

January 28, 2009

Honorable Ted Kulongoski
Governor, State of Oregon
900 Court Street NE
Salem, OR 97301

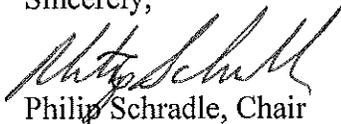
Honorable Peter Courtney
Senate President
Oregon Legislative Assembly
900 Court Street NE, Room S-201
Salem, OR 97301

Honorable Dave Hunt
Speaker of the House of Representatives
Oregon Legislative Assembly
900 Court Street NE, Room H-269
Salem, OR 97301

Dear Governor Kulongoski, President Courtney and Speaker Hunt:

As Chair of the Office of Administrative Hearings (OAH) Oversight Committee, I am transmitting the Oversight Committee report to you per ORS 183.690.

Sincerely,



Philip Schradle, Chair
OAH Oversight Committee
Department of Justice Member

PMS:naw/1264290
Enclosure

- c: Honorable Floyd Prozanski, Chair, Senate Judiciary Committee
- Honorable Jeff Barker, Chair, House Judiciary Committee
- Honorable Suzanne Bonamici, OAH Oversight Committee Member
- Honorable Doug Whitsett, OAH Oversight Committee Member
- Honorable Vicki Berger, OAH Oversight Committee Member
- Honorable Paul Holvey, OAH Oversight Committee Member
- Christine Chute, OAH Oversight Committee Member, Dept. of Justice
- J. Kevin Shuba, OAH Oversight Committee Member, Governor's Designee
- Kelly Skye, OAH Oversight Committee Member, Governor's Designee
- Andrea Sloan, Interim Administrator, Office of Administrative Hearings
- Laurie A. Warner, Director, Oregon Employment Department

The Honorable Theodore R. Kulongoski, Governor
The Honorable Peter Courtney, President of the Senate
The Honorable Dave Hunt, Speaker of the House of Representatives

Date: January 28, 2009

SUBJECT: Report of the Office of Administrative Hearings Oversight Committee

OVERVIEW

The Office of Administrative Hearings Oversight Committee (OAHOC) is established by ORS 183.690 and charged with reviewing the operations of the Office of Administrative Hearings (OAH). The Committee's statutory charge includes conducting studies, as necessary, to identify opportunities to improve the effectiveness, fairness and efficiency of the operations of the OAH and making related recommendations to the Governor and Legislative Assembly.

Additionally, the OAHOC is charged with making recommendations to the Director of the Employment Department regarding hiring the Chief Administrative Law Judge (ORS 183.610).

The Committee submits this report in fulfillment of its statutory charge.

REPORT

History

In 1999, with the passage of HB 2525, the Legislative Assembly enacted substantial changes to the Oregon Administrative Procedures Act, including establishing the OAH within the Employment Department. At the same time, the Legislative Assembly created the OAHOC. Although HB 2525 contains no express statement of purpose, stakeholders generally agree that the bill was designed to improve both fairness and the perception of fairness in administrative hearings and to create cost savings in the administration of administrative hearings. HB 2525 sought to accomplish these goals by requiring many agencies to use Administrative Law Judges (ALJs) assigned from the OAH to conduct contested cases. HB 2525 eliminated the authority of these agencies to select and hire individual ALJs for agency cases, but agencies retained authority to issue final orders after a hearing.

With the OAH authorizing legislation due to sunset in 2004, the 2003 Legislature enacted HB 2526, making the OAH and OAHOC permanent, and Governor Kulongoski signed the bill into law. Over the last eight and one-half years, the OAH has handled approximately 260,000 hearing requests, from 75 different state agencies. Currently, the

OAH employs 137 staff persons, including 66 administrative law judges, 10 managers, 5 policy analysts, and 55 administrative and clerical support staff. Office of Administrative Hearings staff is located in Tualatin, Salem, Eugene, Medford and Bend.

