

OFF THE RECORD

OAALJ

Summer 2003

OREGON'S OFFICE OF ADMINISTRATIVE HEARINGS: LOOKING BACKWARDS

By Thomas E. Ewing
Chief Administrative Law Judge of the Office of Administrative Hearings

On May 22, 2003, Governor Ted Kulongoski signed into law House Bill 2526, creating the Office of Administrative Hearings (OAH), formerly the Hearing Officer Panel.

We have come a long way since January 1, 2000, when the OAH was formed as a pilot program. Then, we were merely the loose collection of seven separate and culturally distinct hearing units. New Year's Day began with much apprehension. Agency heads were fearful of administrative law judges, new to their subject matters, running amok with statutes and rules. Even ALJs, or some of them, were uneasy about the future.

But, of everyone, I may have been the most anxious. I had four months after my appointment to get us ready. Operational indicators had to be identified and tracked. Seventy or so interagency agreements had to be negotiated and signed. A new electronic time-recording system, developed by the Employment Department, had to be modified to accommodate the OAH, something not contemplated when the system was designed. ALJs had to be trained in its use. Billing invoices had to be in place. There was the peremptory recusal provision of HB 2525 (1999), and the fear of a deluge of requests for different ALJs. The panel lacked a common e-mail, word processing, or case management system. A code of ethics had to be adopted. Managing the disclosure requirements governing ex parte contacts was uncertain. ALJs needed access to legal research tools. They required special training in the subject matters of agencies not

heard formerly by any of the seven hearing units. There were questions, still not entirely resolved, over the roles of attorney and non attorney ALJs in the OAH. There were issues relating to quality assurance, especially with respect to licensing board and commission cases. The Oversight Committee had to be up and running.

I felt like a tiny Swiss hamlet, located at the base of a tall mountain in winter, ready to receive an avalanche. But January 1 came and went without incident. Three and one-half years later, there still hasn't been an avalanche. Quite the contrary. An enormous amount has been accomplished. The necessary agreements were executed. The time-recording system was modified. Invoices issued promptly; indeed, I've been told that they are some of the best in state government both for accuracy and detail. There were very few recusal requests. New case management systems were developed for some of the hearing units. And so forth.

But we have done much more than merely meet operational exigencies. For example, we created an internet site. Soon, people will be able to conduct word searches of both proposed and final orders for selected agencies. The quality of our work has dramatically improved. In the early days of the OAH, I received a number of complaints, principally but not exclusively from agencies. Some complaints were legitimate; others were not. For the last year or so, I have received very

few complaints; rarely is one justified. We have embarked on an ambitious training program, although I must admit that we can still do a better job in this area—striking the

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Q & A with Tom Ewing

Recently, Steve Rissberger had an opportunity to pose several questions to Tom Ewing:

SR: What is your overall plan for the future of the Office of Administrative Hearings now that it is a permanent agency? What will change in the next year or two? What will not change?

TE: I hope that many things will change, although how many will occur within the next two years is uncertain. First, I want to physically consolidate the OAH. Today, we have ALJs scattered throughout the state, but principally in Portland, Salem, and Eugene. I would like to create single offices in those cities. Second, I

want to change our organizational structure, from one based on subject matter (the legacy system) to one based on geography. For example, all Workers' Compensation Division cases are handled out of the Cherry Ave. building in Salem. Two ALJs assigned to WCD commute from Portland; the third lives in Salem. In the future, those ALJs living in Portland would work out of the Portland office. Thus, each regional office would hear all OAH cases. Third, we must be more aggressive in our cross-training of ALJs. The model described immediately above can be successful only if we have ALJs trained in several different areas. Moreover, because of the OAH's cost efficiencies demonstrated over the last three years, and because of budgetary restrictions, we have

lost over ten ALJ positions (through attrition). If we are going to serve our customers properly, we must be able to nimbly respond to fluctuating case loads. Fourth, there are currently four different classifications of ALJs. Soon, three of them will be collapsed into one (leaving one alone for the time being). There are two reasons for doing this: multiple classifications for essentially the same work complicate the hiring process; moreover, a classification linked to a particular agency's subject matter sometimes creates in ALJs an unhealthy sense of identity with, or ownership of, a particular area. These are just four things we are looking at. There are many others.

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OAH: LOOKING BACKWARDS

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right balance between training that is both efficient and effective is difficult.

