

OFF THE RECORD

Oregon Association of Administrative Law Judges

Spring 2004

***Cole/Dinsmore v. DMV*, 366 Or ___ (slip op. April 8, 2004)**

OREGON SUPREME COURT REVISITS HEARSAY AND *REGUERO* AND WEIGHS IN ON DUE PROCESS REQUIREMENTS IN IMPLIED CONSENT HEARINGS

By Donald Jacobs

In *Cole/Dinsmore*, the Oregon Supreme Court consolidated two driver license suspension cases for argument and decision. In the first, DMV proposed to suspend Cole under the Implied Consent Law. In the second, DMV sought to suspend Dinsmore on the grounds she had caused or contributed to an accident resulting in the death of another. At the hearings, DMV offered reports written by police officers as evidence to support the suspensions. The officers authoring these reports did not appear. In Cole's hearing, the officer was not subpoenaed. In Dinsmore's hearing, the two officers were subpoenaed by DMV, but neither appeared. All reports were admitted as evidence. The presiding ALJs made findings based on the written reports and upheld the

suspensions. Both suspensions were overturned on appeal, and DMV petitioned for review in both cases.

On review, the Court framed the issue as whether, under the specific circumstances of each case and the standards identified in *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991), the challenged hearsay police reports constituted substantial evidence sufficient to support the administrative decisions. The Court also addressed whether due process requires an agency planning to rely upon such reports to disclose the reports or the officer's identity to allow a petitioner the opportunity to subpoena the officer to the hearing. In resolving the issues, the Court recognized a distinction between cases heard under the strict time lines of the Implied Consent

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Cole/Dinsmore Case Note

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statutes and other matters under the Administrative Procedures Act. The Court also recognized the significance of the state of the evidence, *i.e.*, the presence of other evidence that corroborated or contravened the hearsay police reports.

The court reiterated that the *Reguero* analysis was the appropriate method to determine whether hearsay evidence is substantial evidence to support an agency order under ORS 183.482(8)(c). The court further noted that “[a]n underlying concern must always be fundamental fairness.” Preliminarily, the court found that while both Cole and Dinsmore have an interest in maintaining a driver license, DMV has an interest in removing unsafe drivers from the road. Consequently, the fifth *Reguero* factor, “the consequences of the decision either way” was neutral.

In Cole, the court found DMV could have subpoenaed the officer who made the initial stop, as a viable alternative to relying upon the hearsay report. That factor favored Cole. The court also found that the potential efficacy of cross-examination slightly favored Cole. Next, the court found that the state of corroborating and opposing evidence favored DMV. Of significance was the fact that Cole did not submit evidence contradicting the report. The court also noted that the report was primarily a record of the stopping officer's direct observations and was prepared in the ordinary course of business pursuant to the officer's official duties. Finally, the court considered the importance of the facts sought to be proved by the report and the considerations of economy. Though the legality of the traffic stop is a matter that DMV must prove in order to support an Implied Consent suspension, the court recognized that the considerations of economy “loom large.” The court determined that, in general, when a

party fails to exercise his or her right to subpoena the officer, the agency can use the officer's report as evidence. On balance, the court found that the stopping officer's report was sufficiently reliable and probative to constitute substantial evidence.

As for due process, however, the court found that because DMV did not provide a copy of the stopping officer's report or disclose his identity prior to the hearing, Cole had no meaningful opportunity to review the report or request that the stopping officer be subpoenaed to the hearing. Citing *Goldberg v. Kelly*, 397 US 254 (1970), the court remarked, “when important governmental decisions are based on determinations of fact, due process usually requires an opportunity to confront and cross-examine adverse witnesses.” The court remanded Cole's case to DMV for further proceedings.

