



# OFFICE OF ADMINISTRATIVE HEARINGS NEWSLETTER

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## Topics of Interest:

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- Central Panel Conference
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Questions or comments? Contact us, we want to hear from you.

Call or email -

## CENTRAL PANEL CONFERENCE



On September 8-11, Tom Ewing, Eric Moore, Dee Anna Hassanpour and Kevin Anselm attended the 21<sup>st</sup> conference of Central Panel Chief Administrative Law Judges in Seattle, Washington. Tom has attended these meetings since 1999. For the Deputy Chief ALJs this was their first panel conference. The host was Washington's Office of Administrative Hearings, a central panel much like Oregon's. Approximately 45 people attended, representing 20 state and city central panels.

The first day was taken up with diversity training. The second was a bit more variegated. Tom Ewing led a panel discussion (Georgia, Florida and Texas participating) on "if I only knew then what I know now." Following that was another panel discussion on constitutional issues facing central panels. John Hardwicke, formerly Chief ALJ of Maryland and now the Executive Director of the National Association of Administrative Law Judges, gave a talk on NAALJ, followed by a general discussion on the supportive relationship that this conference can provide with NAALJ.



These conferences have always been very valuable for Tom and now for Eric, Dee Anna, and Kevin. For two days the central panel chief ALJs share problems and solutions, ideas, new technology, new processes and so forth. It has always been a rich experience.

## Indiana Conference

On September 30-31, 2004, Tom Ewing attended a conference sponsored by the Indiana University School of Law, Program on Law & State Government: "Maximizing Judicial Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?" As the title suggests, Indiana is considering the establishment of a central panel. Tom's panel discussed the topic "Fairness, Funding and ALJ Finality." Approximately 100-150 people attended the conference, including the Governor's counsel and a number of agency heads. Tom and John Hardwicke, formerly chief judge of the Maryland Office of Administrative Hearings and currently executive director of the National Association of Administrative Law Judges, co-authored an article: "Central Panels: A Reply to Critics." It will soon be published by the Journal of the National Association of ALJs. Tom's presentation on the panel, as well as the article, focused on the economies associated with a central panel, using Oregon as the model.

Other conference panelists included chief judges and deputy chiefs from other state central panels (North Carolina, Georgia, Minnesota, and Michigan). As one would expect, the panelists were all supportive of the central panel concept. Indiana may be the next state to join the central panel movement.

## MCLEs

Did you know that you can go to the Oregon State Bar website ([www.osbar.org](http://www.osbar.org)) and obtain a listing of the MCLEs that the Office of Administrative Hearings has applied for? If you attended one of these trainings, you would be eligible to receive credit for it.

Instructions: Go to [www.osbar.org](http://www.osbar.org). On the left side click on Regulatory Functions, then MCLE. At the top are several categories. Click on Program Database, which will bring up a box for you to fill in. Under Event Sponsor, type in Office of Administrative Hearings and the list will come up underneath it. Please let Rema know if you should have any problems getting to the site.

## Journal of NAALJ

The Journal of the National Association of Administrative Law Judges just published Tom Ewing's most recent article, *Oregon's Office of Administrative Hearings: A Post Script*. It appeared in the spring 2004 issue. It is a sequel to his previous article, *Oregon's Hearing Officer Panel*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 57(2003). In the first article, Tom traced the history of the Office of Administrative Hearings (then the Hearing Officer Panel) through 2002. In this most recent article, he takes the reader through May 2003, when the Governor signed House Bill 2526, which made the Office of Administrative Hearings permanent.

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## Employee Highlight—Tammy Aldrich, Operations Manager

*by Kevin Anselm*

*Employment Division Hearings*

I am pleased to announce that Tammy Aldrich has accepted the Operations Manager position in the Employment Division of the Office of Administrative Hearings. It was just a couple months ago that Tammy was promoted to the new Hearing Specialist position so many of you will feel a little dejavu in reading this e-mail. So, at the risk of being a bit repetitive, I am including a little about her work history.

Tammy's state government service started back in 1988 in the Department of Motor Vehicles. She worked in several positions there including as a clerical assistant, and Word Processing Tech 1 and 2. She joined the Office of Administrative Hearings (actually then the Hearings Unit of the Employment Department) in March 1996 as a keyer/scheduler. She developed her leadership skills and abilities through progressive moves in the OAH and as lead OS2 (with a few months on rotation with the Employment Appeals Board), then Hearings Specialist in the Operations unit.

