodes of "Law & Order" and "The Colbert Report." Janice can be reached at 503 697-8042 and at janicekrem@involved.com.

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[1] According to a newspaper report, another case was dismissed based on videotape provided by another licensee in a second case. This newspaper reported that the videotapes in both cases contradicted the investigator's statements.

[2] Stephen Colbert, Comedy Central's "The Colbert Report," October 2005. Truthiness describes reliance on what one wishes or believes to be true, rather than the objective facts.

[3] Arguably, efforts to make those requesting a hearing pay the agency's investigation and hearing costs, as well as the agency's attorney fees, are a manifestation of the low rank hearings have in the hierarchy of agency values. These agencies, apparently, do not want to have to pay for the costs inherent in providing these hearings or even for conducting the underlying investigations. There is no reciprocal right to recover costs and attorney fees for the party requesting a hearing. These efforts to recover costs may also expose the underlying disdain that exists for those having the temerity to request a hearing. The threat of paying for an agency's costs and attorney fees, as well as one's own costs and attorney fees, is an effective deterrence to requesting a hearing, especially when the agency will ultimately determine the outcome of the hearing

Q&A: ALJ PROFILES

Here are more responses from the remaining five senior ALJs: John Mann, Dove Gutman, Jennifer Rackstraw, Monica Whitaker, and Joe Allen.

Klamath Basin Adjudication
Salem, Oregon

To view the water hearing, go to: http://www.worksourceoregon.org/index.php/staff-a-providers/16-staff-tools/356-office-of-administrative-hearings.

Q: What piece of advice would you give an attorney appearing for the first time in one of your hearings? Do you have any quirks or pet peeves that participants should consider when appearing before you?

ALJ Mann: I think the best advice I could give about appearing in our hearings applies to pretty much any situation: just be calm. Everyone in the room is a human being first. Remember that and the rest is just details. I have very little patience for people who refuse to treat each other with civility.

ALJ Gutman: Attorneys should review the relevant law well in advance of the hearing. Participants in a contested case hearing should be respectful of the process.

ALJ Rackstraw: My advice to every attorney appearing before the OAH is to be prepared for the hearing—both in terms of your specific case, and in terms of navigating the administrative process as a whole. It is helpful for attorneys to become familiar with administrative law terminology, and it is time-consuming and unproductive when an attorney treats an administrative hearing as a circuit court or other type of proceeding, in spite of the differences between the forums.

I find it slightly embarrassing to be addressed as "The Honorable" in written correspondence.

ALJ Whitaker: One piece of advice I would offer to an attorney appearing for the first time in an administrative hearing is to be familiar with the APA and its requirements, including methods for obtaining discovery, subpoenas, etc.

ALJ Allen: I believe it is imperative for attorneys appearing in administrative proceedings to be familiar with the APA. Too often attorneys appearing in these proceedings have failed to educate themselves about the differences between administrative hearings and proceedings in state or federal courts.

Q: If you were able to change one thing in the current administrative hearing system, what would it be and why?[1]

ALJ Mann: I would make agency final orders more readily available to members of the public and the bar. It would help take some of the mystery out of the process and allow parties to come into the hearing with a better understanding of what to expect.

ALJ Gutman: I would conduct every contested case hearing in-person. I prefer to look the participants in the eye when I am weighing the evidence and assessing credibility.

ALJ Rackstraw: I would like to have final order authority in more types of cases. Currently, approximately three-fourths of my decisions are proposed orders. While I do not take the position that I'm infallible or that every order I write is perfect, it's difficult to have an agency significantly change one of my orders—particularly if the agency changes the outcome. I take the position that the agency has had a full opportunity to make its case, and that allowing the agency to change an order that it does not agree with or like gives it essentially an "escape hatch" and means that any deficiencies in the agency's case preparation or presentation can just be fixed after the fact.

ALJ Whitaker: It would be helpful for parties to have easy access to prior agency final orders before to the hearing. Having this access might help parties, especially those who are *pro se*, prepare for the hearing.

Q: When and where did you receive your legal training? Are you a member of the Oregon State Bar?