In Dinsmore, where the two officers were subpoenaed but did not appear, the court found that their testimony would have been better evidence than relying upon the reports alone. The state of the evidence and the alternative to use of hearsay factors therefore weighed in Dinsmore's favor. The court also found that the cross-examination factor favored Dinsmore. This was because one of the reports, from accident reconstructionist, contained hearsay and double hearsay, and Dinsmore offered significant evidence to contradict the content of the report and the officer's methodology. Finding that four of the five *Reguero* factors favored Dinsmore, the court “was not satisfied that a reasonable person could rely on the report” to support the determination that Dinsmore had been reckless or criminally negligent. The court concluded the hearsay reports did not constitute substantial evidence and

Hearsay – For What It’s Worth

By Lawrence S. Smith

Someone’s objecting over here;

Says what’s offered isn’t very clear;

There’s a judge with a gavel over there;

Telling the reps they better beware.

(Apologies to Stephen Stills)

Consider a typical scenario:

A representative raises an objection based on hearsay. The proffered evidence is hearsay and not that reliable, but the ALJ says that hearsay is admissible in administrative hearings. The representative persists. The ALJ says the evidence is admitted “for what it’s worth.” The representative eventually stops objecting and order is restored. Was the ruling correct?

Not under ORS 183.450(1), which says in part, “All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible.” When admitting the evidence, the ALJ did not apply this standard to determine whether the evidence was reliable and therefore admissible. Moreover, the ALJ’s claim that hearsay is admissible in administrative hearings is not really correct. SOME hearsay is admissible, if it is “of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs.”

Despite that standard, many ALJ’s admit all evidence including hearsay and often avoid evaluating the reliability of such evidence. A main purpose of the hearsay rule is to exclude unreliable evidence. While a lower threshold for evidence may make sense for hearings before ALJ’s, who (theoretically) can discount unreliable evidence and not rely on it as a jury might, ORS 183.450(1) in effect performs a very similar function as the Hearsay Rule,

excluding unreliable evidence. The hearsay rule imposes clearer standards than does ORS 183.450(1), but the purpose is the same. Therefore, the exceptions to the Hearsay Rule can often provide guidance to ALJ’s in evaluating the reliability of evidence and

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determining whether to admit evidence under ORS 183.450(1).

During CLE presentations, I recommend that practitioners object only when necessary, but with the understanding that any evidence against their clients must be reliable and relevant. I also suggest that effective representatives should continue objecting to such evidence on reliability grounds and receive a ruling in order to:

1. Preserve an objection on appeal.
2. Point out how unreliable the evidence is.
3. Receive some idea regarding how much weight the ALJ will be giving the evidence.

Please provide any feedback, rebuttals, or techniques regarding how to handle hearsay objections. Contact OAALJ at ALJnews@hotmail.com.



The Bruce K. Black Award

Last year, the OAALJ Board created the Bruce K. Black award, to honor Judge Black's legacy of activism, professionalism and exemplary service to the citizens of Oregon. The first award was awarded posthumously to Judge Black.

Each year, the Board will select a new recipient of this prestigious award. The Board will consider candidates who exemplify "outstanding public service in the advancement of Oregon's administrative justice system."

The Board welcomes your input. Please submit your nomination, in writing, with an explanation for why your nominee should be considered for this award. Submit your nominations to: OAALJ, PO Box 3626, Salem, Oregon 97302. Nominations must be received by August 31, 2004 for consideration. Thank you.

PLANNING FOR CONFERENCE '04 UNDERWAY

By David Marcus, Committee Chair

The first stages of planning for the OAALJ bi-annual conference, co-sponsored by the Willamette University School of Law (WUCL), are well underway. A committee of thirteen has already met twice to plan conference content and to select faculty members widely recognized for their experience, professionalism and presentation skills.

Committee members include several ALJs from the Office of Administrative Hearings, as well as ALJs from the Workers' Compensation Board and the Bureau of Labor and Industries. The OSB Administrative Law Section and the Department of Justice are also represented on the committee.

This year's full-day conference will again be held on a Saturday, and is tentatively scheduled for October 30. The program is being designed to attract Administrative Law Judges, government agency representatives, practitioners in the field of administrative law, and law students. In addition, OAALJ

and WUCL are planning an "Administrative Law Day" at the law school on the Friday before, and in conjunction with, the conference.

This will be the tenth state conference on administrative law co-sponsored by the OAALJ and WUCL. The first conference was held in 1986. Both were also co-sponsors of the highly successful 5-day Annual Meeting and Conference of the National Association of Administrative Law Judges, held in Portland in 1998.