Please join me in congratulating Tammy and welcoming her to her new duties and challenges as a member of the OAH management team.



## Employee Highlight - Teresa Hogan, Administrative Law Judge

Can you guess where she is (well not in this picture)? Yes, Teresa Hogan, Transportation Division ALJ, ran the New York City Marathon! 26.2 Miles in just under four hours, which qualifies her for the Boston Marathon.

Teresa had to have a qualifying time for the NYC Marathon to have a guaranteed slot and it is actually harder to qualify for than the Boston race.

There were approximately 2.5 million people there as spectators. She ran this race for fun and says she took it easy. This is Teresa's seventh marathon and she still plans on running with the Employment Department team in the Hood to Coast run in August 2005.

If you would like to check out Teresa in the race (pictures of her actually running) you can go to [www.ingnycmarathon.org](http://www.ingnycmarathon.org) and click on the right hand side - Purchase Finisher Photos. Type in next to Bib Number: F1380, and click on Show Photos.

**Congratulations Teresa, a great accomplishment!**



## OAAJ Conference

On Saturday, October 30, 2004 the Oregon Association of Administrative Law Judges, in conjunction with the Administrative Law Section of the Oregon State Bar and Willamette University College of Law, hosted a CLE: "Delivering Justice in Administrative Decisionmaking in Oregon."

The keynote speaker was Justice Michael Gillette of the Oregon Supreme Court, who spoke about his recent meetings with Russian judges from Siberia, and their challenges in implementing a judicial system there. Following were presentations by Norman Williams and Judge Virginia Linder (Oregon Court of Appeals) on developments in federal and state administrative law respectively. There followed a panel discussion by Abigail Herman, Fred Baisden (ALJ in the Office of Administrative Hearings), Ann Fischer, and Janice

Krem on procedural issues in a contested case hearing. There were break out sessions on exploring bias in administrative hearings led by Judge Darleen Ortega; regulatory streamlining with Patrick Allen, David Heynderickx, and Susan Smith; and prehearing issues with Christine Chute, Frank Mussell, and Lawrence Smith (ALJ in the OAH).

In the afternoon, there were other break out sessions: Elaine Hallmark, Peter Rader (ALJ in the OAH), and Richard Birke discussing the benefits of alternative dispute resolution; and Andrea Sloan and Edward Harri on order-writing. At the end of the day, David Elkanich led a panel consisting of Thomas E. Ewing (Chief Administrative Law Judge, OAH), and Yvonne Tamayo on ethics and fairness in administrative law.

The event was well attended. David Marcus, ALJ in the OAH, deserves special credit for his considerable work in putting this fine conference together.



**Judge Michael Gillette**



**Judge Virginia Linder**



**Judge Darleen Ortega**



# OFFICE OF ADMINISTRATIVE HEARINGS

## APPELLATE CASENOTES

SEPTEMBER 2004

*JUDICIAL REVIEW/Justiciability: Judicial review unavailable if sanctions period have expired.*

*Yancy v. Shatzer*

Supreme Court, 337 Or 345 (2004)

<http://www.publications.ojd.state.or.us/court/S50280.htm>

*Facts:* Police cited Yancy for possession of marijuana. The citation excluded him from two Portland parks for a period of 30 days. Yancy appealed the citation to a city hearing officer, to the circuit court, and then to the Court of Appeals. The court determined that the case was moot because the exclusion period had already passed.

*Issue:* Whether there is a justiciable controversy.

*Holding:* After reviewing the Oregon Constitution and United Supreme Court cases, the court held that the constitutional grant of judicial power did not include the power to decide cases that had become moot at some earlier stage in the proceedings. The court expressly overruled previous Oregon Supreme Court decisions which had held otherwise.

*Comment:* This is potentially an important case. It may require the dismissal of some cases before the OAH if the period of sanctions have expired. However, it probably does not apply to those situations in which there is an enhanced penalty for the second offense.