ALJ Mann: I graduated from Lewis & Clark Law School and I've been a member of the Oregon State Bar since 1993.

ALJ Gutman: I received my J.D. in 1994 from Willamette College of Law in Salem, Oregon. I am a member of the Oregon State Bar.

ALJ Rackstraw: I received my J.D. from Lewis & Clark Law School in 2002. I am a member of the Oregon State Bar.

ALJ Whitaker: I received my J.D. from Willamette University. I am an active member of the Oregon State Bar.

ALJ Allen: I graduated from Trinity Law School in Santa Ana, California. I am currently an active member of the California State Bar. I am not a member of the Oregon State Bar.

Q: For which agencies do you now hear cases? Have you been previously employed by any of these agencies?

ALJ Mann: I conduct hearings for most of the agencies that refer cases to us. I've never worked in state government before.

ALJ Gutman: I preside over cases from numerous agencies, boards, commissions, and departments. There are too many to list. I have not been previously employed by any of them.

ALJ Rackstraw: When I first began with the OAH, I was conducting primarily unemployment compensation hearings. I then began to focus on hearings before the Department of Human Services. Today, I conduct hearings before a wide array of agencies. Examples include the various professional licensing agencies, boards, and commissions (*e.g.* Medical Board, Nursing Board, Pharmacy Board, TSPC[2]); PERS[3]; DEQ[4]; Department of Fish and Wildlife; and the Secretary of State's Elections Division. In addition, I serve on a three-member appeals panel for cases involving the Portland Bureau of Fire and Police Disability and Retirement Fund.

I have not been previously employed by any of the agencies for which I now hold hearings.

ALJ Whitaker: I currently conduct hearings for a number of agencies, boards, and commissions (e.g. Board of Nursing, Board of Pharmacy, PERS, and DEQ), and for the Division of Child Support. In addition, I serve on a three-member appeals panel for cases involving the Fire and Police Disability and Retirement Fund for the City of Portland. I previously worked for a county governmental agency that specialized in criminal prosecution and family law.

ALJ Allen: Currently, I preside over hearings for numerous agencies including OWRD[5], DHS[6](State Hospital), ED TAX[7], DEQ, DPSST[8], TSPC, OMB[9], ORC[10], REA[11], etc. Presently, I am assigned to preside over hearings for the Klamath Basin Adjudication.

I have never been employed by any of these state agencies.

Q: How long have you been conducting contested case hearings? What were you doing before you became an ALJ?

ALJ Mann: I've been an ALJ since 2003. Prior to that, I was an attorney in private practice. I also worked for three years as an in-house attorney for an insurance company.

ALJ Gutman: I have been conducting contested case hearings since September 2003. Prior to being hired at the OAH, I had my own law practice in Eugene, Oregon.

ALJ Rackstraw: I began conducting contested case hearings in September 2003. Prior to that, I worked for the Oregon legislature, and also clerked for the Office of the Federal Public Defender and a Washington D.C. law firm specializing in environmental and wildlife law.

ALJ Whitaker: I began conducting contested case hearings in late January 2004. Prior to that, I worked in a District Attorney's office and at a small law firm in Washington, D.C. that specialized in immigration law. I also worked for a financial institution for a little over five years.

ALJ Allen: I have been conducting contested case hearings for about three years now. Prior to becoming an ALJ, I served as a litigation attorney in a small boutique firm in Southern California. My practice centered on Employment and Business litigation.

Q: What is the toughest part of your job as an ALJ? What do you find the most rewarding part of your job?

ALJ Mann: Hearing cases and writing orders has always been extremely satisfying. I also enjoy the collegial atmosphere we have among ALJs. The most challenging aspect of my job is having to shift gears between such a wide variety of subject areas. Some days I'll find myself doing short telephone hearings with *pro se* participants. On other occasions, it can be a multi-day hearing with attorneys and a court reporter. The variety keeps the job interesting, but it also has its challenges.

ALJ Gutman: The toughest part of my job is leaving my work at the office. I even think about cases when I go on vacation. Despite this, I love my job. Every part of it is rewarding to me.

