



# OFFICE OF ADMINISTRATIVE HEARINGS NEWSLETTER

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## Topics of Interest:

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- World Affairs Council
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Questions or comments? Contact us, we want to hear from you.

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## WORLD AFFAIRS COUNCIL



At the request of the World Affairs Council of Oregon, Presiding ALJ Steve Tegger met with two Russian judges in downtown Portland on May 5, 2005. The judges were part of a 10-member group of law professionals from the Republic of Komi who were on a three-week professional training tour sponsored by the Bureau of Educational and Cultural Affairs of the U.S. State Department. While administrative law was not part of the original program, these two professionals said they had heard about administrative law judges and wanted to know more about them. The World Affairs Council contacted Steve and asked if he would be willing, on very short notice, to meet with the judges and talk about administrative law.

Steve met with Elena Katkova with the Komi Republic Justice Department Administration which is attached to the Supreme Court of the Russian Federation. She is responsible for overseeing the functioning of all the courts across the Komi Republic as well as the training, educating and monitoring of judges. Olga Nagornova is a municipal court judge in the capital city of Syktyvkar and handles primarily civil cases. Olga was surprisingly young for a judge at age 31 and has 6-year-old twin boys at home.

The Komi Republic is in the extreme northern part of Russia, about 1,000 km north of Moscow, and actually north of Finland, lying mostly within the Arctic Circle. The population is about 1.25 million and about 65% of the Republic's territory is covered by forests. The economy is heavily dependent on natural resources including coal and oil. The Republic is an autonomous state within the Russian Federation and an independent participant in foreign economic affairs. The State Council of the Komi Republic consists of 50 deputies elected to four-year terms.

Steve began the presentation by explaining the grounding of administrative law in the due process clauses of the 5th and 14th Amendments to the U.S. Constitution. Steve then tried to explain where the Office of Administrative Hearings is situated in Oregon State government and why we are part of the Executive branch and not the Judicial branch. But it was not until Steve began to explain the different types of hearings that we conduct that the two judges began to connect with what we do. Turns out that Olga deals with many of the same issues but it is all handled by the court system. When we talked about the volume of unemployment hearings that we do, Olga explained that the entitlement to unemployment is initially decided by a committee of workers at the place of employment and their decision is appealable to the courts. Olga also deals with the same kind of occupational licensing issues as well as monetary penalties for violations of regulatory acts that are not criminal sanctions.

Overall they thought the development of the administrative law process was very rational and they thought that it was good that citizens had one place to go to resolve their disputes with the state. They thought, however, that all of our orders should be final orders (they struggled with the concept of a proposed order, who could change the ALJ's order and why) and that we should be part of the Judicial branch.

## Employee & Division Highlights

*by Gretchen Miller, Donna Brann, Kevin Anselm  
Eugene Regional OAH Office*

Some of you may have wondered where Donna Brann disappeared to earlier this year. Most of you know that Donna is a Major with the Oregon Army National Guard as a reservist. In February that status suddenly changed and Donna was called back to active duty. Donna and the OAH had only about a week to prepare for Donna's deployment.

Although stationed in Eugene, she traveled I-5 more frequently than when she worked in the OAH in Salem. What many of you didn't know is the reason Donna worked only Monday through Thursday is because for the last year she has worked Friday through Sunday for the military. Although Donna's normal job for the military is Judge Advocate General (army lawyer), that has not been her assignment for the last 18 months. Donna was placed in the position of Rear Battalion Executive Officer (XO) for a deployed infantry battalion. The battalion spent a year in Iraq. The job of the Rear Battalion is to handle all issues and training for the 350 soldiers that did not deploy, handle issues for the 705 that did deploy and ensure all the needs of the 1,000 families are handled. Donna wore a lot of hats. Her primary hat was as the Family Readiness Group Liaison. She spent the last 18 months taking care of any issues that arose with the families. She spent a lot of time making presentations to organizations, dealing with Congressmen and giving trainings such as Casualty Operations. Her most dreaded duties were handling press conferences, the media and planning ceremonies.