*APA/Judicial review: (1) ALJ facts modified by agency reviewable for preponderance of evidence. (2) Facts added by agency reviewable for substantial evidence.*

*ADMINISTRATIVE LAW/Bias: Board member's role as witness not taint the proceeding.*

*ENGINEERING & LAND SURVEYING/Exemptions: Exemptions of ORS 672.060 not apply.*

*Becklin v. Board of Examiners for Engineering and Land Surveying*

Court of Appeals, 195 Or App 186 (2004)

<http://www.publications.ojd.state.or.us/A117586.htm>

*Facts:* District operated a dam. Becklin, not a licensed engineer, was chair of its board. The District submitted, under Becklin's name, an "engineering proposal" to a federal agency for a particular project. Later, at a public board meeting, Becklin stated that "we have been doing the designing [of the project]," and that he was the engineer in charge. The Board charged Becklin with practicing without a license. At hearing, a Board member testified on behalf of the Board. The ALJ found in favor of Becklin. In its final order, the Board modified some facts and added new ones. It found against Becklin.

*Issues:* (1) Whether the Board's modified findings are supported by a preponderance of the evidence. (2) Whether the standard of review of the Board's additional findings is for substantial evidence. (3) Whether the Board member's role as a witness tainted the proceeding. (4) Whether the exemptions of ORS 672.060 for the requirement to have an engineering license applied to Becklin or District.

*Holdings:* (1) The court reviewed the record *de novo* and determined that the ALJ's facts were not supported by a preponderance of the evidence, but that the Board's were. (2) It held that review of added facts is for substantial evidence, and there was substantial evidence to support the Board's findings. (3) The Board's order is not deficient by virtue of the member's role as a witness because the member did not participate in any Board discussions regarding the case, and recused himself at the meeting in which the Board voted to accept the final order. (4) The court also concluded that neither Becklin nor the district was subject to the exemptions under ORS 672.060.

**IMPLIED CONSENT/Chemical analysis: Chemical analysis of hospitalized driver need not be performed in accordance with Health Division methods.**

*State v. Snyder*

Supreme Court, 337 Or 410 (2004)

<http://www.publications.ojd.state.or.us/S50672.htm>

*Facts:* Snyder was involved in a single-car accident. At the hospital, his blood was drawn for a chemical analysis. At trial, Snyder sought to have the test results excluded.

*Issue:* Whether chemical analysis of hospitalized driver must be conducted according to Health Division procedures.

*Holding:* ORS 813.320(1) declares that the implied consent law shall not be construed to limit the introduction of "otherwise competent, relevant evidence." This evidence includes chemical tests taken of hospitalized drivers. ORS 813.160(1)(a) requires that chemical analyses be performed by qualified individuals in accordance with methods approved by the Health Division. The court held that the term "otherwise" indicates legislative intent that the evidence be competent in a way different from that set out in the implied consent law. Therefore, ORS 813.160 is not a limitation on results obtained while a driver is hospitalized.

**STATE AGENCIES/Repayment of excess funds: Statute of limitations is three years from date money paid to agency.**

**DEPARTMENT OF AGRICULTURE/Capital improvement grant: Simplot not entitled**

*J.R. Simplot Co. v. Department of Agriculture*

Court of Appeals, 195 Or App 98 (2004)

<http://www.publications.ojd.state.or.us/A118024.htm>

*Facts:* Simplot raises potatoes to be used as french fries. The Department inspects the potatoes for a fee. By statute, the fee must be enough to cover the costs of inspection and administration. Simplot sought a refund of a portion of fees paid between 1993 to 1999 on the ground that they exceeded the Department's costs. Simplot also applied for a grant of capital improvement funds. The Department denied this application on the ground that it would inure to the private benefit of Simplot. Once before the Department made a grant to another company, Ore-Ida.

*Issues:* (1) Whether the Department must refund money if it were paid to the Department over three years previously. (2) Whether the Department treated Simplot disparately.

*Holdings:* (1) ORS 293.445(2) requires agencies to refund monies in excess of that legally due within three years from the date the money was paid to the agency. The moneys in question were paid over three years earlier. Therefore, the Department has no authority to pay the money. (2) The court rejected Simplot's argument that the Department treated it "grossly" differently than it treated Ore-Ida. The reason is that Ore-Ida agreed that the Department could use the new equipment and facilities paid for by the grant for three years. Simplot made no similar offer.

*Facts:* Deputy contacted driver at an automobile accident, and detected various signs of intoxication. Deputy arrested driver when the latter refused to perform field sobriety tests. At a suppression hearing, driver provided innocent explanations for most of the observations made by Deputy. The circuit court judge suppressed the evidence, concluding that, under the totality of circumstances, Deputy's suspicion of intoxication was not objectively reasonable.

*Issue:* Whether probable cause depends on later validation of facts.