ALJ Rackstraw: While I enjoy and appreciate having a diversified caseload, that diversity can be challenging, both in terms of needing to learn new subject matter quickly and in managing the cases themselves. Some types of cases have a protracted "management" period (prehearing conferences, multiple motions, multi-day hearings, post-hearing filings), while others may be heard in a matter of minutes, require an order to be issued almost immediately, and are then off my desk. Balancing the workload, while meeting deadlines and producing well-written, thorough rulings and orders, is an ongoing challenge.

The most rewarding part of my job is the human element. While I am undoubtedly focused on the legal aspects of a case, and my ultimate task is to render a legally sound decision, I can't overlook the fact that my decisions have real consequences for the people involved. Whether it's a decision denying a person medical coverage, a decision allowing a person with mental illness to be forcibly medicated, a decision revoking a person's nursing license, or a decision denying a person's request to be a foster parent, I look at every case individually and strive to ensure that the persons affected by the decisions feel fairly treated, respected, and heard. No matter how many times I hear a similar story or fact pattern from a hearing participant, I know that every person is unique and that the particular hearing and outcome may mean everything in the world to that person. It has been immensely rewarding when, on several occasions, hearing participants have thanked me for allowing them to have a voice in the administrative process and for treating them with dignity, in spite of the fact that they know they did not or will not prevail in their case.

ALJ Whitaker: Maximizing my time in the most efficient manner possible and balancing the various types of cases to which I am assigned is a challenge at times. The most rewarding part of the job is that the administrative law system offers a fair, efficient, and affordable avenue for parties to be heard in an impartial forum.

ALJ Allen: I cannot say what the toughest part of this job is. I came from a fast-paced litigation firm that required substantial time commitments. In all honesty, I am enjoying this job immensely. I particularly enjoy the opportunity to work with so many different agencies and segments of the public to resolve varied and often complex issues of law.

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1 ALJ Allen did not provide a response to this question.
2 Teachers Standards and Practices Commission
3 Public Employees Retirement System
4 Department of Environmental Quality
5 Water Resources Department
6 Department of Human Services
7 Employment Department, Unemployment Insurance Tax
8 Department of Public Safety Standards and Training
9 Oregon Medical Board
10 Oregon Racing Commission
11 Real Estate Agency

REPRISE OAH OVERSIGHT COMMITTEE MEETS

UPDATE: The next Oversight Committee meeting for the Office of Administrative Hearings has been scheduled for Wednesday, October 6, 2010, from 1:30 to 3:30 p.m. in the 3rd floor conference room of the Oregon Employment Department. For the agenda and to receive notices of future meetings contact the OAH at rema.a.bergin@state.or.us, 503 947-1918; or contact the Employment Department at Rebecca.Nance@state.or.us, 503 947-1732.

State Rep Paul Holvey, Chair

J. Kevin Shuba, Vice -Chair

The Oversight Committee for the Office of Administrative Hearings[1] met on March 18, 2010, in Salem at the Employment Department. The committee elected Representative Holvey to serve as chair and elected Kevin Shuba as vice-chair. The committee requested that the Attorney General's office apprise them of the proposed changes to the model rules under review for the Office of Administrative Hearings. The rest of the meeting was devoted to administrative issues concerning the operation of the office.

Members of the committee are:

Paul Holvey, Chair
State Representative
900 Court Street NE
Salem, OR 97301
House Speaker Appointment

Vicki Berger
State Representative
900 Court Street NE, H-488
Salem, OR 97301
House Speaker Appointment

J. Kevin Shuba, Vice-Chair
Garrett Law Firm
P.O. Box 749
Salem, OR 97308
Governor Appointment

Christine Chute
Department of Justice
1162 Court Street NE
Salem, OR 97301
Attorney General Appointment

Doug Whitsett
State Senator
900 Court Street NE, S-302
Salem, OR 97301
Senate President Appointment

Suzanne Bonamici
State Senator
900 Court Street NE
Salem, OR 97301
Senate President Appointment