Her primary responsibility before returning to the OAH June 15, 2005 was helping the transition home for the soldiers. She coordinated with the VA, Vet Center and other mental health facilities to make counseling and transitional resources available for the soldiers and their families. She has conducted multiple police trainings preparing them for what to expect when the soldiers return. She also worked with the Eugene Employment Department to co-host a veteran job fair that was attended by approximately 125 veterans seeking work. The final task she had to complete before returning to OAH was to write the Oregon Regulation on Rear Detachment Commands, the handbook on how to run a rear command (in civilian speak, she wrote the plan to provide services to reservists using community resources since most reservists and their families do not have access to regular military bases. This new format creates a program that places a greater emphasis on taking care of the families and soldiers during the deployment and helping the soldiers have a smoother reintegration into their families and communities once they return from deployment). Donna reports that her biggest obstacle was finding writing time, good preparation for returning to the OAH. Donna completed her active duty orders, and, 114-page document (the regulation to put the plan noted above into effect), on June 8, 2005. She returned to the OAH on June 15, 2005.

On June 24, 2005 Donna returned to the OAH in uniform, accompanied by Brigadier General Douglas Pritt, Brigade Commander for the 41<sup>st</sup> Brigade Combat Team, Colonel Cameron Crawford, Deputy Brigade Commander for the 41<sup>st</sup> Brigade Combat Team and Major Ed Tanguy, Executive Officer for 2<sup>nd</sup> Battalion, 162<sup>nd</sup> Infantry, the unit Donna was attached to as the Rear Executive Officer. The purpose of the visit was for BG Pritt to present Kevin Anselm with the Patriot Award. During her military duty, Donna nominated the OAH for the award. In eleven years of military service, Donna has never nominated an employer for such an award. The nomination was approved through the Department of Defense in Washington D.C.

The Patriot Award is a national award presented on behalf of the Oregon Army National Guard and the Department of Defense through Employer Support for the Guard and Reserve (ESGR). ESGR is a national organization created to assist service members having difficulty with employment issues resulting from their military service. ESGR also recognizes employers that have gone above and beyond in assisting service members during their deployment and making a smooth transition back to work and for their overall contribution and service to members of the military. The Patriot Award is the first of four levels of awards that an employer can receive. It also makes the OAH eligible for consideration for the three higher awards. Kevin Anselm was honored not only for the assistance the OAH provided to Donna, but also for her contribution through teaching other panels about the Servicemembers' Civil Relief Act, assisting in the national education of other judges regarding the rights of military members. Of course, as Kevin points out, that teaching is accomplished as a result of Donna's willingness to share her knowledge, extending her help and support with materials.



BG Pritt thanked Kevin Anselm for her tremendous support of the Oregon Army National Guard and the US Military. As BG Pritt stated at the award ceremony, "If not for the contribution and assistance of people like Kevin, the military would not be able to retain soldiers like Major Brann." BG Pritt found this especially important as the work that Donna completed during her activation was presented to, and accepted at the national level as the new format for how Rear Operations will be conducted. In her remarks, Kevin thanked BG Pritt for the kind recognition, observing that OAH is doing what every employer should do to support soldiers. She also thanked each of the servicemembers for their continued hard work, and welcomed Donna back to the OAH.

### These are the four levels of the award.

**"Patriot Award" Certificate of Appreciation.** ESGR awards this certificate and a Patriot lapel pin on behalf of the Department of Defense. All members of the National Guard and Reserve forces are eligible to nominate their employers for the "Patriot Award" certificate. This nomination is subsequently used by the local ESGR Committee as the basis for consideration to receive higher level awards.

**Local ESGR Committee Chair's Award.** This award is given in limited numbers and presented annually by each ESGR Committee. It is designed to recognize those employers who have gone above and beyond the legal requirements for granting leave for military duty.