*Held:* Citing previous cases, the court held that it is irrelevant for purposes of probable cause whether

**IMPLIED CONSENT/Probable cause: Driver's subsequent explanations for signs of intoxication not relevant for probable cause.**

*State v. Vantress*

Court of Appeals, 195 Or App 52 (2004)

<http://www.publications.ojd.state.or.us/court/A118336.htm>

*Facts:* Deputy contacted driver at an automobile accident, and detected various signs of intoxication. Deputy arrested driver when the latter refused to perform field sobriety tests. At a suppression hearing, driver provided innocent explanations for most of the observations made by Deputy. The circuit court judge suppressed the evidence, concluding that, under the totality of circumstances, Deputy's suspicion of intoxication was not objectively reasonable.

*Issue:* Whether probable cause depends on later validation of facts.

*Held:* Citing previous cases, the court held that it is irrelevant for purposes of probable cause whether an officer's subjectively and objectively reasonable belief is later validated. Further, an officer is not required to eliminate alternative explanations of indicia of intoxication before concluding there is probable cause to arrest.

**UNEMPLOYMENT INSURANCE/Deference & RULE CONSTRUCTION/Deference: If facts clearly show misconduct, remand to departmental representative is unnecessary.**

*Jordan v. Employment Department*

Court of Appeals, 195 Or App 404 (2004)

<http://www.publications.ojd.state.or.us/A122323.htm>

*Facts:* Employer discharged claimant for violating company policy on several occasions and then lying about it. An authorized representative of the Employment Department concluded that her conduct did not constitute misconduct. The ALJ found misconduct, as did the EAB. *Issue:* Whether the EAB should have deferred to the authorized representative's interpretation of agency rule.

*Holding:* Since the representative was interpreting and applying a Departmental rule, that interpretation generally deserves deference. However, here the facts are clear that the violation occurred several times and was willful. No conclusion other than that the behavior constitutes misconduct under the rule would be plausible. Therefore, remand is unnecessary.

**UNEMPLOYMENT INSURANCE/Misconduct: Remand necessary where EAB fails to adequately explain its reasoning.**

*Freeman v. Employment Department*

Court of Appeals, \_\_\_ Or App \_\_\_ (slip op. 9/29/04).

<http://www.publications.ojd.state.or.us/A120045.htm>

*Facts:* Employer instituted a zero-tolerance policy toward DUII. Later, employer fired claimant for DUII. The Employment Departmental representative concluded that the firing was for misconduct because the license was necessary for continued employment. The ALJ reversed, finding that the conduct constituted an isolated instance of poor judgment. The EAB reversed, finding that claimant was wantonly negligent in failing to maintain the license; this failure was too severe to constitute an isolated instance; and claimant did not make a good faith error.

*Issue:* Whether claimant's conduct constitutes misconduct.

*Holding:* The court agreed with the EAB that claimant was wantonly negligent. But it found that the EAB failed to provide substantial reasons for concluding that claimant's conduct was not an instance of poor judgment or not a good faith error, both exceptions to misconduct under department's rules. The court also noted that claimant had raised a new issue: whether misconduct is excused if it constitutes an isolated instance of poor

judgment or good faith error. The departmental representative needs to address this. .

**REAL ESTATE AGENCY/Revocation: Acts committed prior to receiving license may justify revocation of license.**

*Kerley v. Real Estate Agency*

Court of Appeals, 337 Or 309 (2004)

<http://www.publications.ojd.state.or.us/S49995.htm>

*Facts:* Prior to becoming a licensed real estate agency, Kerley, an attorney, made unauthorized withdrawals of partnership funds. He was disbarred. Agency revoked his license because, under the pertinent statute, it constituted untrustworthiness. Relying upon *Dearborn v. Real Estate Agency*, 334 Or 493 (commissioner may not revoke a license for "private acts"), the Court of Appeals reversed because the conduct occurred before Kerley had received his license.

*Issue:* Whether the commissioner may revoke a license for acts committed prior to receiving a real estate license.

*Holding:* Clarifying *Dearborn*, the court held that the fact Kerley committed the acts prior to receiving his license is not relevant. All that is required is that the acts justify the commissioner's conclusion that Kerley is unfit because he is not trustworthy.