When I compare our own central panel with the central panels of other states, which have been in existence for many years, I am deeply proud of the progress we've made. But that progress did not ensure that the Legislature and Governor would rescind the sunset provision on the OAH, and make it permanent. Indeed, in light of the state's budgetary crisis, the Legislature was in no mood to institutionalize any government program. But, there were three things that ultimately assured victory.

First, many legislators had either heard

from their constituents or knew firsthand of our good work, performed both by operational staff and ALJs. Second, we had compelling evidence that the present OAH operates more efficiently and at less cost than the seven separate hearings units operated before January 1, 2000. For example, the average cost of a referral dropped by \$15 over the last three years, from \$292 in 2000 to \$277 in 2002. That translates into about 1.2 million dollars in cost savings per year.

Third, but perhaps most importantly, the OAH had a tireless champion in Representative Lane Shetterly, Chairman of the Oversight Committee. For these last three and one-half years,

Rep. Shetterly has been unequivocal in support of our panel. He skillfully navigated HB 2526 through the 2003 legislative session. Without his leadership, we just might have disappeared.

Finally, I would like to acknowledge the role of OAALJ. This association has long advocated for a central panel in Oregon. Under the presidencies of Charlotte Rutherford and currently Steve Rissberger, it has been a good partner to me personally. I thank Charlotte, Steve, and all OAALJ's members for their many contributions to our OAH.

More Ewing Q & A

SR: What is the significance of changing the title from the Hearing Officer Panel to the Office of Administrative Hearings, other than that no one seemed to like the acronyms such as HOP and CHOP?

TE: You already explained one of the reasons. Another is that we are no longer “hearing officers”—a title for which I had little affection—but administrative law judges. The name “office of administrative hearings” was chosen because it, or some derivation, is commonly used for other states’ central panels.

SR: Why, in your view, did the legislation implementing the new Office of Administrative Hearings as a permanent agency, HB 2526, pass with such an overwhelming majority in the legislature?

TE: There are many reasons. Legislators are familiar with the fine work of operational staff and ALJs in the OAH. The OAH has proved itself to be a much more cost-effective alternative to the former system of seven separate hearings units. And, Rep. Lane Shetterly—one of the most respected members of the Oregon Legislature—has enthusiastically supported us from the very beginning.

SR: There have been a number of vacant ALJ positions open due to attrition since the Hearing Office Panel was implemented. Are these positions likely to remain vacant? Why or why not? Is the Office of Administrative Hearings capable of deciding

more cases with fewer ALJs?

TE: Most of the positions have been eliminated at the direction of the Department of Administrative Services. This is largely in response to Oregon’s budgetary crisis. Regarding the question of capacity, there is no question but that in 2002 the OAH was far more efficient than it was in 2000, our first year of operation. For example, in 2000, an ALJ spent an average of 4.01 hours on every referral. In 2002, it was 3.56 hours. I’m hoping to reduce it even further. What makes me anxious, though, is that our case load in 2003 is projected to be higher than it was in 2002. Just how much additional efficiency can be squeezed out of the OAH is an open question.

SR: Have there been significant increases or decreases in case loads in particular programs?

In a recent e-mail to your staff, you mentioned that the case load for OLCC was down while the case load for UI was up. How do you plan to adjust to shifts in case loads in different programs?

TE: If there is one certainty in our business, it is that case loads will always fluctuate in response to changes in the law, the economy, and the season. For example, there were about 15,000 UI referrals in 2000; there were 21,000 in 2002; we expect even more in 2003. The principal way to respond is

through cross-training. But we will also be aggressive in using ALJs hired as limited durations, temporary employees, and contract ALJs.

SR: With the UI program in particular, is timeliness still a chronic problem, and if so, what plans do you have to cure this problem?

TE: For the last three months, we have been meeting most of the federal timeliness requirements for UI. I want to make sure that we continue to do so.

SR: You have said repeatedly that you intend to significantly increase cross-training in the panel among ALJs. Do you have a particular plan in mind to implement this? Will cross-training be required or voluntary?

TE: That’s difficult to answer.

My preference is always to make these things voluntary. Usually, persuasion has worked.

SR: Do you plan to change the management structure of the panel in any way?

TE: No, not at least now. That may change when we move to a structure based on geography.

SR: What about salaries? 2526 provides you with the authority to set salaries for ALJs. Are we likely to see any proposals for a

“The OAH has proved itself to be a much more cost-effective alternative to the former system of seven separate hearings units.”