The Office of Administrative Hearings Oversight Committee

The OAHOC is comprised of eight members. The Governor, the President of the Senate, the Speaker of the House of Representatives and the Attorney General each appoint two members. Legislative members serve two year terms and all other appointed members serve four year terms. The Chief Administrative Law Judge (CALJ) is an *ex officio* member. The current membership of the OAHOC is:

Member	Appointed By	Appointment Year
Mr. Philip Schradle, Chair	Attorney General Myers	2007
Mr. Kevin Shuba, Vice Chair	Governor Kulongoski	2007
Hon. Vicki Berger	Speaker of the House Merkley	2008
Hon. Suzanne Bonamici	President of the Senate Courtney	2008
Ms. Christine Chute	Attorney General Myers	2007
Hon. Paul Holvey	Speaker of the House Merkley	2008
Ms. Kelley Skye	Governor Kulongoski	2008
Hon. Doug Whitsett	President of the Senate Courtney	2007
(vacant)	Chief Administrative Law Judge	<i>ex officio</i>

The OAHOC’s meetings are open to the public. A portion of each meeting is reserved for public comment.

The OAHOC has considered oral and written testimony from members of the general, public, from ALJs and OAH staff, from the CALJ, from union representatives, from attorneys, and from agency representatives; operational and other performance data provided by the OAH, the Employment Department and other agencies; and the report of a consultant. The OAHOC’s work has been somewhat frustrated by the fact that the OAH’s data management systems are fragmented and limited in their ability to provide complete information for decision making.

The Office of Administrative Hearings

During the period 2005 – 2007, the most recent period that data were available, the OAH received more than 65,600 requests to hold hearings from state agencies. Nearly 54,000, or 85 percent, of these requests resulted in a hearing being held and an order issued. Unemployment Insurance (38,200), Department of Transportation (12,300), and Department of Human Services (5,100) account for 82 percent of the cases referred to the OAH. In 41,000, or 76 percent of the cases where an order issued, ALJs agreed with the action originally proposed by the agency.

Were Legislative Expectations for the Central Hearings Panel Met?

In the fall of 2006, the Employment Department retained Public Knowledge, LLC to assess whether the OAH is meeting the statutory expectations that were set when it was

authorized by the Legislature. Additionally, the consultants were asked to make recommendations to the Employment Department for improvements to OAH operations. At its first meeting, in March 2007, the OAHOC reviewed and commented on the scope of work document for an assessment of OAH operations. In July 2007, Public Knowledge issued its report, *A Review of Oregon Office of Administrative Hearings*. The full text of the Public Knowledge, LLC report may be found at:

http://www.oregon.gov/EMPLOY/OAHOC/docs/OAH_Report_final_080607.pdf

At the October 3, 2007 OAHOC meeting, the consultant presented summary findings of the report. The consultant concluded that the OAH has:

- Achieved fairness and the appearance of fairness in administrative hearings, a belief shared both by OAH staff and the public.
- Obtained efficiencies related to costs.

The consultant's report also made a number of recommendations regarding OAH operations. The report recommended, among other things, that the OAH design a strategic plan for change that would permit greater participation by staff; that the OAH adopt additional performance measures and routinely survey staff to assess whether they believe these goals are being met; that the OAHOC resume regular meetings; and that the OAH consider forming a dedicated panel of paraprofessionals specializing in unemployment insurance cases. The OAHOC reviewed and discussed these recommendations at length, but did not formally adopt them.

Final Order Authority

When the OAH was established, the Legislature continued the historical practice of providing that ALJs issue proposed orders, and left authority to issue final orders in the hands of agencies responsible for implementing the particular statutes involved. By retaining final order authority, state agencies retain the ability to modify proposed orders issued by ALJs. Some agencies have delegated final order authority to the OAH; some have not. Still others have delegated it for some programs but not others. In addition, the Legislature has provided that the OAH issues final orders in unemployment insurance and employment tax cases from the Oregon Employment Department (the largest source of OAH hearings). ORS 657.270, 657.485.

During the past year, the OAHOC has examined whether to recommend a change in the historical practice so that the OAH would issue final orders in all cases before it. The OAHOC has solicited and heard testimony from an appellate court judge, state agencies, practicing attorneys, administrative law judges, and the public in its review of this issue.

The OAHOC has not been able to gather completely reliable data about the extent of and reasons for changes to OAH orders. The OAH provided fairly comprehensive but partially incomplete data that shows that in 2007, ALJs issued proposed orders in 598 cases; only 12 of those proposed orders were substantively modified; and only three of

those were reversed by the agency's final order. The data for 2006 showed similar results. The results of this review were submitted by Andrea Sloan on behalf of the OAH to the members of the Interim Judiciary Committees by letter dated November 7, 2008. It should be noted again, however, that the data generated to date is not complete.

