

# OFF THE RECORD

OAALJ

Fall 2003

## OAALJ

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### December 11 - Sweetbrier Inn, Tualatin

## OAALJ Annual Meeting

Its that time again! OAALJ members, potential members, their guests and other interested parties are invited to attend the association's annual dinner and meeting, set for **Thursday, December 11, 2003** at 6:15 p.m. in the Willamette Room at the **Sweetbrier Inn** in Tualatin. Please consider

this your invitation to attend.

This year's keynote speaker will be the Honorable Robert D. Durham, Justice of the Oregon Supreme Court. During the business meeting we will be discussing bylaw amendments. As always, it should prove to be an

enlightening evening and an excellent opportunity to mix and mingle with members and friends. There will be a buffet dinner and no-host cocktails.

RSVP requested, but not required. Call Cathy Coburn at (503)646-9952, ex 370, or email [ALJnews@hotmail.com](mailto:ALJnews@hotmail.com).

## Spotlight on Diana Godwin

### Chair of the Administrative Law Section



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In this issue, OAALJ focuses on Diana Godwin, the incoming chair of the Oregon State Bar Administrative Law Section and a well-known figure in Oregon legislative and administrative law. Godwin holds a Bachelor of Arts in political science and a secondary teaching certificate from the University of California at Berkeley. She holds a Juris Doc-

torate from the University of Oregon. She began her career in 1977 as legal counsel for the Oregon Senate Judiciary Committee. In 1979, she opened a private practice in Eugene specializing in lobbying and administrative law. In the 1980s, Godwin served as a contract hearing officer for the Bureau of Labor and Industries adjudicating employment cases. From

1983 through 1991, she worked as a contract lobbyist for the Oregon State Bar.

Since 1981, Godwin has continued her solo practice in Portland. Her clients include independent physical therapy clinics seeking assistance in obtaining payment for their services through the workers' compensation system.

*(Continued on page 2)*

## Spotlight on Diana Godwin, continued

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She also participates in rule-making before the Workers' Compensation Division.

Godwin represents parties before various agencies including the Department of Human Services, Building Codes Division and medical professional licensing agencies. Additionally, she works as an arbitrator for Multnomah County.

For a number of years, Godwin supported establishment of a central panel. She holds the opinion that the Office of Administrative Hearings has radically improved the system, fostering a more professional approach and improving the appearance of fairness because administrative cases are presented to a neutral and unbiased fact finder outside the agency. She testified before the 2003 legislature favoring HB 2526 by which OAH attained permanent status.

In 2002, when OAALJ raised the issue of judicial independence within OAH (formerly the Hearing Officer Panel), Chief ALJ Tom Ewing formed a committee, including Godwin, to review the issue. Godwin authored the committee's report recommending peer review with objective standards. Ewing accepted these recommendations and instituted the internal peer review system presently in place.

The Administrative Law Section was instituted in 2000 and Godwin has served as a member of the Executive Committee since 2002. In March 2002, the section sponsored a CLE which was attended by 150 practitioners. The section has also published an OSB CLE manual which will be updated and expanded in 2005.

Godwin is interested in discovery practices in administrative disputes as a matter of fundamental fairness and protecting due process rights. The Attorney General's Model Rules leave discovery in the hands of the agency and the availability of discovery varies from one agency to another. For example, a foster care home or a medical professional whose license is at risk may not learn the name of the complainant until the day of hearing.

Godwin suggests discovery practices that balance three in-

terests i.e. the agency's mission to protect the public, a complainant's confidentiality, and the respondent's right to prepare an adequate defense. She points out that in a

criminal rape case, the victim's name is known to the defendant and defendant's counsel from

the outset, but it is not revealed to the public. The same end could be accomplished in administrative cases by adopting a key which denotes witnesses by a simple code and is used by both the agency and respondent but which is not available to the public.

The Administrative Law Section maintains a Legislation and Rules Committee. Janice Krem is the current committee chair and Godwin is a member. In the coming year, the committee will consider addressing the question of discovery in administrative contested cases. If the committee were to formulate a proposal, it would probably take the form of a statutory amendment in order to affect discovery practices at the agency level as well as in contested case hearings.

Godwin views the role of the Administrative Law Section as improving administra-

***Godwin holds the opinion that the Office of Administrative Hearings has radically improved the system, fostering a more professional approach and improving the appearance of fairness because administrative cases are presented to a neutral and unbiased fact finder outside the agency.***

tive practices in the state.

Godwin intends to devote her term as section chair to promoting fundamental fairness, enhancing the integrity of administrative

proceedings, and fostering public confidence in governmental authority.

