

MINUTES
Office of Administrative Hearings Oversight Committee

Date: Monday, March 3, 2008

1:00pm-5:00pm

Location: Dave Pleasant Conference Room

Employment Department Central Office

Welcome and Introductions:

Phil Schradle, Department of Justice, opened the meeting and requested all attendees introduce themselves.

Committee and Staff:

Phil Schradle, Department of Justice
Senator Doug Whitsett, Senate
District 28

Representative Suzanne Bonamici,
House District 34

Representative Vicki Berger, House
District 20

David Reese, Portland State University
J. Kevin Shuba, Garrett Law Firm

Tom Ewing, Chief Administrative Law
Judge

Christine Chute, Department of Justice
Laurie Warner, Director, Employment
Department

Janet Orton, Rules Coordinator,
Employment Department

Rebecca Nance, Legislative
Coordinator, Employment Department

Other Attendees:

Sara Cromwell, EAB

Sarah Owens, EAB

Steven Demarest, OAALJ & SEIU Rep

Bill Fink, Deputy Director, OED

John Ford, Private Citizen

Don Hughes, Private Citizen

David Marcus, OAH

Charles Smith, OAALJ/SEIU

Lawrence Smith, OAALJ

Lynne Wehrle, OAH ALJ

Guests:

Bill Boyd, Construction Contractors Board (CCB)

Judith Bracanovich, Oregon Liquor Control Commission (OLCC)

Gregg Dal Ponte, Oregon Department of Transportation (ODOT)

Steve Rodeman, Public Employees Retirement System (PERS)

Housekeeping:

A motion was proposed by Mr. Schradle to approve the minutes from the January 9, 2008 meeting. The motion was seconded by Representative Bonamici and the minutes were adopted with no changes.

Ms. Chute moved that Kevin Shuba be elected as vice-chair of the committee. Mr. Shuba was willing to serve as vice chair. The motion was seconded by both Mr. Reese and Representative Bonamici and Mr. Shuba was elected as vice-chair.

ACTION:

- No action items

OAH History – Recusal and Final Order Authority:

Bill Fink

Bill Fink, Deputy Director of the Employment Department, presented data on recusals of ALJs and final order authority; all data is from 2005-2007, the most complete data set. Mr. Fink stressed that while the data is somewhat representative, it is also limited due to the data provided by the case management systems in use. The data revealed that the majority (78%) of cases in 2005-2007 were found in favor of state agencies. This is not a surprising outcome as agencies write the rules they are attempting to enforce, train to those rules and administer the programs responsible for the rules. Agencies can elect to delegate final order authority to ALJs either for all decisions from a particular agency or for a particular program within the agency. Additionally, an agency can retain final order authority and use it to modify the decision of an ALJ without changing the direction of the decision. The data presented by Mr. Fink specifically examined four agencies; the Department of Consumer and Business Services (DCBS), the Oregon Department of Transportation (ODOT), the Oregon Liquor Control Commission (OLCC), and the Department of Human Services (DHS). Below is a chart of the percentage of orders altered by the agency:

Agency	Proposed Orders Against Agency	Altered by Agency	% Altered
DCBS	16	0	0%
ODOT	90	3	3%
OLCC	54	5 (8)*	15% (9.3%)*
DHS	35	5 (7)*	14% (20%)*
Total	195	16	8%
*NOTE: In the cases noted in the parentheses, the decision was modified by the agency but the direction of the order was not changed.			

The data provided by Mr. Fink, while limited, indicates that a small percentage of orders issued by ALJs are altered by agencies.

Mr. Fink also discussed the recusal issue, highlighting data where ALJs had been recused by the agency. The ALJ recusal statute (ORS 183.645) allows for one change of ALJ without cause, any other changes and cause must be

shown. In only 5,214 referrals out of 65,600 did recusal requests occur; in other words, a very small number of requests for change of ALJ occur.

There is currently no data available to track the number of final orders reversed in higher level appeals. The exception is for Unemployment Insurance referrals which have an additional appeal level within the Executive Branch, namely the Employment Appeals Board (EAB). The data from 2005-2007 resulting from a review of EAB orders is as follows:

- 4,422 OAH orders were appealed to EAB
 - 1,693 (78%) of OAH orders were affirmed
 - 246 OAH orders were reversed
 - 43 OAH orders were modified

Mr. Fink concluded by saying that OAH is collecting data on the following elements for all state agency referrals:

- Agency use of final order authority to change OAH proposed orders
- Agency use of recusal without cause
- Reversal, affirmation and modification of OAH orders at higher level appeal

ACTION:

- No action items.

Perspectives on the OAH – Multi Agency Panel:

Guests Panelists listed below

For further history of the OAH, information on AJL recusals and final order authority, several state agency representatives were invited to discuss the OAH from their perspective.