Amber Hollister
General Counsel, Office of the Governor
900 Court Street NE
Salem, OR 97301
Governor Appointment

Denise Fjordbeck[2]
Attorney-in-Charge, Appellate Division
1162 Court St NE
Salem OR 97301
Attorney General Appointment

Karla Forsythe
Chief Administrative Law Judge
Office of Administrative Hearings
P.O. Box 14020
Salem, OR 97309
Ex-Officio Member

The Oversight Committee is responsible for studying the operations of the Office of Administrative Hearings; making recommendations to the Governor and the legislature to increase the effectiveness, fairness, and efficiency of the hearing office; making recommendations for additional legislation governing the operations of the hearing office; and conducting studies necessary to accomplish these responsibilities.[3]

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[1] ORS 183.690 provides:

"(1) The Office of Administrative Hearings Oversight Committee is created. The committee consists of nine members, as follows:

(a) The President of the Senate and the Speaker of the House of Representatives shall appoint four legislators to the committee. Two shall be Senators appointed by the President. Two shall be Representatives appointed by the Speaker.

(b) The Governor shall appoint two members to the committee. At least one of the members appointed by the Governor shall be an active member of the Oregon State Bar with experience in representing parties who are not agencies in contested case hearings.

(c) The Attorney General shall appoint two members to the committee.

(d) The chief administrative law judge for the Office of Administrative Hearings shall serve as an ex officio member of the committee. The chief administrative law judge may cast a vote on a matter before the committee if the votes of the other members are equally divided on the matter."

[2] Margaret Olney, who was previously appointed by the Attorney General to this committee, resigned from the Department of Justice in March 2010.

[3] The committee's By-laws provide:

"Section 2. Voting Rights

Each member of the Committee who is present shall cast one vote on any question. The Chief Administrative Law Judge may vote only when the votes of the other members are equally divided. A vote of the majority of members present (50 percent plus one, excluding the Chief Administrative Law Judge) shall be sufficient to pass a motion, providing a quorum is present.

Section 4. Terms of Membership

A. The term of a legislative member shall be two years. If a legislative member ceases to be a senator or representative during the person's term on the Committee, that person may continue to serve the balance of the term.

B. The term of all appointed members shall be four years. Appointed members may be reappointed. If a vacancy occurs prior to the expiration of a member's term, the appointing official shall appoint a new member to serve the remainder of the term. An appointed member may be removed from the Committee at any time by the appointing official."

REPRISE OAH STATISTICS ON RECUSALS AND FINAL ORDERS: WHAT DO THE NUMBERS SHOW?

By Karla Forsythe

Karla Forsythe
Chief ALJ

Agencies and parties are permitted by statute to recuse an administrative law judge without cause. Modification or rejection of an ALJ's proposed order also is authorized by law for some types of contested case hearings. Do these provisions influence the impartiality of ALJ decision-making? Since the inception of the Office of Administrative Hearings, these statutorily-authorized practices have raised concern from practitioners who represent private parties in contested case hearings.

In an effort to obtain data about the extent to which ALJs are recused and final orders are rejected, the OAH has developed tracking systems so that reports can be provided to the OAH Oversight Committee on a regular basis (unemployment insurance, unemployment insurance tax, and child support cases have not been included). The first reports were included on the agenda for the March 18, 2010 committee meeting.

Recusals

Under ORS 183.645, a different ALJ will be assigned automatically upon the written request of a party or an agency. A showing of good cause is not required, unless the request is not timely, is a subsequent request, or the request is in a case involving suspension of driving privileges under the implied consent law. "Good cause" is defined as any reason why an ALJ's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceedings (OAR 471-060-0005(2)(b)).

From July 2007 through June 2009, out of 6,692 hearings tracked, 108 recusal requests were made. Information about recusals is not shared with ALJs. Senior managers review recusal trends. If an agency routinely recuses an ALJ, or if an ALJ is recused by several agencies, the manager will contact the agency and inquire whether there are objective indicators that the ALJ cannot be impartial or other performance issues. The ALJ will continue to be assigned to agency cases based on availability.