IN MEMORIAM:
BRUCE KIMBALL BLACK
December 3, 1945—April 12, 2003
By David Marcus

Our esteemed colleague, Administrative Law Judge Bruce K. Black, died suddenly as he was jogging on the evening of Saturday, April 12. He was 57 years old. He is survived by his mother, his wife and best friend Ruth, and his 25 year old son, Adrian, as well as a host of friends and colleagues.

Bruce was raised in Salem, Oregon. He graduated from South Salem High School and Stanford University. Bruce earned his J.D. at the University of Oregon, then married and settled in Salem. After practicing law for a few years, he joined the Employment Department as a hearings referee in 1976. He was one of the founding members of the Oregon Association of Administrative Law Judges the following year, 1977.

Bruce was highly involved in the early development of the OAJL and served as its president in 1984 and 1985. Under his leadership, the OAJL focused its efforts on legislation to establish a central office of administrative hearings, along with efforts to provide CLE programs for ALJs and opportunities for ALJ networking. He remained on the Board following his presidency and was responsible for launching the Association's newsletter, "Off the Record," which has remained continuously in publication ever since. Recognizing that legislation to establish a central office of administrative hearings had failed in several prior sessions, Bruce recommended introducing piecemeal legislation in 1987. Four bills were introduced, including

a bill to establish the Commission on Administrative Hearings. The strategy worked; while the main bill to establish a central office of administrative hearings again failed, the Commission bill passed. Under the chairmanship of now Justice Robert D. Durham, concerns about the administrative hearing process received significant attention and exposure through the efforts of the Commission. The seeds were sown for what was to come ten years later.

By the time the Commission had completed its work, Judge Black was appointed to serve as an Administrative Law Judge at the Workers' Compensation Board. He renewed his involvement in the Association when it became clear that the Governor's Work Group on Administrative Hearings would introduce legislation in 1999 to establish the Hearing Officer Panel. Bruce served on the OAJL Board again from 1999 until his death. He was Vice President during much of that tenure, and was also the editor for Off the Record. In December 2001, he was appointed by Chief Hearing Officer Tom Ewing to chair an external Quality Review Committee to address issues of ALJ independence and review of ALJ work products in the Panel. The Committee filed its report and recommendations with the Chief in April 2002, and the Chief adopted a progressive policy of peer review in keeping with those recommendations. Most recently, Judge Black was chosen to serve on the 2003 Executive Committee of the Oregon State Bar Administrative Law Section.

OAJL
ANNOUNCES THE
BRUCE K. BLACK
AWARD

To honor Judge Black's legacy of activism, professionalism and exemplary service to the citizens of Oregon, the OAJL has established the "Bruce Black Award" for "outstanding public service in the advancement of Oregon's administrative justice system." The award recipient will be selected by the Board and presented each year at the annual meeting. The first award will be awarded posthumously to Judge Black at the 2003 annual meeting. Judge Black's wife is expected to accept the award.

**Amendments
to the
Hearing Panel Rules**

The Department of Justice's amendments to OAR 137-003-0515 through 0670 of the Hearing Panel Rules became effective July 21, 2003. Although, per HB 2526, the Hearing Officer Panel is now the Office of Administrative Hearings, and Hearing Officers are now Administrative Law Judges, the amended rules still retain the older designations, as the changes were drafted before HB 2526 passed. Additional amendments are contemplated.

The substantive changes in the new rules address the filing and service of documents,

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News from NAALJ

By David Marcus

The NAALJ mid-year seminar and Board Meeting was held in Chicago May 29-31. Co-sponsored with the National Conference of Administrative Law Judges (NCALJ) of the ABA Judicial Division and the Illinois State Bar, the seminar featured a full day of instruction on effective decision writing and a day and a half was devoted to a variety of sessions that explored the roles and relationships of ALJs and agencies. Two recent federal cases were the starting point for those discussions: *Harrison v. Coffman*, 35 F. Supp.2d 722 (E.D. Ark. 2999); and, *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000).

There were approximately 85 attendees at the seminar, with a substantial portion of out-of-state attendees. Given the budget concerns in most states, the attendance was quite excellent. The program offered a wide variety of speakers, mostly in a panel discussion format, with opportunity for questions and comments from the audience. The evaluations indicated a high level of satisfaction with and appreciation for the program. The opportunity to discuss issues with ALJs from around the country was invaluable.