# NAALJ 2003 Conference Highlights

By Monica Smith

I recently attended the 2003 NAALJ Annual Conference in Florida, which was held October 10-15. I really appreciated networking with ALJs from other states. Hearing from these other judges presented many learning opportunities for me. I now have contacts from Alaska to New York who I can call to discuss those thorny administrative law issues that arise.

The list of speakers at the conference ranged from the President of the National Judicial College, who spoke on "The Changing Role of the ALJ," to the Chief Justice of the Florida Supreme Court, who talked about his experiences on the bench. He was very supportive of what we do as ALJs. There was a dynamic presentation by a Florida Law School Professor on hearsay evidence. While Oregon's law on the admissibility of hearsay evidence in administrative proceedings differs from that of many other states, this session offered a great refresher course on hearsay and the generally recognized exceptions to the hearsay rule.

Lois Oakley, the Chief ALJ from Georgia, spoke about assuring quality ALJ services in the face of state budget cuts. Like Oregon and many other states, Georgia is experiencing a budget crisis. Ms. Oakley saw the lack of funding for the agency as an opportunity to

streamline services. She explained how ALJs with the Georgia panel have had to become more efficient, responsible and professional. She also noted that many management positions were eliminated from the panel, so that now there is only one manager who presides over all the ALJs.

There was also a panel on complex adjudication and controlling out of control litigants. One interesting tidbit I picked up during this segment is that a person cannot be cognitive and angry at the same time. Therefore, when dealing with an angry and apparently out of control litigant in a hearing, you should ask that person a question (presumably off the subject of their anger) that requires him or her to think. The person then has to focus on answering the question, which tends to take away the anger. Also, if a person is thinking straight, he or she is only acting or pretending to be angry, because you can't be both simultaneously.

The conference was educational, not just from the sessions offered but also due to my interactions at the social events with cohorts in the other 49 states. David Marcus and I wowed the group one evening singing Karaoke during the "No Talent Show." I highly recommend attending the mid-year conference in Toronto, Canada in June 2004 or the next annual conference, which will be in November 2004 in St. Louis Missouri. Presumably, Karaoke is not a requirement.

## *Dicta: News and Moves*

More management changes in the Office of Administrative Hearings: **Dee Anna Has-sanpour**, OAAJ Treasurer, is now the Deputy Chief ALJ for the Social Services Hearings Division. **Maurice "Skip" Russell**, OAAJ Vice President, is now the Presiding ALJ for that division, while **Gary Tyler** has become the Presiding ALJ of the Employment Section.

# Member Profile: Kevin Anselm

By Alison Webster



It's been quite a year for Kevin Anselm, the Deputy Chief Administrative Law Judge for the Employment Hearings Division of the Office of Administrative Hearings. She was promoted to Deputy Chief in May 2003, after working for several years as an ALJ for

the Employment Hearings Division's Child Support Program.

Kevin was raised in Klamath Falls, Oregon, but headed north to Portland for college. In three short years, Kevin graduated from the University of Portland with two degrees, a Bachelor of Business Administration and Bachelor of Arts in Political Science. During that time, she was elected student body president, the first woman to hold that post in the university's history. After college, Kevin embarked on a career in the financial services industry. She spent nearly nine years working as a stockbroker and financial planner, earning designations as a Chartered Financial Consultant and Chartered Life Underwriter. She also worked briefly as an investigator with a law firm, membership services director at a non-profit organization and as a production assistant at a tree farm.

In 1989, Kevin was hired by the state's Department of Consumer and Business Services (DCBS), Division of Finance and Corporate Securities as a securities examiner and compliance officer, investigating securities dealers, investment advisors and mortgage brokers licensed by the state. While working at DCBS, Kevin attended law school at Willamette University. She graduated in 1994 with a Juris Doctor and a certificate in dispute resolution.

Armed with a law degree, Kevin went to work as a manager in the dispute resolution section at the Workers' Compensation Division. There, she was in charge of the vocational rehabilitation section. After a few years, Kevin moved on to the DCBS Director's Office, working as a policy assistant to the Deputy Director. In 1997, Kevin accepted a position with the Employment Department. Working with Steve Tegger (currently a Presiding ALJ for the Transportation Hearings Division of the Office of Administrative Hearings), Kevin set up the InterGovernmental Affairs Unit for the Employment Department. In late 1998, family matters required that Kevin have a more predictable schedule. It was then that she accepted a job rotation into the Employment Department's Hearings Section to preside over child support cases. She realized she really enjoyed being an ALJ, so she stayed on when the legislature created the Hearing Officer Panel (now Office of Administrative Hearings).