The OAHOC plans to continue to study this issue and has included a recommendation to enable gathering more accurate data.

Requests for a Change of ALJ without Showing Cause

When the OAH was established, the Legislature provided that any party in a contested case hearing or the state agency must be granted one request for recusal of the assigned ALJ without showing cause (ORS 183.645). When such a request is granted, the CALJ selects and assigns a different ALJ. Parties to a hearing and agencies have identical rights to recuse an ALJ. But because agencies have more information about individual ALJs, agencies could be perceived as having an advantage in requesting recusal. Some ALJs expressed concern that an agency can disqualify ALJs perceived as unsympathetic to the agency, without showing cause, and some ALJs might feel they should favor the agency to avoid recusal.

The data available to assess whether or not state agencies' use of ORS 183.645 creates an uneven playing field is quite limited, but it seems to show that recusals are used only rarely. 2005-2007 data are available for recusal requests by the Department of Human Services (DHS). In 2005-2007, DHS referred 5,141 hearing requests to the OAH. During the same period, DHS exercised its ability to recuse the assigned ALJ, without showing cause, 18 times (less than one-half of one percent of the referrals). The OAHOC plans to continue to study this issue.

Public Testimony

The issues of moving authority for final orders from agencies to ALJs, automatic recusals of ALJs, and other topics were the subject of public testimony.

Lane Shetterly and John DiLorenzo. At its January 9, 2008 meeting, the Committee heard presentations by former Representative Lane Shetterly and attorney John DiLorenzo. Mr. Shetterly was a principal architect and sponsor of both House Bill 2525 (1999) and 2526 (2003). He also chaired the Oversight Committee from 2000 to 2003. Currently, Mr. Shetterly is an attorney in private practice. Mr. DiLorenzo is an attorney in private practice who practices before the OAH.

Mr. Shetterly explained the legislative goals behind the creation of the OAH, and described the early efforts to create an independent adjudicatory body. He discussed the political compromises required to obtain adequate support to create the OAH including compromises related to discovery, recusal of ALJs without cause, final order authority, modification of proposed orders, *ex parte* contacts, and fiscal matters. The OAHOC learned that each of these issues remains controversial.

Mr. DiLorenzo discussed the issue of final order authority for OAH administrative law judges (ALJs). He expressed the opinion that, if agencies retain authority to “overturn” ALJs’ proposed orders, those agencies’ orders should be reviewed by circuit courts, perhaps in a *de novo* (new) hearing.

Justice Michael Gillette, Oregon Supreme Court. Justice Gillette provided a detailed overview of administrative hearings in Oregon at the May 28, 2008 OAHOC meeting. He described the administrative hearing process, emphasizing that there is no single process for all cases, but that all cases are finally reviewable by the Oregon Court of Appeals and Supreme Court.

Oregon Association of Administrative Law Judges. At most meetings, representatives of the Oregon Association of Administrative Law Judges (OAALJ) provided testimony on issues under consideration by the OAHOC. The OAALJ testimony included comments regarding ALJ decisional independence, final order authority, and recusals of ALJs without cause. The OAALJ believes that the decisional independence of ALJs must be protected. OAALJ representatives agreed that agencies should be policy-makers, but stated that agencies should not wait until a final order issues before declaring that policy. OAALJ representatives expressed concern that some ALJs may feel pressure to rule as they think agencies would like them to rule, in order to avoid recusal by agencies. In addition, representatives of the OAALJ testified about issues related to management of the OAH, including location of ALJ offices, selection of the CALJ, reclassification of ALJs, and morale at the OAH.

State agencies. State Agencies and Boards offered comments at both the March 3, 2008 and May 28, 2008 meetings. The following agencies and boards participated in panel discussions: Public Employment Retirement System (PERS), Transportation (ODOT), Construction Contractors Board (CCB), Liquor Control Commission (OLCC), Human Services (DHS), Oregon Medical Board, and the Building Codes Division (of DCBS).

Some of the Agencies and Boards delegate final order authority to ALJs, some do not; and, in some cases delegation would conflict with federal laws governing specific programs. Recusal was unusual, according to the Agencies and Boards that were represented at these two meetings.