**OFFICE OF ADMINISTRATIVE HEARINGS**  
**CUSTOMER SATISFACTION SURVEY**  
**SUMMARY<sup>1</sup>**

**OAH AGENCY RESULTS**

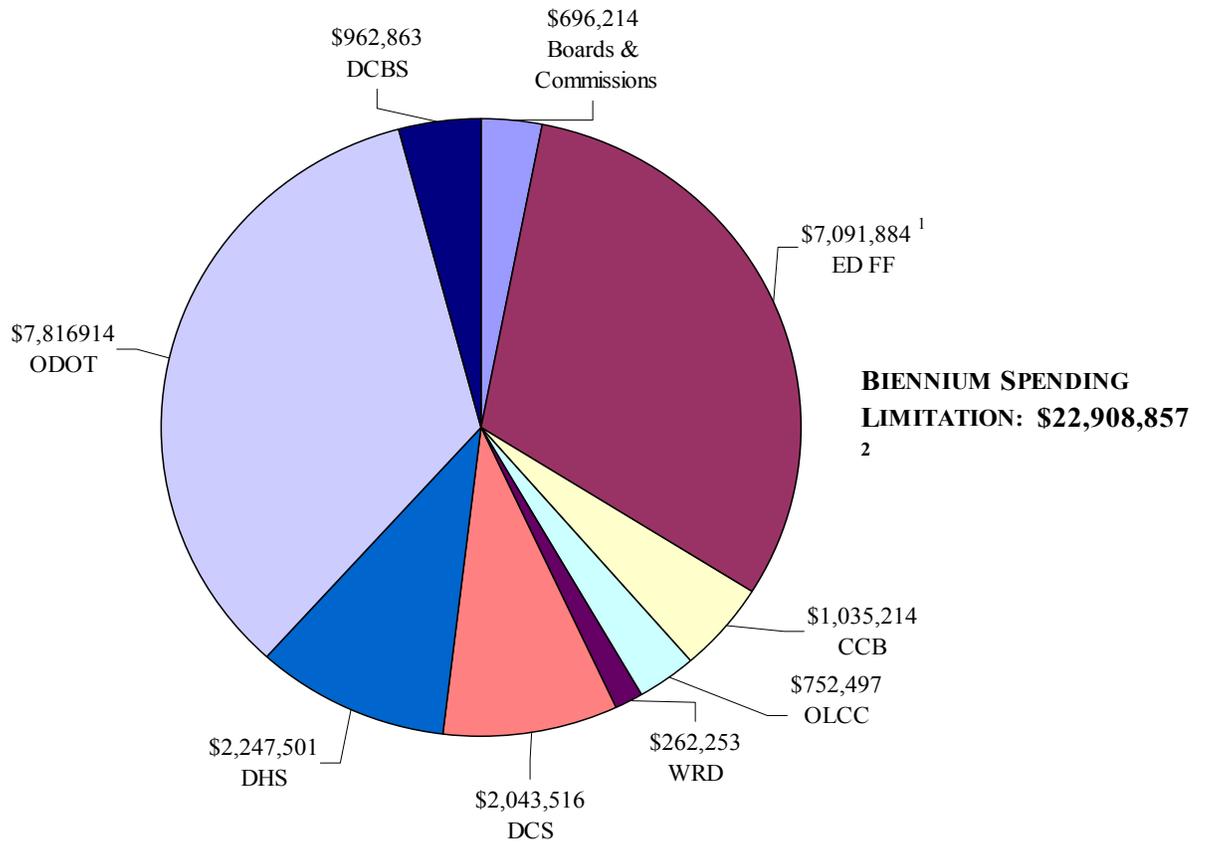
		Not Satisfied	Satisfied	Very Satisfied
1.	Was our clerical support staff professional in handling your request for hearing?	3	108	127
2.	Did the ALJ conduct the hearing in a professional manner?	5	76	161
3.	How would you rate the level of knowledge/expertise of the ALJ?	8	96	136
4.	Did our order clearly explain the decision in light of applicable statute, rule, and precedential court cases?	13	84	142
5.	What was your overall level of satisfaction with our service?	6	95	142

**OAH CUSTOMER RESULTS**

		Not Satisfied	Satisfied	Very Satisfied
1.	Was our clerical support staff professional in handling your request for hearing?	8	32	74
2.	Were you able to fully present your case at hearing?	13	28	62
3.	Did we complete the hearing and issue the order in a timely manner?	16	35	51
4.	Did you understand our decision and how that decision was reached?	20	26	55
5.	What was your overall level of satisfaction with our service?	21	30	54

<sup>1</sup>Summarizes responses to specific questions. Not everyone responded to all questions.

