

Administrative Law

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NEWSLETTER

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From the Chair

By Janice Krem*



Janice Krem

Recently, I reviewed the notice of an agency's intended action for sufficiency and considered my client's obligations when requesting a hearing in the matter. I was again struck by the unfair disparity between the procedural requirements for the agency's notice and the procedural requirements for my client's response to it under the model rules.

Under the "new" notice requirements in ORS 183.415 (3),¹ the agency is still required to give a "short and plain statement of the matters asserted or charged" and a "reference" to the statutes and rules involved. The rest of the statutory provisions require the agency to provide what is essentially boiler-plate information.² The model rules, however, make it even easier for the agency to meet these basic notice requirements. If the agency wants to amend its notice--**even after the hearing record has closed and the proposed order has been issued**--the model rules allow for that. OAR 137-003-0530 (4) provides:

"Notwithstanding any other provision of these rules, **at any time** after the issuance of the notice required by ORS 183.415, an agency may issue an amended notice. . . . If the agency files an amended notice **after the evidentiary record has been closed**, the agency shall inform the administrative law judge, who will reopen the record and conduct any further hearing or listen to additional argument required by new matters in the amended notice. If the administrative law judge **has issued a proposed order**, the administrative law judge shall prepare an amended proposed order after completion of any further hearing."³ (Emphasis added.)

Under the model rules, the agency can amend its notice at any time. That is not the case for the party's request for hearing, however. OAR

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137-003-0501 allows the agency to require responsive pleadings from the party at the time the request for hearing is filed and to sanction the party for inadequate pleadings. OAR 137-003-0501 (2) provides:

“An agency may have rules specifying the time for requesting a contested case hearing, **the content of a hearing request, any requirement for and content of a response to the contested case notice, the permissible scope of the hearing** and timelines for issuance of a proposed or final order.” (Emphasis added.)

In the case I was working on, the agency exercised its authority under the model rules to impose pleading requirements on the party. The agency’s procedural rules provide that a response to its notice must contain: 1) An admission or denial of each factual matter alleged in the notice; and 2) A short and plain statement of each relevant affirmative defense the party may have. The rules further provide that, except for good cause:⁴ 1) any facts in the notice that are not denied are admitted; 2) failure to raise a particular defense will be a waiver of the defense; and 3) any “new matters” raised by the party are presumed to be denied by the agency. Importantly, no evidence can be taken on any issue not raised in the answer.⁵

These kind of pleading requirements, which sanction the party and relieve the agency from having to respond itself, are not unique to this particular agency. Within a matter of minutes, I identified six more agencies having similar requirements.

Why does this kind of inequality exist under the model rules? The agency has minimal substantive notice requirements. Nevertheless, the agency can “fix” its notice —**even after the proposed order is issued**. Without even the benefit of prior discovery of the agency’s investigation file, the party is expected to meet significant substantive pleading requirements—**at the time the hearing request is filed**. Furthermore, the defenses required to be identified by the party in its response are frequently contained in unpublished or otherwise inaccessible final orders and agency memoranda.⁶ Nevertheless, only the party is sanctioned for failing to plead every relevant allegation in its initial pleading.

The model rules certainly protect the agency from any failure to give clear and simple notice of what it

alleges at the time it has decided to take action adverse to the party. The model rules also give the agency the tools it needs to create a set of pleading requirements for the party that makes it easier for the agency to prove its case and not consider relevant defenses. The requirements for the party are unnecessarily legalistic and the party can be severely sanctioned for the party’s failure to meet them. The agency, apparently, is well served by its attorney, who wrote the model rules. But is the administrative justice system well served?

The unrepresented party would likely find meeting these procedural requirements daunting, if not a hopeless exercise. On the other hand, consider the expense to the represented party of paying an attorney to meet these pleading challenges, not only in the short time-frame provided by the agency for requesting a hearing, but for any subsequent amendments by the agency after the hearing is over.

The procedural rules should make it easy for the agency to meet its statutory responsibilities. The procedural rules should also make the hearing process user-friendly. The model rules should not make it easier for the agency to “win” because of procedural hurdles. The vast majority of agency decisions go unchallenged. If the party has enough concern over the agency’s proposed decision to actually challenge it, the hearing forum should be a fair opportunity for review of the agency’s decision. It should not be an uneven playing field. The unrepresented, the unwary, or those uninitiated in agency lore should not be out-flanked by procedural rules.

It is time for the procedural rules to be written by a consortium of practitioners affected by the rules, rather than by the Attorney General’s office. The lawyers in the Attorney General’s office are among the best administrative law practitioners to be found. Surely having procedural rules that provide a level-playing field is not too much to expect.

**Janice Krem is in private practice with an emphasis on representing licensees and applicants before Oregon boards and commissions. She was formerly an administrative law judge and an agency executive. She was editor of the 2001 OSB CLE publication, Administrative Law in Oregon, and its 2005 Supplement. She has also written on a variety of administrative law issues. She can be reached at 503 697-8042*

Endnotes

- 1 ORS 183.415 (3) was amended in 2007. Notice under ORS 183.415 (3) must include:

“(a) A statement of the party’s right to hearing, with a description of the procedure and time to request a hearing, or a statement of the time and place of the hearing;

“(b) A statement of the authority and jurisdiction under which the hearing is to be held;

“(c) A reference to the particular sections of the statutes and rules involved;

“(d) A short and plain statement of the matters asserted or charged; and

“(e) A statement indicating whether and under what circumstances an order by default may be entered.” Oregon Laws 2007 c.288 §2.