Over the years, the bi-annual state conference has come to be recognized as one of the outstanding sources in Oregon of continuing legal education in administrative law. This year's conference promises to again meet and exceed that expectation.

If you wish to offer suggestions for the conference, or if you are interested in presenting at the conference or otherwise working with the planning committee, please contact me at ddtmarcus@netzero.net.

Conducting Complex Cases

By Maurice "Skip" Russell

Written Direct and Rebuttal Testimony

In cases that are fact-intensive, it may be useful to take testimony in writing, and reserve the in-person hearing for cross-examination. There are several reasons why this is useful.

First, and most obviously, it reduces the time required for the hearing. Since Direct and Rebuttal Testimony are filed before the hearing is convened, the parties do not need to provide that testimony verbally, thereby shortening the hearing considerably. In addition, it is common that cross-examination may not be required for many of the witnesses, obviating the need for them to attend, at all, and further reducing the commitment of resources to the hearing, itself. Indeed, one of the advantages of this process is the ability to receive into the record the testimony of a large number of witnesses who, because of the character of their evidence, are not likely to be cross-examined in any event. A witness whose primary testimony involves authenticating documents in evidence is one example of this. In these cases, the witnesses need not be required to attend the hearing, reducing the inconvenience and expense of the hearing for them and the parties to the case, as well as for the agency and the hearings authority.

Secondly, the parties have time after the direct testimony is filed to prepare their rebuttals. This gives more assurance that each party has addressed those portions of the other parties' testimony that are really at issue, rather than responding off-the-cuff, and without the opportunity for reflection.

Requiring Direct and Rebuttal testimony to

be submitted in writing before the hearing commences also reduces the expense of the hearing in complex cases by providing the bulk of the testimony in written form without the need of transcription.

In most cases, this procedure also helps to keep a clear record, as there can be little dispute as to the content of the testimony when the witness wrote it and submitted it.

Typically, an order is issued after a prehearing conference, providing a schedule for filing evidence in the case. Proposed exhibits are generally filed with the testimony of the witness whose testimony refers to the exhibits. The submissions for both parties are generally filed simultaneously, that is, all parties file their direct testimony on the same date, then file rebuttal testimony, again on the same date some time later. The ALJ can include with the prehearing order instructions on preparing and submitting the testimony and numbering the exhibits. Parties should be instructed to include in the testimony authentication of the exhibits, and to submit the testimony under oath, either in affidavit or deposition form.

The prehearing order should also include a deadline for requesting cross-examination of witnesses that gives enough time to the parties to review the written testimony, and enough time for the witnesses who are requested to make whatever travel arrangements are needed.

Once the hearing is convened, the first order of business is then to obtain the acceptance by the parties of the testimony of those witnesses who have not been called to testify. This material then goes into the record immediately. The witnesses who are to be cross-examined then are sworn and cross-examined.

CONDUCTING COMPLEX CASES

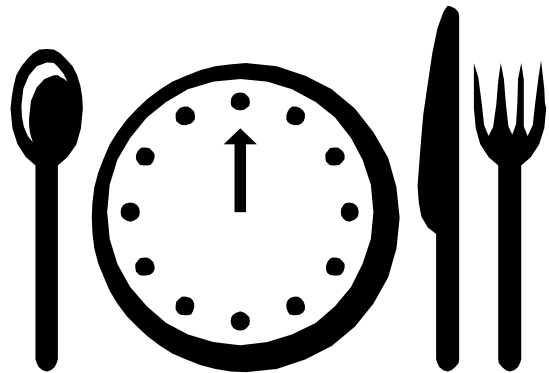
Continued from page 3

Counsel should be instructed to have these witnesses authenticate their written testimony at the beginning of cross-examination. The witnesses can then be cross-examined, and any redirect the parties think appropriate is conducted. The ALJ may find it useful, at some time before the hearing, to build into the schedule a time for dealing with any objections to evidence that has been offered in the case. I have generally done this at the first of the hearing, although in especially large hearings it would probably be wise to do it earlier.