Final orders

The March 2010 report reviewed the status of 62 proposed orders issued by the OAH from October through December 2009. The data set is not complete, because as of March, final orders had not been provided to the OAH in 39 of the cases. Of the 23 final orders

received, 22 substantially adopted the OAH order, and one rejected the OAH order. There were no changes to ALJ findings of historical fact.

Efforts are under way to revise the administrative rules to ensure that the OAH receives copies of all final orders in a timely manner, so that the complete set of orders for a given time period can be analyzed.

What do the numbers show?

The aggregate number of recusals is minimal: ALJs were recused in less than two percent of the hearings tracked. Since parties currently have an automatic right to a recusal, there is no way of knowing the motive behind these recusals. Anecdotally, ALJs report that although they are aware of the possibility of recusal, this does not influence their decision-making. From an operational standpoint, re-assigning a case increases the workload for OAH's busy operations staff, and limits OAH flexibility in assigning judges to hear cases in a timely manner.

Similarly, the number of final orders rejected by agencies appears to be minimal. However, this conclusion is based on incomplete data in the absence of copies of all final orders, and also reflects only one quarter of activity.

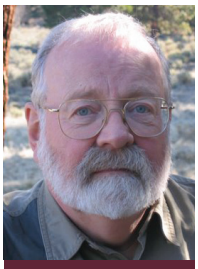
Reports on both recusals and final orders will be updated on a quarterly basis so that policy-makers can use them in making decisions about these important policy issues.

Karla Forsythe is the Chief Administrative Law Judge of the Office of Administrative Hearings. She has been serving in that position since February 2009.

REPRISE AN OPEN LETTER TO THE OAH OVERSIGHT COMMITTEE[1]

"SAVE THE STATE SOME MONEY WHILE IMPROVING THE ADMINISTRATIVE JUSTICE SYSTEM."

By Frank Mussell



Frank T. Mussell

In the upcoming legislative session the Oregon legislature has the opportunity to both save money for the State of Oregon and to improve Oregon's administrative justice system. It is not likely there will be many other such opportunities during the session to simultaneously save money and achieve law improvement. In this case, both of these goals can be accomplished by simply repealing agency and party veto power over the assignment of administrative law judges that is contained in ORS 183.645(1). That subsection provides:

> "(1) After assignment of an administrative law judge from the Office of Administrative Hearings to conduct a hearing on behalf of an agency, the chief administrative law judge shall assign a different administrative law judge for the hearing upon receiving a written request from any party in the contested case or from the agency. The chief administrative law judge may by rule establish time limitations and procedures for requests under this section."

This legislation was enacted in 1999 as part of HB 2525 that created the Hearing Officer Panel, the predecessor of the Office of Administrative Hearings. [2] The Hearing Officer Panel was established as a pilot project and its enactment reflected a number of compromises between the Governor's office and advocates of the creation of a central panel of administrative law judges. ORS 183.645(1) was one of those compromises.

As former Chief Administrative Law Judge Thomas Ewing noted in a 2005 article, the creation of the Hearing Officer Panel was greeted by state agencies "with fear and even loathing." [3] It is generally recognized that agency reaction rested on a lack of trust and confidence in the cadre of hearing officers incorporated into the central panel.[4] It also rested on agency resistance to and general unwillingness to relinquish control of the ALJ and of the contested case hearing process. In the case of this subsection, the compromise resulted in agency power to disqualify the administrative law judge (hearing officer at the time of enactment) who is assigned to preside over the contested case hearing and the ability to do so without providing any reason for its veto.[5]

The provision for an unfettered veto power was included in HB 2525 at agency instance, despite the inclusion of a provision, codified as ORS 183.645(2), that an administrative law judge could be disqualified upon a showing of good cause. The Office of

Administrative Hearings has by rule defined good cause as "any reason why an administrative law judge's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding."[6]

The consequences of agency veto power over ALJ assignments are several:

- Agency power to disqualify administrative law judges without explanation or justification results in secret agency action that may be discriminatory or otherwise improper.
- The veto power imposes an unnecessary financial burden on the operations of the Office of Administrative Hearings.
- The mere existence of the agency veto power, whether or not exercised against a particular administrative law judge, nevertheless results in an unhealthy impact on administrative law judges and needlessly burdens their commitment to impartiality. This concern remains in the back of the minds of some of the most experienced ALJs.
- The veto power is unnecessary in light of the provision for ALJ disqualification for good cause.

