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Independence in Adjudication

Understanding the Office of Administrative Hearings

By Thomas E. Ewing

London, 1606. The Royal College of Physicians denied Thomas Bonham, Doctor of Physick, a license to practice medicine. He practiced anyway. The college demanded that he stop. Bonham refused. He was ordered to appear before the college. On the day of hearing, he walked into the council room. Sitting in stony judgment were the college president and its censors. They found him guilty, physically escorting him to prison, where he remained for seven days.

Dr. Bonham sued for false imprisonment. The case came before Sir Edward Coke, Chief Justice of Common Pleas and one of the leading jurists of English common law. Believing that the president and censors had too great an interest in the outcome to decide it fairly, Coke left the memorable statement, which echoes even today: "No man can be the judge in his own cause."

The story may sound familiar. Your client holds an occupational license. She received a notice from the regulatory board proposing to revoke it. You and she walk into the hearing room. Sitting in judgment are the very people who initiated the investigation — and who decided to revoke the license in the first place. Representing them is an assistant attorney general, there to persuade the board to do what it wants to do anyway. To your client, and perhaps you, the result was predetermined.

Beginning in 1946, state legislatures sought a different answer: the establishment of independent "central panels" of administrative law judges (ALJs), removed from the agencies that employed them and whose cases they heard. There were two purposes: first, to promote the appearance of fairness in administrative adjudication; second, to prevent agencies from inappropriately dictating the outcome of cases.

History of the Office of Administrative Hearings

For 20 years there were various but unsuccessful efforts in Oregon to create a central panel. Momentum grew in 1995, when the director of the Department of Revenue was accused of changing hearing orders that did not support the department. Two years later, Sen. Neil Bryant and Rep. Lane Shetterly sponsored a bill to form an office of administrative hearings. Although receiving bipartisan legislative support, the governor vetoed it, believing that a central panel was a solution looking for a problem but too costly in any event. Nevertheless, he agreed to further study.

Shetterly chaired a small committee of himself, Henry H. ("Chip") Lazenby, the governor's counsel, and David Schuman, deputy attorney general. Out of that study emerged House Bill 2525 (1999) creating the Office of Administrative Hearings (OAH) (formerly known as the Hearing Officer Panel). The OAH became operational on Jan. 1, 2000. Because of the fierce resistance to formation of the OAH, especially by agency heads, a compromise was struck making the OAH a pilot program, due to sunset in 2004. In 2003, Shetterly, among others, sponsored House Bill 2526 to make the OAH permanent. The bill passed both chambers of the legislature with only one dissenting vote. In May 2003 Gov. Ted Kulongoski signed the bill into law.

Structure
The OAH is the consolidation of hearings units of seven agencies: Construction Contractors Board, Department of Consumer and Business Services, Department of Human Services, Department of Transportation, Employment Department, Oregon Liquor Control Commission and the Water Resources Department. It employs 67 administrative law judges.

In 2003 the OAH received almost 40,000 referrals from 75 different agencies. This represents over 90 percent of all state agency contested-case hearings. Its span of jurisdiction makes it one of the largest central panels in the nation: unemployment insurance, implied consent, Medicaid, foster care, occupational licensing and child support, to mention only a few.

Hearings
Most parties in OAH hearings are unrepresented. This simple fact profoundly shapes the nature of those hearings, distinguishing them from judicial trials and even most other state administrative proceedings. ALJs are directed by the Administrative Procedures Act (APA) to make a "full and fair inquiry into the facts" of every case (ORS 183.415(10)). The ALJ, as a consequence, is a dynamic presence — conducting the examination of witnesses, perhaps issuing subpoenas and even possibly soliciting additional evidence when appropriate. ALJs generally do not have the benefit of attorneys guiding them through the web of statutes, rules and case law. They must, therefore, be fluent in the subject matter of the hearing. The APA also requires ALJs to write orders with complete findings of fact and conclusions of law — another feature distinguishing administrative adjudication from judicial trials.

OAH hearings are conducted simply and efficiently. They generally convene and are concluded within only a few weeks of the request for hearing. The majority last from one to two hours and are conducted by telephone. The ALJ, having specialized knowledge of the subject matter, knows exactly the questions to ask. This same specialized knowledge enables ALJs to write no-frills orders that are accurate and precise. These orders generally issue no later than 45 days from close of record.

In addition to these "high volume" cases, there is also a significant number of hearings held in person with representation on both sides. This is true, for example, of implied consent, construction contractor, water resources and occupational licensing cases. Hearings may last for days. The length of the orders, often 15-25 pages, reflect the complexity of the legal or factual issues, or both.

Procedural Rules
The attorney general is authorized to write the procedural rules of the OAH (ORS 183.630). Those rules may be found at OAR 137-003-600 to 137-003-0700. (*Practice tip:* The attorney general is authorized to exempt an agency in whole or in part from these rules. The exemptions may be found at http://oah.state.or.us/table.cfm.)

They are not free of controversy. Some question whether the Department of Justice, the state's law firm representing agencies in contested case hearings, should write the procedural rules for those hearings; generally, central panels adopt their own procedural rules. Others criticize the complexity of the rules, particularly for unrepresented parties. (It is true that the rules are elaborate. However, they have been written flexibly in order to avoid prejudice against the *pro se* litigant.)

One continuing dispute involves discovery. Ultimate control, especially over depositions, resides with agencies. Members of the bar complain that lack of access to agency files and to witnesses undermines their ability to represent their clients. Agencies, on the other hand, fear that unlimited discovery will merely judicialize and delay the hearing process, not to mention subjecting agency heads to harassment. The OSB's Administrative Law Section proposes shifting more authority to ALJs. In response to the criticism, the Department of Justice added a provision to the rules allowing any party dissatisfied with an ALJ's discovery decision to seek review by the chief ALJ. Although the chief ALJ's ruling is advisory only, it has in practice proved to have some influence with agencies.