Remember that under OAR 137-003-0600, the conduct of the hearing is subject to your discretion. You have the authority to arrange the hearing in the way that is most convenient to you and the parties, and most likely to result in an efficient, but full and fair hearing. The parties are also likely to agree to an arrangement that results in a savings of cost and time, such as the submission of Direct and Rebuttal testimony in writing before the hearing. At least for those cases that are factually complex and likely to involve numerous witnesses, it is worth considering this procedure to shorten and simplify the hearing.

FREE LUNCH

That's right – we're offering a **FREE LUNCH** to two lucky OAALJ members at our monthly First Friday lunches! OAALJ members and friends are invited to eat, network and relax each month! In the Portland area, the lunch is at China Moon on SW Macadam (formerly Mazzy's). In Salem, the lunch is at Newport Bay on Market Street. Two lucky winners will be chosen at random, one from Salem and one from Portland, each month. We hope to see you there at noon on the First Friday!



OAALJ Board of Directors 2004

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Member Profile: Steve Rissberger

By Andrea Sloan



Who better to profile in this edition of *Off the Record* than our immediate past president, Steve Rissberger. Steve was the president of

OAALJ for three years (he holds the record for longest presidential term) and has been a member of the Board since 1996. Steve also chairs the OAALJ Ethics Committee, which drafted the Code of Ethics adopted by the Office of Administrative Hearings. In addition, Steve is a founding member of the Oregon State Bar's Administrative Law Section.

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Steve has been an Administrative Law Judge in Oregon since 1990. Most of his career, to date, has been with the Employment and Social Services sections. Steve estimates that he has conducted hearings for over 30 state agencies -- no easy task. In July 2003, Steve made the move to the Worker's Compensation Board. He's enjoying the challenge of learning a new, complex field of administrative law and appreciates the increased salary and chance for advancement that came with his new position.

Before becoming an ALJ, Steve practiced law, specializing in commercial litigation and Chapter 11 bankruptcies. He also clerked for the Honorable W. L. Richardson, presiding

judge of the Oregon Court of Appeals.

Steve is a graduate of Syracuse University College of Law in New York, where he earned a Government Law and Regulation certificate. Steve was also editor-in-chief of the *Syracuse Journal of International Law and Commerce*. He did his undergraduate work at Lewis and Clark College, spent a year studying at the Ludwig-Maximilians Universitat in Munich, Germany, and six months studying in Turkey and Greece.

Steve is a native Oregonian, growing up in McMinnville, where he was active in sports. He's the father of two (ages 10 and 13) and is married to Patty, also an attorney. Steve and his family live in Tualatin. He's still active in sports, and enjoys running, mountain biking and swimming. Steve also enjoys spending time with his children, bouncing on the family trampoline.

Steve's secret passion is writing. He worked as a newspaper reporter after college and one of his science fiction stories has been published! He hopes to get back to writing now that he is settling into his new job.

The OAALJ Board wants your opinion!

Would you be interested in receiving *Off the Record* by email? The Board is exploring ways to reduce waste and decrease costs.

Please let us know if you are interested in this new option by emailing your opinion by
May 15, 2004 to:
ALJnews@hotmail.com

News from National

By David Marcus, NAALJ Board Member

The National Association of Administrative Law Judges (NAALJ), our parent organization, has taken some huge steps to ensure growth in its membership and in its influence on the development of administrative law across the country. NAALJ has recovered from its financial crisis of a few years ago and, although attendance at the 2003 Annual Meeting & Conference in Orlando was less than hoped for, the conference was nevertheless a financial success. This turnaround has enabled the Board to authorize the hiring of a part-time executive director for the organization.

John W. Hardwicke, former Chief Administrative Law Judge for the Maryland Office of Administrative Hearings, and a former president of NAALJ, accepted appointment as the executive director effective February 1, 2004. There is simply no more qualified individual for the task. In three short months, Judge Hardwicke has entered into an agreement with the University of Baltimore School of Law, under which UB has provided an office and staff support for NAALJ, with a future view of developing a national center for administrative law. In addition, initial steps are being taken to obtain grants for developing specific Association programs.