At the conclusion of the seminar, the NAALJ Board held its mid-year meeting. Thanks in

large measure to the success of the 2002 Annual Conference in Lexington, Kentucky, the NAALJ's financial outlook has improved dramatically from two years ago. In addition, the association has worked more closely with the National Judicial College, to put on the Mediation for ALJs training program, and anticipates other cooperative efforts in the near future.

With grant monies made available through LexisNexis, NAALJ has launched a challenge grant to help assure that at least one member of each affiliate chapter is able to attend the Annual Meeting and Conference with minimal or no personal expense. Each affiliate has the opportunity to participate, but must match the LexisNexis grant amount. OAJL has elected to participate. *See Scholarship article on this page for more information.*

And speaking of the Annual Meeting and Conference, this year it's Orlando! The dates are October 10-15. Hosted by the Florida Division of Administrative Hearings and the Administrative Law Section of the Florida State Bar, the theme for this year's conference is "Building a Better Administrative Law Process." The program contains something for everyone, from special education to alternative dispute resolution to ethics for

Administrative Law Judges.

Program brochures were mailed in mid-July and the early registration deadline is August 31. Logon to www.naalj.org for all the information you will need.

Should you have any questions, concerns or suggestions regarding the national association or its upcoming programs, please do not hesitate to contact me at ddtmarcus@netzero.net.

NAALJ Scholarship

By Andrea Sloan

As part of its Challenge Grant Program, LexisNexis has created a scholarship for the 2003 NAALJ Annual Conference in Orlando, Florida. This scholarship is available to members of OAJL, and includes \$300 plus waiver of registration fees to the conference. In addition, OAJL will match NAALJ funds to the scholarship recipient.

If you are interested in attending the NAALJ Conference, are a member of OAJL, and would be willing to make a presentation about the conference at a future OAJL gathering, we would like to hear from you.

Please submit a letter of interest to the OAJL Board no later than **August 26, 2003**. Include your email address and telephone number, detail your ALJ experience and explain why you should be selected for the scholarship. The scholarship winner will be notified by August 28, 2003.

Member Profile: Charlotte Rutherford

By Alison Webster



Charlotte Rutherford is a past president of the OAJLJ and past member of the NAALJ Board. She is currently employed as an ALJ for the Office of Administrative Hearings, Transportation Hearings Division. She has

been presiding over administrative hearings in Oregon since 1992, when she moved back to her hometown, Portland, after several years as a civil rights attorney in New York City. When she began as an ALJ, Charlotte was part of the Oregon Liquor Control Commission's hearings program. She still hears OLCC cases primarily.

Charlotte graduated from Howard University School of Law in Washington D.C. in 1983 and is a member of the District of Columbia Bar Association. In 1985, she earned a LL.M. from Georgetown University Law Center. She began her legal career working for the NAACP Legal Defense and Educational Fund as the Director of the Black Women's Employment Program. In her more than seven years with the Legal Defense Fund during the Reagan/Bush era, Charlotte litigated employment discrimination cases, wrote *amicus* briefs and published law journal articles on Black women's policy issues.

But, even before law school and her years as a civil rights attorney, Charlotte had a full life. She lived in Los Angeles and Seattle, married and divorced twice and had two children. She completed her undergraduate degree after 11 years, graduating from Portland State University in 1976 with a bachelor's degree in Administra-

tion of Justice, and a minor in Black Studies. She continued her parent's tradition of community service by working with various organizations involved with race and equal justice issues. She was employed first as an investigator and then as compliance officer for the Civil Rights Division of the Oregon Bureau of Labor and Industries from 1976 to 1980. Working for the Civil Rights Division prompted her to pursue a legal career. A scholarship from Howard University, along with focus, determination and hard work (as well as two understanding adolescents) made her goal of being a civil rights attorney a reality.

When asked what she likes best about being an ALJ, Charlotte says that it is being the one who has the first shot at making the decision in any given case. Charlotte enjoys being part of the OAH, and the opportunity to conduct hearings for a variety of agencies, boards and commissions. As for what she considers to be her least favorite part of the job, Charlotte identifies having to sort out a poorly presented case. This includes cases in which the agency's laws or rules do not directly address the agency's proposed action as well as those cases where the parties and/or their attorneys are unprepared or unfamiliar with administrative law. Charlotte works out of her home, and says that this "outstation" arrangement has both pros and cons. While she likes the casual dress code and short commute down the hall, she misses the camaraderie of an office environment and the convenience of nearby clerical and technical support. Ideally, of course, Charlotte would prefer the best of both worlds, an office setting with telecommuting opportunities.