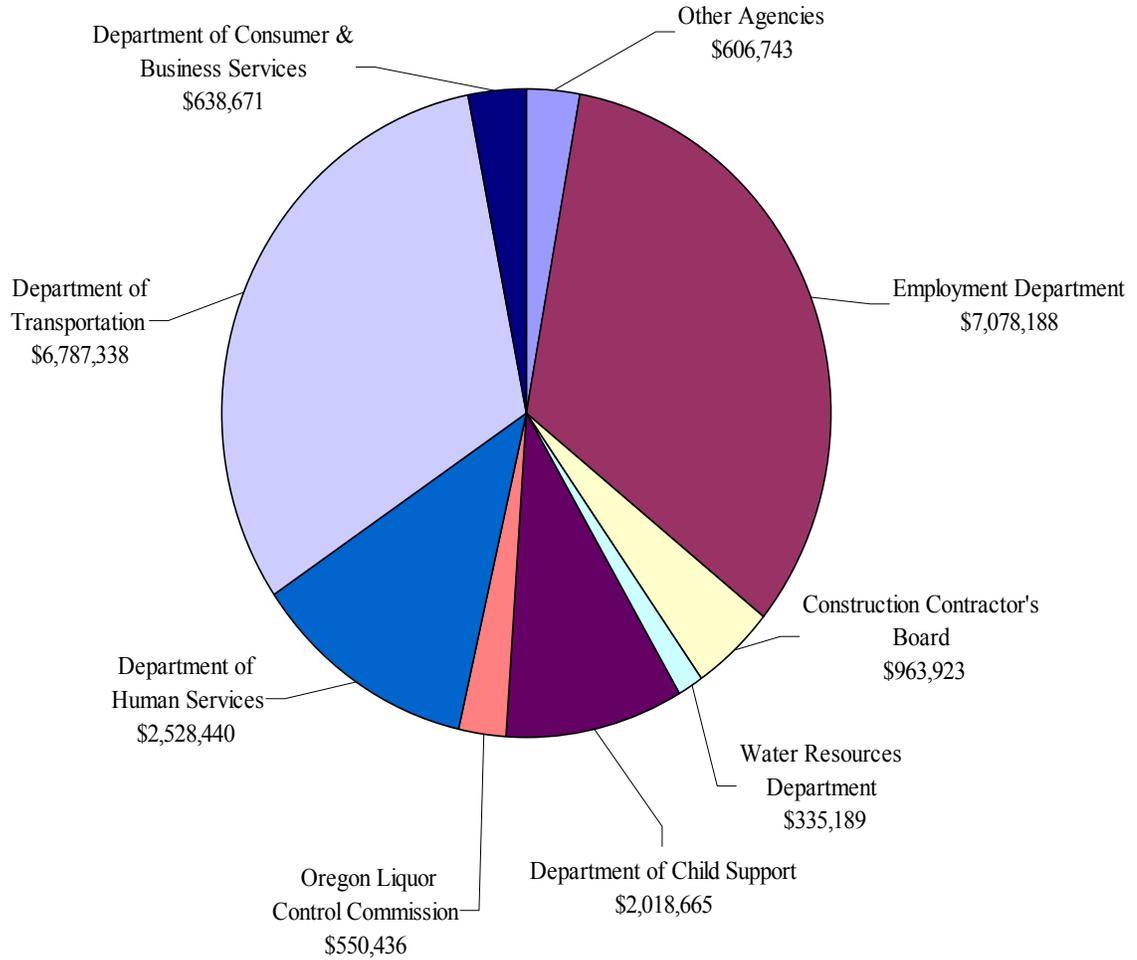
**HEARING OFFICER PANEL 2001-2003  
LEGISLATIVELY APPROVED BUDGET**



1. Includes 2002 E-Board request for unemployment insurance hearings: \$578,096

2. 2001-03 Legislatively approved budget \$21,615,805  
 2002 E-Board 578,096  
 Cost of Living Adjustment (COLA) 715,677  
 Total \$22,908,857

**OFFICE OF ADMINISTRATIVE HEARINGS  
ACTUAL EXPENSES BY AGENCY 2001-2003**



**ACTUAL COSTS: \$21,507,598**

**OFFICE OF ADMINISTRATIVE HEARINGS  
LEGISLATIVELY APPROVED BUDGET 2003-2005**