**PRO PATRIA Award.** It is presented to those employers who demonstrate exceptional support for our national defense by adopting personnel policies that make it easier for employees to participate in the National Guard and Reserve. Each committee may give only one PRO PATRIA annually.

**Employer Support Freedom Awards.** These awards, ESGR's most prestigious, are presented annually to an employer by the Secretary of Defense. It recognizes unique support to National Guard and Reserve employees. The nation's most supportive employers receive the awards at a ceremony held annually in November. Current nominees include Home Depot, Boeing, Coor's and few other major employers.

## Employee & Division Highlights (continued)

*by Jon Debban*

*Transportation Division*

### Arleen Edgar

After 30 years with the State, Arleen has decided to move on. (She told me not to use the word "retire" because it made her sound old.) Arleen's last day with us was Thursday, June 30th.

Arleen began working with the State's Adult and Family Services. She came to the Office of Administrative Hearings in December of 1999. She has applied her expertise in tracking/reporting statistical and financial data as well as database development and documentation to name just a few areas. Arleen's knowledge and attention to detail will be greatly missed. Please help me in wishing Arleen good luck in the future.

### Goodbye for now to Walt... and Congratulations to Maureen Brinkman on her promotion!

Walt White was featured in the last edition of the newsletter for his decision to retire after 29 years of state service. With his retirement, we recruited to fill his position and hired Maureen Brinkman. Maureen has been a part of us since January of 1998 gaining valuable technical experience in the Employment Hearings Division. Walt agreed to stay on through the end of this May to help in the transition. Walt and Maureen have been working closely together over the last month. Maureen will be responsible for 405 time entry, 405 invoice creation, statistical reports and database development among other things. Please help in wishing Walt well on his retirement and congratulating Maureen in her new role.

*by Steve Tegger*

*Beaverton Regional OAH Office*

I am pleased to announce that Alison Webster has been appointed to the OLCC Hearing Officer position. Alison comes with a wealth of experience as a former peer reviewer and having conducted complex 405 hearings as well as OLCC. Alison will assume the position as of July 1. Please join me in congratulating Alison on her new position.

*by Skip Russell*

*Social Services Division Hearings*

The Social Services Division of the OAH has experienced quite a bit of change, lately. In recent months we cross-trained two ALJs into UI and lent the experience of three previously transferred UI ALJs to help with the back log of UI cases. We have also been able to assign some of our in-person hearings for the Department of Human Services (DHS) to ALJs from the Transportation Hearings Division who are already located near the hearing-site, avoiding quite a bit of travel by our people based in Salem and Eugene.

A number of people have left the Social Services Division recently, and a number of others have joined us. Shannon DeMello, having received her Bachelor's Degree, has moved on from our operational staff to join a national corporation. Micki Warrick has left our mail-room to accept a position with the Department of Human Services. We are sure that DHS will benefit from Micki's optimism and warmth, as we have. Last, but certainly not least, ALJ Stephen Elmore recently accepted a position as the Administrative Law Manager with the Department of Human Services. Congratulations to all of you! We will miss you all greatly.

At the same time, we now have three new employees who bring a new diversity of skills to our division. Misty Fragua joined us when Shannon left, and has picked up the work with great enthusiasm and skill. Kim Alvarez has taken over in the mail room for Micki, and after only a few days training is already doing a great job. ALJ Jeni Rackstraw transferred from Employment Hearings Division. She had already been doing some hearings for us on a backup basis. Welcome to all of you! We look forward to a long and happy time together!

## Employee & Division Highlights (continued)

*by Kevin Anselm*

### *Employment Division Hearings*

It's my pleasure to introduce the six new ALJs who are beginning their work with OAH on Tuesday, July 5 in the Employment Hearings Division.