Other interesting tidbits about Charlotte: She has five grandchildren plus one on the way. Also, Charlotte's daughter has a Ph.D. from Stanford University and currently teaches philosophy at Spellman College in Atlanta.

More Ewing Q & A

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tiered salary system or other salary changes for ALJs in the next year or two?

TE: Ultimately, I would like to see a tiered structure for ALJ salaries, something like "ALJ1" and "ALJ2." The latter might be called "senior ALJ," similar to what the Department of Justice does. But, in the short term, budgetary constraints would seriously limit the number of ALJs able to move into it. Moreover, while I have no objection to having longevity with the OAH as a component of eligibility, movement must depend on ability and proven performance.

SR: Has there, or will there be, any change in the funding model for the Office of Administrative Hearings now that it is a permanent agency?

TE: I have looked at the funding models of other central panels. There are three. During the last three years, ours has proven to be very serviceable. I have no plans to change it. However, there has been one significant change with the signing of HB 2526. When we were a pilot, I had to request agency permission to purchase equipment (computers) for example. Some agencies agreed; others did not. That created disparities within the OAH. Now, I no longer ask permission. I consider our needs, and, if the purchase is justified, the cost is charged to all OAH agencies under our allocation formula. This gives me much more flexibility in managing the OAH.

Model Rule Amendments

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amended notices and documents, and discovery issues. For example, OAR 137-003-0520 specifically addresses the filing of discovery motions and OAR 137-003-0570 specifically authorizes the agency *or the hearing officer* to issue a written discovery order upon request for an order requiring discovery, where such discovery "is reasonably likely to produce information that is generally relevant to the case and necessary, or likely to facilitate resolution of the case." OAR 137-003-0570(7). The hearing officer may also deny, limit or condition discovery upon request to protect any party, witness or agency from annoyance, embarrassment, oppression, undue burden or expense, or to limit information that is confidential or privileged by statute or rule. The amendments to this rule also set forth consequences for failure to respond to discovery requests as well as procedures for review of discovery orders. Also of significance is OAR 137-003-0572, a new rule concerning depositions in contested cases. Although depositions require agency authorization, the rule sets forth the procedure for requesting such depositions and for taking the deposition if granted by the agency. Finally, OAR 137-003-0595, which deals with public attendance, exclusion of witnesses and removal of disruptive persons, was amended to encourage persons to notify the hearing officer when he or she reasonably believes that any person participating in the hearing may present a danger or be a threat to anyone else involved in the hearing.

DICTA: NEWS AND MOVES

OAALJ Board changes: OAALJ Board member and Workers' Compensation Board ALJ **Bruce Black** died suddenly on April 12, 2003. *See article on page 4.* OAH ALJ **Diana Upite** has been appointed to complete **Bruce Black's** term. **Kevin Anselm** has elected to step down from the Board as a result of her recent appointment as Deputy Chief ALJ for OAH, Employment Division. We wish her well and congratulate her on her new appointment. OAH ALJ **Andrea Sloan** has been appointed to take Kevin's place . . . OAH leadership changes: **Jenette Fischer**, OAH Deputy Chief ALJ, Social Services Section, died following a lengthy battle with cancer on July 7, 2003. **Gary Tyler**, former Presiding ALJ for OAH's Social Services Division, has been appointed to take her place. **Dee Anna Hassapour**, OAALJ Board member and Treasurer, has been appointed to fill Gary's place and is now presiding ALJ in OAH's Social Services Division. **Dwight Apple** has retired as Deputy Chief ALJ of OAH's Transportation Division after 26 years of state service. **Eric Moore**, formerly a Presiding ALJ for the both OAH's Employment and Transportation Divisions, has been appointed to take Dwight's place. OAALJ Board member and Secretary, **Monica Smith**, has been selected as lead ALJ for child support cases in OAH's Employment Division. Former OAALJ President, **Ken Betterton**, has been selected as lead ALJ for unemployment insurance case in OAH's Employment Division . . . Other Moves: OAALJ President, **Steve Rissberger**, has accepted a position as an ALJ with the Workers' Compensation Board. **Submit your news and moves to ALJnews@hotmail.com**

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The editors welcome submissions, "*Dicta*" news items and subject matter suggestions.

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