Agencies expressed concerns about the relatively high turnover of ALJs, ALJs’ lack of specialized knowledge, and about delays in the issuance of some proposed orders.

Members of the public. Two members of the public testified, on October 3, 2007 and March 3, 2008, asking the OAHOC to review and change the results in their individual cases. The OAHOC explained in writing to both parties that this was beyond the authority of the OAHOC.

Other information provided to the committee. The OAHOC also received written testimony presented to Interim Joint Judiciary Committee of the Oregon

Legislature by attorney Janice Krem. Ms. Krem's written testimony presented her positions regarding final orders in contested cases, off-the-record (*ex parte*) communications, procedural rules for hearings, discovery in contested case hearings, consistency of agency decisions, mental and physical competency examinations, and agency assessment of attorney fees and costs. At the same time, the OAHOC considered a position paper on some of these issues that had been prepared by the Oregon Department of Justice in 2004 and additional written comments collected by a committee member. After extensive discussion of each of these proposals, the OAHOC developed recommendations for action or further study that relate to several of them. Those recommendations agreed to by the OAHOC are included in the recommendations section below.

CONCLUSIONS AND RECOMMENDATIONS

Pursuant to ORS 183.690, the OAHOC is charged with making recommendations to the Legislature and the Governor regarding the operations of the OAH. The OAHOC is also charged with making recommendations to the Director of the Employment Department regarding the selection and appointment of the Chief Administrative Law Judge. During the past year, the OAHOC has performed all of these duties. This section of the Committee's report includes the OAHOC's recommendations to the Governor and the Legislature for statutory changes to improve the operations of the OAH.

In addition to its recommendations for statutory changes, the OAHOC participated in the selection of the CALJ. The OAHOC met with and interviewed finalist candidates and made recommendations to the Director of the Employment Department regarding the appointment.

Recommendations to the Legislature

The OAHOC recommends that the Legislative Assembly improve the operations of the OAH by enacting legislation in the following areas.

Final orders in contested cases. Under current law, state agencies may delegate authority to issue final orders in contested cases to the OAH. If the agency does not delegate final order authority to the OAH, the OAH issues a proposed order. The agency may adopt the proposed order or it may modify the proposed order. The OAH does not have complete data regarding the frequency with which state agencies adopt, modify, or reject recommendations made in proposed orders because the agencies have not always provided the OAH with a copy of the final order that issues from the agency.

The OAHOC recommends that the Legislature enact legislation requiring state agencies to provide the OAH with a copy of the final order in cases where the OAH has issued a proposed order.

Agency assessment of fees for attorney fees and costs. Currently, several state licensing agencies have the authority to impose the cost of the disciplinary process upon a

licensee who is disciplined by the agency. Sometimes, these costs to the licensing agency are spread across the industry through licensing fees. Sometimes, state licensing agencies have statutory authority to assess these costs directly to the licensee who is disciplined by the agency. The OAHOC recognizes that agencies must fund the costs of disciplinary proceedings in some way.

The OAHOC recommends that the Legislature require state agencies to adopt in rule the amount and types of costs that may be assessed against a licensee in a disciplinary action.

Recommendations to the Governor:

The OAHOC recommends that the Governor support the OAHOC in its plan to study and report on:

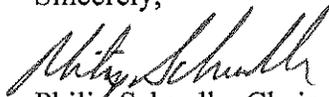
- The pros and cons of changes to the pre-hearing discovery available in contested cases and whether ALJs should have an expanded role in managing discovery.
- Whether the current limits on *ex parte* communications under the Oregon Administrative Procedures Act are sufficient or should be expanded.
- Whether hearings before the OAH should be conducted under the Attorney General's Model Rules of Procedure or rules developed by the OAH.
- Whether there should be any changes to the current statutory provisions governing state agency modifications and changes to OAH proposed final orders.

Finally, the OAHOC does not at this point agree that all ALJs at the OAH should be required to be members of the Oregon State Bar or hold a JD degree.

ACTION REQUESTED

The OAHOC requests that the Governor and the Legislative Assembly accept this report in fulfillment of its duties under ORS 183.690.

Sincerely,



Philip Schradle, Chair

Office of Administrative Hearings Oversight Committee