Recusals
One important feature of House Bill 2526, unique to OAH hearings in Oregon (and indeed rare anywhere), is the recusal provision, ORS 183.645. A party or agency may recuse the assigned ALJ for no reason. The second request requires a showing of "good cause," defined by OAR 471-060-0005 as "any reason why an administrative law judge's impartiality might reasonably be questioned." However, a request (whether the first or subsequent) will be denied if the requester had a "reasonable opportunity" to make it but did not do so. Most requests are denied for this reason, often after an interlocutory order that dissatisfies a party, who now wants a different ALJ.

At the beginning of the OAH, management was deeply concerned over the potentially disruptive effects of this provision. In practice, however, recusal requests are unusual. More importantly, the provision provides agencies and the public with some assurance of ALJ competence and impartiality — if they lack confidence in the assigned ALJ, they can request another.

Ex parte contacts

The provision governing *ex parte* contacts between parties and ALJs is another unusual feature of House Bill 2526. The Oregon Code of Judicial Conduct (JR 2-102) prohibits a judge from communicating about any matter outside the course of the proceeding. Under ORS 183.685, by contrast, an ALJ *may* communicate ex parte, so long as the communication is disclosed to the other side.

There is a reason for this very different approach. Several agencies were concerned that forcing them to communicate with ALJs only through their assistant attorneys general would significantly increase hearings costs. The governor was even clearer: He believed that the true goal of administrative hearings is to provide a forum for the development of good policy, not for the resolution of conflict. Prohibiting informal contacts between ALJs and agencies would result in delays and increased costs. In the face of this opposition, the Shetterly committee phrased the ex parte provision in the permissive. As a practical matter, however, ALJs are as careful as judicial-branch judges to avoid such contacts.

Modification of ALJ proposed orders

One of the key features of House Bill 2526 is the provision governing the modification of proposed orders, ORS 183.650. The Shetterly committee sought to strike a balance between assuring the policy-making role of agencies, while protecting independent fact-finding by ALJs.

The answer was yet another compromise. If an agency is to change legal conclusions in any "substantial manner," the agency must identify the change and provide an explanation. The agency may alter factual findings, provided those findings are not supported by a preponderance of evidence in the record. On judicial review, appellate courts are required to review the record *de novo* — a departure from the standard of substantial evidence review for administrative law cases — to independently determine whether the ALJ's findings are supported by a preponderance of the evidence.

Neither agencies nor the bar is especially happy with this solution. For agencies, the irritant is the additional cost of changing orders with which they disagree. For attorneys, it is the frustration of winning at hearing, only to see victory snatched away at the final order stage. The bar's Administrative Law Section advocates legislation that would preserve the ALJ's finding unless there is "no substantial evidence" to support it. Agencies will fiercely resist such a change.

It may be that both sides are exaggerating the problem. The OAH studied 344 proposed orders issued between 2000 and 2002 on behalf of licensing boards and commissions. Eighty-seven percent affirmed the agencies' proposed actions. Thirteen percent (45 in number) disaffirmed. Slightly under half of the disaffirmances were on legal grounds; that is, there was no dispute regarding the facts, only their legal effect. The other half were on factual grounds. Interestingly, an even larger percentage (95 percent) of agency final orders affirmed the proposed orders, indicating an agency preference for the contrary outcomes recommended by ALJs. In only 16 orders (five percent) did the agencies refuse to accept the proposed decisions — 10 of them for legal reasons and six on factual grounds (generally, the agency preferring to rely on the evidence of its own witnesses).

OAH website

An important service to the bar is the OAH's website at http://OAH.state.or.us. It includes historical information on the OAH, general information on hearing practice and procedure, a list of all the websites, statutes and rules of agencies for whom the OAH holds hearings, and hearing forms.

Of greater value may be the effort to place on the web, available by word search, OAH-proposed orders and agency final orders. If an attorney wants to learn how the agency has ruled in the past, it is frustrating, not to say perilous, to rely on agency clerical staff for past final orders. Moreover, publishing agency final orders gives some assurance to the public that policy will be implemented consistently rather than on an ad hoc basis. Decisions from the Construction Contractors Board, Department of Education, Department of Forestry, Oregon Liquor Control Commission and the Water Resources Department are available now. More agencies will be included over time.

Conclusion

Members of the bar greeted the establishment of the OAH in 2000 with high expectation; agencies did so with fear and even loathing. Whatever their anticipation, most would agree that in five years the OAH has proved itself. Consolidation of seven independent hearings units has resulted in steadily declining hearings costs; in fiscal year 2003-04 alone, savings are estimated to be $1.4 million. Both agencies and the public seem content with the process — only two percent of respondents (agencies and citizens) in customer satisfaction surveys indicated dissatisfaction with their hearings.

But the greatest benefit of the OAH is the fairness and impartiality which independent judges bring to adjudication. Thomas Bonham fought for that principle. Lord Coke vindicated it. Four hundred years later, Oregon embraced it.

ABOUT THE AUTHOR

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Endnote

For more on Oregon's Office of Administrative Hearings, see David W. Heynderickx, *Finding Middle Ground: Oregon experiments with a central panel for contested case proceedings*, 36 Willamette L. Rev. 219 (2000); Thomas E. Ewing, *Oregon's Hearing Officer Panel*, 23 J. NAALJ 57 (2003), and *Oregon's Office of Administrative Hearings: A Postscript,* 24 J. NAALJ 20 (2004).

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