Please join me in welcoming:

#### **Michael Duane Brown**

Michael has been in private law practice, including trial and appellate work, as well as mediation and arbitration in Salem for more than 25 years. Prior to private practice, Michael was a Marion County Deputy District Attorney. Over the last five years or so, Michael's legal practice was specialized in alternative dispute resolution, including mediation and arbitration. Michael served as a pro tem Circuit Court Judge for several years. He has also worked with the OAH as a contract ALJ, hearing 405 and Social Services cases. After initial training, Michael will have an office in Salem.



#### **Richard D. Davis**

Richard recently relocated to Oregon from California, and passed the Oregon Bar. In California, Richard was in private practice including work in civil litigation, DMV license suspension hearings, bankruptcy and criminal law. He served several years as a pro tem Superior Court Judge hearing traffic and small claims matters. After initial training, Richard will have an office in Salem.



#### **Jill Messecar**

Jill is leaving her post as a Deputy District Attorney for Hood River County where she has been handling the misdemeanor docket as well as other cases for nearly four years. While in law school at Willamette University, Jill assisted Professor/Judge Tornquist and clerked for a local attorney and legal aid. Prior to law school, Jill processed workers' comp claims for self insured employers. After initial training, Jill will have an office in Beaverton-Jenkins.



#### **Terrence Murphey**

Terrence is closing a private law practice in Eugene to become an ALJ. He relocated to Oregon from California several years ago. While in California, he practiced primarily in personal injury, product liability and business transactions. Before law school, he worked for a number of years with the Social Security Administration. After initial training, Terrence will have an office in Eugene.



## Employee & Division Highlights (continued)

### Susan Rossiter

Susan is leaving her senior attorney position at Immigration Counseling Service (ICS) to join OAH (formerly serving over four years as the ICS Executive Director). Susan has over eight years prior experience as an ALJ with the Employment Relations Board (just down the street from Tom's office), and has continued doing contract work with the Board while at ICS. After initial training, Susan will have an office in Beaverton-Jenkins.



### George Williams

George has been in private law practice for over 12 years in the Portland area, working primarily in consumer bankruptcy, with some representation of clients in traffic court on various matters. Earlier in his practice, he did criminal litigation and some administrative practice in the areas of professional licensing and implied consent. After initial training, George will have an office in Beaverton-Jenkins.



All of us at the OAH welcome you!



## Employee & Division Highlights (continued)

### *Farewell to Walt and Arleen...*



# OFFICE OF ADMINISTRATIVE HEARINGS

## APPELLATE CASENOTES

APRIL-JUNE 2005

**JUDICIAL REVIEW/Standing: Person whose enjoyment of a river would be affected by a rule had standing to challenge the rule.**

**RULE VALIDITY/Judicial Review: Petitioner enjoying fly fishing on river has standing to contest the validity of a rule affecting river wildlife.**

**RULE VALIDITY/Departure from Statute: Rule requiring Commission to "moderate" effects on stream flows different from statute requiring "maintenance" of stream flows.**

*Waterwatch of Or., Inc. v. Water Resources Commission*

Court of Appeals: 199 Or App 598 (2005)

<http://www.publications.ojd.state.or.us/A119779>

*Facts:* Bachman owned some land on the Deschutes River used for fly fishing. He joined Waterwatch to contest the validity of two rules which generally allowed for the appropriation of water and set mitigation limits because diminished stream flows would reduce the wild fish.

*Issues:* (1) Whether Bachman has constitutional standing to challenge the rules. (2) Whether the rules are valid.

*Holdings:* (1) Bachman has standing because the rules would have a practical effect on him. (2) The enabling statute requires the Commission to ensure that existing stream flows be "maintained." The rules require only that mitigation "moderate" the effects on stream flows. This is a standard different from the statute's. The rule is invalid.