- Gregg Dal Ponte, Oregon Department of Transportation (ODOT), shared his agency perspective on using final order authority. ODOT delegates final order authority as much as possible with three key exceptions:
 - Lack of clarity in policy and case law.
 - Palpable differences of opinion on matters of legal interpretation
 - Scenarios involving niche areas of consideration

Mr. Dal Ponte stressed the importance of retaining final order authority to prevent conflicts in policies within state agencies

- Bill Boyd, Construction Contractors Board (CCB), discussed the differences between CCB's use of OAH as a dispute resolution forum. In many cases, CCB is only involved as a mediator between two parties in a construction related dispute where the ALJ acts as an arbiter. Often the issue in these types of cases is not one of fault but of the amount of damages to award. CCB has no monetary investment in the outcome of the case but is interested to see the right decision made on behalf of the interested parties. CCB retains final order authority because of the complexity of construction law. They rarely overturn or modify an ALJ's decision. Additionally, CCB is the only agency with the ability to permanently recuse a particular ALJ without cause. Mr. Boyd also expressed concern over the turnover of ALJs. He said the turnover makes training ALJs on basic construction concepts (example: what a header is) fairly expensive on the part of CCB. Mr. Boyd

did clarify that the training is not ex parte contact between CCB and ALJs as it focuses exclusively on construction-related education. Mr. Ewing stated that the turnover rate at OAH is no higher than in state government in general.

- Judith Bracanovich, Oregon Liquor Control Commission (OLCC), discussed the process at OLCC during contested case hearings. In most contested case hearings, OLCC staff present the case before the ALJ. Occasionally, OLCC will use the Attorney General's assigned assistant attorney general to present the case if there is a question of law prominent in the case. The OLCC's five Commissioners retain final order authority over decisions except in default cases. The OLCC's range of cases include enforcement cases such as Liquor Control Law violations (example: serving minors), actions on licenses which impose specific conditions on a licensee, and liquor agent contract interpretation. Liquor Control Laws, relating case law and licensing is very complex and this is why OLCC retains final order authority. Ms. Bracanovich stated the concerns OLCC has with the quality of decisions sometimes made. She is a proponent of the OAH but stated her concerns over the quality of legal analysis due to the intricacies of liquor related law. She also recognized Mr. Ewing's efforts to recruit more attorneys to the AJL role and said that this effort is appreciated.
- Steve Rodeman, Public Employees Retirement System (PERS), began by discussing the volume of contested cases referred to the OAH by PERS. PERS has very few cases but amends or reverses the decisions on a much higher number. The PERS board retains final order authority. PERS has two categories of cases, disability cases and everything else, including entitlement, death benefit, beneficiaries, and operations of the agency.
 - The disability cases put the burden of proof on the claimant to prove they are unable to work. The ALJ is charged with reviewing all of the medical record documentation to determine whether the claimant has met their burden of proof. Given the extensive amount of time a disability case entails, PERS is grateful for the ALJ's role as a reviewer. Disability cases rarely go beyond the ALJ decision; many of the decisions are slightly modified by the board but the resulting outcome remains the same.
 - The everything else cases, while near in number to the disability cases, result in far more appeals beyond the ALJ's decision.

Mr. Rodeman stated for both disability cases and all other cases, by the time the case reaches the ALJ, it has been through three PERS level reviews. The only cases brought to OAH are cases in which the PERS staff and management are unable to find a means to provide the claimant benefits. Because of the extensive review prior to the case being heard at the OAH level, the PERS board rarely exercises its authority to overturn decisions. When it does overturn an ALJ's decision it is in the interest of preserving the integrity of the retirement fund system. For example, maintaining the tax qualified status of PERS entails millions and millions of dollars of monetary risk; consequently, the PERB believes it is essential

for the Board to retain final order authority so that it can exercise its fiduciary responsibility. Mr. Rodeman stated that the PERS cases usually are heard by the same ALJs. Finally, Mr. Rodeman closed by saying that he had no experience with ALJ recusals.

ACTION

- No action items.

OAH Workplan Update:

Tom Ewing

Mr. Ewing highlighted further the workplan the OAH has implemented in recent years to deal with changes faced by the agency. The OAH brought in an outside facilitator, Connie Green, to assist in meetings between management and staff. The meetings examined what the culture of the OAH is for the staff and management and what is the culture of the future by listing attributes and desires. Mr. Ewing felt the dialogue was lively, open and constructive. Ms. Green assisted the group in coming up with timelines for change. The lists created in the meeting as well as the timeline were sent to staff by Mr. Ewing for prioritization. The OAH's leadership team will evaluate staff responses and determine next steps. Mr. Ewing stated that the management of the OAH are trying to implement some of the suggestions received from staff such as;

- Communication and work improvement suggestions like streamlining UI case hearings.
- Teamwork through the implementation of non-mandatory stand-up meetings on Thursday afternoons.
- The collaborative decision making committee which is an employee suggestion forum.
- Creation of an employee survey with the option to respond anonymously. The questions are crafted by management.