At the May 18, 2010 meeting of the Administrative Law Section's Executive Committee, Chief Administrative Law Judge Karla Forsythe discussed the reassignment of ALJs under ORS 183.645(1) and its impact on the OAH. Forsythe noted that in her judgment the veto authority under the statute did not qualify as a "best practice" for a central hearings panel. She also noted that there were significant costs in staff time and inefficiencies in OAH processes because of the necessity to make reassignments of ALJs when the veto power over assignments is exercised.

Forsythe also noted that an ALJ's disqualification by an agency exercising its veto power could become a performance issue leading to a personnel action. During the discussion, Deputy Chief Administrative Law Judge Andrea Sloan (and Section Executive Committee member) noted that ALJs were aware of the potential adverse effect on their careers if they were subject to multiple reassignments due to agency vetoes, although she was confident that ALJ impartiality was unaffected by this knowledge.

In sum, ORS 183.645(1) should be repealed. The power to veto the assignment of an ALJ without reason or explanation is unnecessary.

- Both agencies and private parties are sufficiently protected by subsection two of the statute which provides for the disqualification of an ALJ for good cause.
- The veto power imposes unnecessary financial and administrative burdens on the OAH.
- The agency veto power creates a not so subtle and wholly unnecessary pressure on the impartiality of ALJs which would be eliminated by repealing the veto power.

- Agency fear and distrust of the OAH have proven to be unfounded as the OAH has demonstrated its competence and effectiveness.
- The OAH, not agencies, should have control over the management and assignment of ALJs.

Repeal of ORS 183.645(1) would result in increased effectiveness, fairness and efficiency of the operations of the Office of Administrative Hearings. In fulfillment of this legislative mandate, I urge the Office of Administrative Hearings Oversight Committee to recommend to the Governor and the Legislative Assembly that the veto power over ALJ assignments in ORS 183.645(1) be repealed. This is an opportunity that should not be missed.

Frank Mussell has been in private practice for eight years. He divides his time between Portland and Central Oregon. His administrative law practice focuses on representing professionals before their licensing boards. Before entering private practice he served for 21 years as an Assistant Attorney General in the Oregon Department of Justice. In that capacity he was counsel to the Board of Pharmacy, the Board of Nursing, the Board of Dentistry and numerous other boards and commissions.

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[1] The Office of Administrative Hearings Oversight Committee is charged under ORS 183.690 to make any recommendations to the Governor and the Legislative Assembly that the committee deems necessary to increase the effectiveness, fairness and efficiency of the operations of the Office of Administrative Hearings.

[2] Or Laws 1999, ch 849, § 11.

[3] Ewing, Independence in Adjudication: Understanding the Office of Administrative Hearings, Oregon State Bar Bulletin (April 2005).

[4] Any agency concerns regarding the competency or efficiency of a particular ALJ should be addressed openly and directly with the Chief Administrative Law Judge. If the agency veto of the assignment of a particular ALJ is used to address performance concerns, that process subverts the authority of the OAH to manage its professional staff and its ability to effectively and efficiently address perceived performance issues. The method of addressing such issues should be direct and transparent, not convoluted and secret.

[5] Although the subsection also empowers respondents to disqualify the assigned ALJ, the proponents of the central panel did not advance or support this provision. Respondents don't need this power and they can't effectively use it in any event. Unlike agencies, respondents are typically involved in only a single contested case. Consequently, respondents do not have a body of experience upon which to base a decision to veto a particular administrative law judge assigned to the case. The experience of counsel representing respondents is similarly limited. Thus, as a practical matter, there is no real value to respondents of having the power to veto an assigned administrative law judge.