**UNEMPLOYMENT INSURANCE/Isolated Instance: Claimant's reasoning for the act of misconduct must be considered.**

*Jones v. Employment Department*

Court of Appeals, 199 Or App 571 (2005)

<http://www.publications.ojd.state.or.us/A125528.htm>

*Facts:* Claimant worked for a funeral home. He authorized the cremation of a body on the basis of family members' requests. He did not obtain written consent from the surviving husband, who was then in jail for her murder. The Employment Department concluded that claimant's mistake was an isolated instance of poor judgment. The ALJ concluded that the claimant had engaged in misconduct. The EAB affirmed, stating that claimant had broken the law, and that this was too serious to constitute mere poor judgment.

*Issue:* Whether claimant's conduct was an isolated instance of poor judgment. *Holding:* Severity of the conduct (here, violation of the law) can be considered when assessing poor judgment. However, it is also necessary to examine the claimant's thinking that led to the misconduct.

*Comment:* The court directed the EAB to defer to the authorized representative's interpretation of the department's own rule defining misconduct, to the extent that the AR relied upon the rule. This continues the court's reluctance to order the EAB & OAH to send cases back to ARs for further review.

**CHILD SUPPORT/Change of Circumstances: Loss of job not unanticipated if it occurred at the time of stipulated judgment.**

**CHILD SUPPORT/Gainful Employment: A court must apply the rebuttable presumption that a parent can be gainfully employed.**

**CHILD SUPPORT/Credit: A credit for child living with noncustodial parent not justified where parent habitually refused to comply with support terms.**

*Crook and Crook*

Court of Appeals, 199 Or App 260 (2005).

<http://www.publications.ojd.state.or.us/A122565.htm>

*Facts:* In 1997 father and mother divorced. Mother received custody of the children, and father was required to pay child support. Mother did not work. Father lost his job. Following the loss of his job, the parties entered into a stipulated modification of support. It mentioned that father had lost his job. Father later sought to end his child support obligation because he had lost his job. During this period while mother had custody and father has support obligations, one of the children lived with him. Father consistently refused to comply with the support terms set out in the stipulated judgment. At hearing, the court made no finding regarding mother's capacity for gainful employment.

*Issues:* (1) Whether father's loss of his job warranted a reduction in support obligations. (2) Whether the court should have made a finding regarding mother's ability to work. (3) Whether the court should have given father a credit for the period of time child lived with him. *Holdings:* (1) To justify reducing child support based on a change of economic circumstances, the change must be unanticipated. Here, the modification itself acknowledged loss of the job. Thus, the change was not unanticipated. (2) The rules create a rebuttable presumption that a parent can be employed on a full-time basis at minimum wage. The court should have made such a finding. (3) Under certain circumstances, a court may, but is not required, to give the noncustodial parent a credit if a child lives with him. Here, father did not deserve such a credit because of his history of noncompliance with the stipulated support terms.

**EMPLOYMENT TAX/Default Tax Rate: It is the account, not the employer, that must have 12 months of experience.**

*All PEO, Inc. v. Employment Department*

Court of Appeals, 199 Or App 293 (2005)

<http://www.publications.ojd.state.or.us/A121747.htm>

*Facts:* Owner owned PEO, a payroll service company. He had to suspend operations, and by December 2001 lost his employees. He then purchased a small software sales company. He did not purchase its location, employees, or inventory, nor did he continue its software sales business. Instead, owner changed the company's name to All PEO, and in January 2002 began operations similar to those of PEO. PEO's employees came to work for All PEO. Owner did not acquire any of PEO's assets, computer system, or accounts. The Employment Department assigned a new account number to All PEO.

*Issue:* Whether All PEO is a new business subject to a default tax rate.

*Holding:* An employer's tax rate is calculated on the basis of actual experience of the employer with respect to unemployment claims only if there have been 12 consecutive months throughout which the employer's account has been chargeable with benefits. It is the *account*, not the employer, that must have the experience. The account did not have that experience, and therefore must be charged the default tax rate.