With these developments, the 2004 Annual Meeting and Conference will be held in Baltimore November 3-7, 2004, and is expected to attract a record number of conferees. It is expected that the Lexis-Nexis challenge grant will be offered again this year, to assure that at least one representative from every affiliate is able to attend the conference. Last year, OAALJ Board member Monica Smith received the grant to go to Orlando. OAALJ members will be notified once the availability of the grant is confirmed.

The establishment of the executive director position is a cornerstone of the Strategic and Long-Range Plan (SLRP), which was reviewed at length, revised and adopted by the Board, and presented to the membership, in Orlando last fall. Long-range goals identified in the SLRP include:

establish a truly national membership organization with a larger membership and affiliate chapters in all states (there are currently 13 affiliates); expand training and networking of ALJs through consistently well-attended, quality conferences; expand the ADR program; create a national ALJ certification program; and implement a comprehensive survey of administrative adjudication in the United States, in cooperation with the LBJ School of Public Affairs at the University of Texas. The full text of the SLRP, as well as additional information and resources for ALJs can be viewed at www.naalj.org.

NAALJ is a co-sponsor with the Council of Canadian Administrative Tribunals, for the *3rd International Conference: Bringing Administrative Justice to the People of the World*, which will be held in Toronto, June 20-23, 2004. Representatives from at least 50 countries are expected to attend, and NAALJ has offered ten conference fee scholarships for NAALJ members. The deadline is April 15. Applications and additional information are available at the website, www.naalj.org.

Publication of the next issue of the Journal of the NAALJ will be forthcoming. In addition, NAALJ will be publishing the latest *Manual for Administrative Law Judges*, revised and updated this year by Professor Morrell Mullins. The manual will be distributed to all current members and will be available for purchase to others through NAALJ. And the Spring issue of the NAALJ newsletter is due to be released before May 1.

I am chairing the NAALJ Education Committee for the second year, and efforts will focus on developing ALJ training initiatives (including distance learning programs), and expanding efforts at public education and law school outreach, which will include preparation of a resource guide for distribution to affiliate chapters before the end of the year for use in developing programs at the state level.

Justice Durham Headlines OAALJ Annual Meeting

By Steve Rissberger

Noting dramatic progress in administrative law with the creation of a central panel in Oregon, Supreme Court Justice Robert Durham headlined OAALJ's 2003 annual meeting on December 11, 2003. The dinner meeting also featured the introduction of the Bruce Black Award for excellence in administrative law and a changing of the guard among members of OAALJ's governing board.

Justice Durham stated that establishment of a central panel in Oregon represented a landmark development in the evolution of administrative law in Oregon. He lauded ALJs for high quality work in conducting and deciding a wide range of hearings, based on his perspective as a member of the state's highest appellate court. Justice Durham served as Chair of the Oregon Commission on Administrative Hearings from 1988 through 1989. The Commission eventually recommended the establishment of an independent central panel in Oregon, but the Oregon legislature failed to act on the commission's proposal for nearly a decade.

The meeting featured the introduction of a new institution for OAALJ—the annual Bruce Black Award for excellence in administrative law. The first award was given to Bruce Black's widow, Ruth, during a ceremony near the end of the annual meeting. David Marcus, a founding member of OAALJ, noted that the award would be given each year “to a member of administrative law profession who best represented the qualities that made Bruce such a positive force in the community.”

Black died suddenly in April 12, 2003 while jogging. He was a former

president of the organization, the founding editor of OAALJ's newsletter “Off the Record” and a sitting board member at the time of his death.

The Board was expanded from seven to nine members in 2002. The Board has elected to continue to operate with nine members in order to strengthen ties with the membership, increase the board's ability to take on multiple projects and to allow a larger pool of members to remain involved in the organization's day-to-day activities.

We'd like to start a new column in the summer edition of *Off the Record*. The column is tentatively titled, “The 61st Day.” We have all had humorous or unusual hearings, and this is our chance to share our experiences.