[6] OAR 471-060-0005.

NEWS AND EVENTS

The Administrative Law Section welcomes submissions regarding firm and agency changes, and other news and events of interest to our members.

SECTION

Fall Ad Law CLE – Save the Date!

Mark your calendar for *The Nuts and Bolts of Administrative Law* seminar on September 30 at the Oregon State Bar Center. This practical, practice-oriented CLE seminar cosponsored by the Administrative Law Section, the Office of Administrative Hearings and the OSB CLE Seminars Department, will tackle a number of issues found in administrative law.

Start the day with an overview of the Office of Administrative Hearings, the types and number of cases it encounters, as well as the agency's philosophy and mission. Find out what to do when a client has an administrative law issue and how to avoid procedural traps in a contested case. Learn what to do when appearing before the OAH, and the different types of OAH hearings. A panel of agency experts will explain how they conduct investigations and the factors that are considered when imposing and mitigating penalty sanctions. Explore the investigative and enforcement process and receive valuable tips for representing your client. End the day with an ethics discussion that focuses on represented and unrepresented parties.

Please join the Administrative Law Section for this insightful and informative seminar. Special rates are available for legal aid attorneys, public defenders, new lawyers, and administrative law judges. Administrative Law Section members also receive $20 off of the early or regular registration price. Watch your e-mail for registration details soon.

Questions? *Please call the OSB CLE Service Center: (503) 431-6413 or toll-free in Oregon (800) 452-8260, ext. 413.*

Award Ceremony for Thomas E. Ewing

As part of its tenth anniversary celebration, the Executive Committee of the Administrative Law Section will formally recognize the important contributions that **Thomas E. Ewing** has made to the section and to Oregon's administrative justice system. The section will present Ewing with his award at 4 p.m., September 30, 2010, at the Oregon State Bar Center, following the CLE seminar, *The Nuts and Bolts of Administrative Law*.

New Ad Law Book Scheduled for Publication

A new edition of *Oregon Administrative Law*, the Oregon State Bar's Legal Publications reference book, is scheduled for publication in the fall of 2010. Retired Oregon Supreme Court Justice **Hans Linde** is assisting **Alison Webster** and **Steve Schell** in editing the book.

The revision adds **new** chapters on:

- Extraordinary remedies
- Public records and meetings
- Attorney General opinions and advice
- Cease and desist orders and civil penalties
- Criminal enforcement of administrative rules
- Professional licensing
- Governmental oversight
- Ethics.

Other chapters are updated and the 2005 supplement will be integrated into the text. The publication addresses more than individual rights as issues in contested cases and orders in other than contested cases. Both the public and the private bar will find the new reference book useful. The revised reference book is not intended to replace the Attorney General's Administrative Law Manual for practitioners.

Annual Meeting

The section's Annual Business Meeting is scheduled for November 16, 2010, at 4 p.m. at the Oregon State Bar Center.

OAH OVERSIGHT COMMITTEE

Next Meeting

The next Oversight Committee meeting for the Office of Administrative Hearings has been scheduled for Wednesday, October 6, 2010, from 1:30 to 3:30 p.m. in the 3rd floor conference room of the Oregon Employment Department. Contact the OAH for the agenda and to receive notices of future meetings at 503 947-1918, rema.a.bergin@state.or.us; or contact the Employment Department at rebecca.nance@state.or.us, 503 947-1732.

New Appointment

Attorney General Kroger has appointed **Denise Fjordbeck** to serve on the Office of Administrative Hearings Oversight Committee. She is the Department of Justice's Attorney-in-Charge of its Appellate Division and handles civil and administrative litigation in the appellate courts. She replaces **Margaret Olney** on the committee.

OAH

Transitions

Andrea Sloan, Executive Administrative Law Judge at the Office of Administrative Hearings, has resigned from her position. She has been appointed to the Federal Immigration Court.

AGENCIES

To review the agency budget reduction proposals requested by **Governor Kulongoski** for meeting the budget shortfall, go to: http://www.oregon.gov/DAS/BAM/0610AgencyAllotmentReductions.shtml