In her spare time, Kevin serves as Vice Chairman of the YMCA Youth and Government Program Committee. In high school, Kevin was a student governor for Oregon, and she has remained involved with the program over the years. Last year, 300 Oregon high school students participated in the program.

Kevin lives with her husband, Scott, a chef who teaches Culinary Arts at Linn-Benton Community College. They have three acres near Salem, where you will find pot-bellied pigs, goats, sheep, ducks, a large dog and three cats. They also stock their ponds with trout and sturgeon, so that Scott does not have to go far for fresh fish for his dishes. In addition, they have a vineyard and produce a small amount of wine each year.

## Case Note: *Johnson v. Employment Dept.*

189 Or App 243 (2003)

By Bill Halpert

This case has an extensive procedural history. Employer Deschutes County discharged claimant Johnson for a number of reasons. Claimant filed an initial claim for unemployment insurance benefits with the Employment Department. When employer did not respond to the initial claim by offering its reasons for discharging claimant, an Employment Department adjudicator issued an administrative decision allowing benefits to claimant, concluding that employer had not established that claimant had been discharged for misconduct connected with the work. Employer appealed that decision to an ALJ.

At the hearing, employer asserted numerous grounds for its decision to discharge claimant, including claimant's failure to pay employer for a county employee's delivery of wood to claimant's home. Based solely on claimant's failure to pay for the delivery, a violation of employer's policy, the ALJ reversed the administrative decision and disqualified claimant from receiving benefits. The ALJ also found that such conduct was more serious than an isolated instance of poor judgment or good faith error. Had the ALJ found otherwise, claimant would have been eligible for benefits because isolated instances of poor judgment and good faith errors are not dis-

qualifying under Employment Department law.

Claimant appealed the ALJ's denial to the Employment Appeals Board (EAB). EAB affirmed and, in addition to finding that claimant failed to pay for the delivery of wood, made findings that claimant had committed misconduct at other times during his employment. The additional findings were based only on allegations in an investigator's report that was part of the hearing record but employer did not raise them at hearing.

Claimant appealed. The Court of Appeals, in *Johnson v. Employment Department*, 177 Or App 464 (2001) (*Johnson I*), decided that EAB should not have addressed those additional allegations of misconduct, because they were not raised by employer at hearing, and remanded the case to EAB for further proceedings. On remand, EAB affirmed the ALJ's denial of benefits, agreeing with the ALJ's conclusion that Claimant's failure to pay for the delivery of wood was neither an isolated instance of poor judgment or good faith error. Once again, Claimant appealed to the Court of Appeals.

In *Johnson II*, the court held that the existence of good faith, which is a mental state, is a question of fact and that the ap-

propriate standard of review is substantial evidence. The court decided that substantial evidence in the record supported EAB's determination that claimant's failure to pay for the delivery of wood was not a good faith error. But, the court decided that EAB's determination that claimant's conduct was too serious to be considered just poor judgment involved an interpretation of the administrative rule that specifically excepts isolated instances of poor judgment from the definition of misconduct. Ultimately, the court remanded the case, through EAB and the ALJ, to the authorized representative, with instructions to determine whether claimant's failure to pay for the delivery of wood was an isolated instance of poor judgment. The court reasoned that the interpretation of the term, isolated instance of poor judgment is one that is delegated to the Employment Department to interpret and that, in claimant's case, the Department never had an opportunity to do so. *Johnson II* simply reaffirms earlier decisions that require that fact finders give considerable deference to an agency's reasonable interpretation of its own rule. But, under *Johnson II*, ALJs, where authorized, may have to remand interpretations of agency rules to the agency itself before the ALJ can become involved in a rule interpretation in a contested case.

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The editors welcome submissions and subject matter suggestions. If you wish to be removed from our mailing list, please contact us at [ALJnews@hotmail.com](mailto:ALJnews@hotmail.com). Thank you.

Editors: Alison Webster and Andrea Sloan. Contributors, this issue: Cathy Coburn, William Halpert and Monica Smith.

## Dues Reminder

Whether you are a current member, a past member, or have never been a member, we invite you to join both the OAALJ during 2003-2004. As a member of OAALJ, you also become a member of the NAALJ. These organizations are committed to supporting the interests of individual ALJs and promoting higher standards in the profession as a whole. Dues are \$65 annually.

You can join at the Annual Meeting on December 11, 2003, or by mailing your check and a membership application to "OAALJ, PO Box 3626, Salem, OR 97302-0626."

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