Mr. Ewing also clarified the outstationed ALJ situation by stating that while some were hired with the condition that they could work from home, many were already located in centralized offices and then sent to work from home. Mr. Ewing believes that the now centrally located ALJs seem to be adjusting well to the change and that, in time, the discontent that some may still feel will be outweighed by the benefits of centralization. Additionally, Mr. Ewing believes that while there is a fiscal cost to being centralized, it will ultimately be less overall than having the individual ALJs in their homes because of increased efficiencies from having the right technology (such as phone lines and fax lines) to do the work.

A question was raised about the recommendations made by Public Policy LLC regarding the dedicated UI panel and the performance measures. Mr. Ewing responded that the OAH has not yet had an opportunity to consider the concept of a dedicated UI panel. Mr. Fink clarified further that he and Director Warner have asked for a financial analysis for the dedicated UI panel concept; that analysis is in progress and can be shared with the committee when

complete. Additionally, the issue of performance measures has not yet been addressed by the management team at the OAH.

ACTION

- Mr. Schradle asked that the OAH Workplan Updates continue.

OAALJ Presentation on Independence:

Steve Demarest, OAALJ and Larry Smith, OAALJ

Mr. Smith, Vice-President of the Oregon Association of Administrative Law Judges, began by stating that the key interest of the OAALJ is to ensure fairness and independence in administrative law practice. Mr. Smith asked that the OAALJ be given an opportunity to respond in writing to the information provided earlier in the meeting by Mr. Fink. Mr. Smith stated that he agreed with the opinion that agencies should be the policymakers but that often ALJs decisions are not upheld because the policy set by the agency is not clear. Mr. Smith said that in many hearings agencies are a party and have the right to present the policy and shouldn't wait for the final order before spelling out the policy. He stressed that he would like the opportunity to hear the other side of the hearing situation, namely individuals who represent licensees.

Mr. Demarest, board member of the OAALJ, discussed the OAALJ's views before the committee regarding the recusal statute. He stated that the statute works in favor of the agencies as they have the ability to gain insight into an ALJ prior to a hearing whereas the public does not. The OAALJ believes that this inside knowledge and recusal ability on the part of the agencies, besides being unfair toward individuals, creates a case for lack of independence of ALJs. Mr. Demarest briefly outlined the culture of the OAH to clarify why independence is important to ALJs. He said that there are two levels of ALJs within the OAH and the distinguishing feature is whether or not they work on Agency, Boards and Commissions (ABC) cases or unemployment insurance, DMV and DHS cases which are considered more routine. ALJs who hear ABC cases are classified higher and therefore receive higher pay. The OAALJ believes that there is an economic incentive for ALJs to preside over ABC hearings and avoid recusal. This, the OAALJ argues, limits the ability of ALJs to act independently. The OAALJ is interested in pursuing legislation requiring a showing of cause for a recusal. Additionally, Mr. Demarest stated that his concern with the new AJL classification system is with the pay disparity between ALJ 2s and ALJ 3s.

Mr. Ewing was asked to explain the process by which individual ALJs were identified to be level 2s versus level 3s. The number of level 3s was identified by the Department of Administrative Services (DAS). DAS determined that there would be 14 level 3s and the remaining ALJs would be level 2s. Mr. Ewing said that then the management team of the OAH discussed all of the ALJs in a half-day meeting; they assumed all of the ALJs would want level 3 status. Once the group had identified 14 individuals, they

discussed their decision with the individuals one-on-one. Mr. Ewing then emailed the staff to announce the level 3s.

ACTION

- No action items.

State Agency and Public Comment:

A sign up sheet was available for those who wished to make public comment. The following individual made comments:

- John Ford, Private Citizen, addressed his concerns with dealing in the OAH in his specific case. Mr. Ford was extended an offer by Mr. Schradle to submit any additional documentation he wanted to the committee for additional review.

ACTION

- No action items

Committee Roundtable: Group

The committee discussed upcoming issues and plans in a roundtable format. A recommendation was made to improve the data available for analysis. Mr. Schradle said that he believes the committee is now up and running given the information presented at the last few meetings. He asked the committee members where they would like to go on recommendations to the OAH from here. Senator Whitsett said he would like to see more information similar to some of the concerned individuals who have testified at past meetings as far as their perception as to whether or not the process is fair. He would like to see quantifiable outcomes and performance measures as opposed to anecdotal recommendations. Mr. Ewing addressed a question about administering surveys to parties in a hearing prior to the final order being issued; the current practice is to administer the survey after the final order is issued. Sending out surveys before the final order was a recommendation made by Public Knowledge LLC but the management team at the OAH believes that more valuable information can be gleaned from surveys administered after the final order has been received and will keep this as their practice.

ACTION

- Mr. Schradle asked that a report with case information such as timeliness and cost be generated and given to the committee at the next meeting.

Agenda Items for Next Meeting:

- Justice Gillette's perspective on the OAH.
- Further agency perspectives on the OAH by the Department of Human Services, the Medical Examiners' Board, and the Building Codes Division.

The meeting adjourned at 5:20pm

Next Meeting:

May 28, 2008, 1:00pm-5:00pm

Dave Pleasant Conference Room, Employment Department Central Office