If you have a story to tell, and if the appeal time has run on the case you want to share, please submit your experiences and send them to *Off the Record* at ALJNews@hotmail.com

Oregon Association of Administrative Law Judges
A Chapter of the National Association of Administrative Law Judges

MEMBERSHIP APPLICATION: PLEASE ANSWER QUESTIONS FULLY. TYPE OR PRINT.

1. Name:

_____ last name first name MI

2. Home address: _____

_____ City State Zip Code

3. Home phone: () _____ Work phone: () _____

4. Agency name:

5. Business address: _____

_____ City State Zip Code

7. Please send my mail to: Home address____ Work address____ Email only____

8. Email address(es): _____

9. Are you an attorney?: _____ yes _____ no

10. Do you serve as an ALJ or Hearing Officer _____ full or _____ part-time?

11. Are you interested in serving on a local OAALJ committee or a national NAALJ committee dealing with issues such as membership, continuing education, ethics, communications, legislation, other?

____yes, --- _____OAALJ (local) _____NAALJ (national)

I'm interested in: _____

12. Are there other issues that concern you?

Signature: _____ Date: _____

THANKS FOR YOUR INTEREST. Please enclose annual dues of \$65.00 (includes membership in NAALJ) and mail to: OAALJ, P.O. Box 3626, Salem, OR 97302-0626

President's Message

By Alison Webster

Greetings loyal readers of *Off The Record*. At the annual meeting last December, the OAALJ membership elected the association's Board and, in February, the Board chose its officers for 2004. I am honored to serve as President, and I have a great team working with me: Vice President Greg Naugle, Treasurer Peter Rader, Secretary Cathy Coburn, and members David Marcus, Steve Rissberger, Andrea Sloan, Larry Smith and Monica Smith. I want to take this opportunity to thank Steve Rissberger for his two years of dedicated service as President. I also want to thank the outgoing Board members: DeeAnna Hassanpour, Skip Russell and Daina Upite. Their participation on, and contributions to, the Board will be missed.

OAALJ has lots on tap this year. This fall, we will be co-sponsoring a full day conference on Administrative Law with Willamette University School of Law. A committee of ALJs and practitioners, chaired by David Marcus, is putting the conference together. Currently scheduled for Saturday, October 30, 2004, the conference will cover a wide variety of administrative law-related topics, and feature an outstanding list of speakers, professors and panel presentations. More on the conference to follow in upcoming issues of *Off The Record*.

Membership in OAALJ entitles you to a significant discount on tuition for the fall conference. And, speaking of membership, we encourage you to join now. Those of you who are new to the Office of Administrative Hearings or other agencies, we welcome you. And, you former members who have yet to renew (and you know who you are), we would love to have you back in the fold as well. By joining now, your membership will be good through June 2005. For the reasonable fee of

\$65.00, you also become a member of our affiliated organization, the National Association of Administrative Law Judges.

In addition to receiving our newsletter, you will receive NAALJ's highly-regarded Journal, which contains academic articles by experts in the field of administrative law. In the Spring 2003 issue of the NAALJ Journal, our very own Tom Ewing published an article about Oregon's Hearing Officer Panel. Other OAALJ membership benefits include eligibility for a scholarship to the National Judicial College in Reno and, as explained elsewhere in this issue, free lunches to our First Friday program. My first year property professor claimed that there was no such thing as a free lunch, but I plan to prove him wrong in this instance! Both the NJC and the First Friday lunches offer you the opportunity to meet, greet and eat with colleagues in an informal setting. Our non-profit status makes a portion of your dues tax deductible. A membership application is included in this issue. If you have questions about OAALJ, please contact any of the officers or directors on our masthead. They'd be happy to talk to you about our organization.

OFF THE RECORD

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Visit our website at: www.OAALJ.org
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Opinions expressed herein are those of the individual authors and do not necessarily represent the views of OAALJ members or the Association's Board of Directors. Letters to the Editor or other materials submitted in response to newsletter content are encouraged, and will be published as space allows.

The editor welcomes submissions, news items and subject matter suggestions.

Editor: Andrea Sloan
Contributors this issue: Lawrence Smith, Maurice "Skip" Russell, David Marcus, Donald Jacobs, Steve Rissberger, Alison Webster and Andrea Sloan

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