**JUDICIAL REVIEW/Attorney Fees: Agency director signing final order in case in which she was statutorily a party is unreasonable.**

*Kaib's Roving R.Ph. Agency, Inc. v. Employment Department*

Supreme Court, 338 Or 433 (2005).

<http://www.publications.ojd.state.or.us/S51165.htm>

*Facts:* Kaib's disputed a determination by the Department that services it provided were performed by employees rather than by subcontractors. The ALJ issued a proposed order in favor of the Department. The Director of the Department signed the proposed order. The Court of Appeals held that the Director was a party and could not sign the order. It reversed and remanded the case. It refused to award attorney fees.

*Issue:* Whether the Department acted without a reasonable basis in law when it failed to recognize that the Director was a party to the proceeding.

*Holding:* The court held that the Department's failure to recognize that by statute the Director was a party was unreasonable. Therefore, an attorney fee award was justified.

**CHILD SUPPORT/Substantial Change: Child moving out of home or spending less time with parent not unanticipated, but increased income is a substantial change.**

*Nieth and Nieth*

Court of Appeals, 199 Or App 330 (2005)

<http://www.publications.ojd.state.or.us/A122979.htm>

*Facts:* When father and mother divorced, they shared physical custody of their two children and no child support was awarded to either. Within the next four years, one child living with father moved out to live on her own; a second child began spending less time with father, thereby reducing father's support expenses; and both father's and mother's income increased. Mother sought child support.

*Issue:* Whether the changes that occurred within the four years were unanticipated at the time of dissolution, justifying a reconsideration of the child support arrangement.

*Holding:* The change of the first daughter's moving out was not unanticipated because the parties knew that the obligation to support her would end before the obligation to support her younger sister ended. Also, the reduction in expenses due to second daughter spending less time with father was not unanticipated because the stipulated judgment allowed the children to move back and forth between households. Increased income is a substantial change because the policy behind child support is to provide the child with the benefit from the income of both parents to the same extent that the child would have benefited had the family unit remained intact. Their joint income had increased by \$716, or 19 percent, which is substantial. Most of that increase came from father. Child support payments from father are justified.

**RULE VALIDITY/Agency Preference for Outcome: Agency preference for certain drugs does not mean that agency will not consider comments prior to rulemaking.**

**STATUTORY CONSTRUCTION/Statement of Statutory Policy: A statement of policy is not binding on agency.**

**RULE VALIDITY/Judicial Review: Court reviews only for facial not as-applied validity.**

*Purdue Pharma L.P. v. Department of Human Services*

Court of Appeals, 199 Or App 199 (2005)

<http://www.publications.ojd.state.or.us/A119392.htm>

*Facts:* DHS intended to adopt a rule identifying certain drugs reimbursable under the Oregon Health Plan. A statute set out legislative policy that DHS was required to first consider effectiveness and second cost when adopting drugs for reimbursement. The Governor sent a letter to medical professionals listing by name certain drugs that would be reimbursable under the Plan after a rule was adopted. Manufacturers of drugs which were not adopted by DHS challenged the validity of the rule on the grounds that the procedure did not comply with rulemaking procedures and exceeded the statutory authority of DHS.

*Issues:* (1) Whether preference for certain drugs before the receipt of public comment invalidates the rule. (2) Whether a statement of statutory policy is binding. (3) Whether an appellate court when determining the validity of a rule may consider the possible misuse of that rule.

*Holdings:* (1) Merely because an agency has expressed a view about a rule in advance of adoption does not demonstrate that the agency will not consider comments later received. (2) Manufacturers argued that the rule is invalid because DHS adopted them without determining which was the most effective. The court answered that a statutory statement of policy is not a mandate, and in any event DHS did consider cost. (3) Manufacturers argued that DHS might apply the listing in a manner inconsistent with statute. The court rejected this too because under ORS 183.400 judicial review is limited to facial and not as-applied challenges to rule validity.