- 2 OAR 137-003-0505 reiterates the statutory requirements in ORS 183.415 (3) and corollary statutory provisions. It also helps the agency protect its record for appeal purposes. OAR 137-003-0505 (1) requires that the agency include in the notice:

“(a) A caption with the name of the agency and the name of the person or agency to whom the notice is issued;

“(b) A short and plain statement of the matters asserted or charged and a reference to the particular sections of the statute and rules involved;

“(c) A statement of the party’s right to be represented by counsel and that legal aid organizations may be able to assist a party with limited financial resources;

“(d) A statement of the party’s right to a hearing;

“(e) A statement of the authority and jurisdiction under which a hearing is to be held on the matters asserted or charged;

“(f) Either:

“(A) A statement of the procedure and time to request a hearing, the agency address to which a hearing request should be sent, and a statement that if a request for hearing is not received by the agency within the time stated in the notice the person will have waived the right to a contested case hearing; or

“(B) A statement of the time and place of the hearing;

“(g) A statement indicating whether and under what circumstances an order by default may be entered; and

“(h) Any other information required by law.”

Section 2 of the rule provides:

“A contested case notice may include either or both of the following:

“(a) A statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case and all materials submitted by a party,

automatically become part of the contested case record upon default for the purpose of proving a prima facie case;

“(b) A statement that a collaborative dispute resolution process is available as an alternative to a contested case hearing, if requested within the time period stated in the notice, and that choosing such a process will not affect the right to a contested case hearing if a hearing request is received by the agency within the time period stated in the notice and the matter is not resolved through the collaborative process.”

See also OAR 137-003-0001 for notice requirements for hearings that are not conducted by the Office of Administrative Hearings.

- 3 The party does have the ability to **request** an opportunity to file an even more extensive pleading or be deemed to acquiesce in the agency’s assertions, according to these kinds of pleading requirements.

“If an agency issues an amended notice, any party may obtain, upon request, a continuance determined to be reasonably necessary to enable the party to file an amended response, if required by agency rules, or to respond to any new material contained in the amended notice.” OAR 137-003-0530 (4).

- 4 Apparently, there are times when the agency has the discretion to not require these pleading requirements; however, no standard for this is evident in the rule. What constitutes good cause also is not apparent.
- 5 This exclusion of evidence also applies to issues not raised in the notice, but the agency has a right to amend its notice at any time and the agency can then have the evidence admitted. It seems very unlikely that the exclusion sanction in this rule would ever be an obstacle for the agency. See OAR 137-003-0530 (4).
- 6 Having access to final orders or agency memoranda as public records is usually an ineffective method for finding relevant defenses. The search for applicable past practices and policy among years and years of agency documents is a monumental and expensive task without an index or other way of determining which public records have relevant issues. Without a simple way of culling applicable precedent, the task of searching public records becomes so overwhelming that relevant agency policy is rendered virtually inaccessible. That, of course, is an issue that could be addressed through discovery—if a right to discovery existed.

New Due Process Protection for Patients and Residents of the Oregon State Hospital

By Deanna Hassenpour

Prior to December 2007, patients and residents of the Oregon State Hospital system who withheld informed consent to undergo significant medical procedures did not have the right to a contested case hearing, or any other type of adjudicative hearing, to contest the hospital's decision to medicate him or her without informed consent. Oregon Administrative Rule (OAR) 309-114-0005(14) defines significant medical procedure as "a diagnostic or treatment modality which poses a material risk of substantial pain or harm * * * such as, but not limited to, psychotropic medication and electro-convulsive therapy." The former process required what is typically referred to as a "three-physician review" or "override" process wherein an independent examining physician would be brought in to review the matter and make a recommendation regarding the decision to proceed with the procedure without informed consent to the chief medical officer. All three doctors (treating, chief medical officer, and the independent physician) had to agree for the override to take place. There was no process in place that provided for further review or appeal from the override order.

In September 2007, the Oregon Advocacy Center (OAC) was on the verge of filing a federal lawsuit against the hospital, citing in part that the process in place violated the 14th amendment clause against deprivation of liberty without due process. The hospital and OAC settled the matter quickly, and as a result of that settlement agreement, the hospital and OAC immediately began meeting to develop rules that would re-vamp the manner in which the hospital seeks to obtain informed consent for significant medical procedures, including allowing patients and residents who wish to challenge an order to proceed with the proposed procedure without informed consent the right to a contested case hearing before an administrative law judge from the Office of Administrative Hearings (OAH). The work group members include hospital staff (psychiatrists, psychologists, administrative and other staff); Beth Englander, attorney for OAC; Micky Logan, Senior Assistant Attorney

General /general counsel for the hospital; Rick Luthe, DHS rule writer, and myself.

What resulted were significant changes to the "Informed Consent to Treatment and Training by Patients and Residents in State Institutions", Oregon Administrative Rules (OAR) 309-114-0000 to 0025. These rules now provide for additional safeguards throughout the process of obtaining informed consent. Most notable are the addition of a medication educator and the right to a contested case hearing. The function of the medication educator is to provide information about the proposed procedure to the patient or resident. The medication educator is required to make at least one good faith attempt to obtain informed consent from the patient or resident. Most importantly, the medication educator is not an employee of the hospital, and thus is in no way related to the decision to medicate without informed consent.

The second, and arguably more significant, safeguard is that patients and residents who are deemed to be unable to consent to, or who refuse, withhold or withdraw consent may request a contested case hearing under ORS 183.310. Hospital staff is required to assist the patients and residents in completing a written request for hearing (any indicia of disagreement with a decision to proceed without informed consent has been found to trigger a right to a contested case hearing) before the Office of Administrative Hearings (OAH). The hospital then refers the matter to the OAH. A hearing must be held within seven days of the date of the request, with some exceptions. *See* OAR 309-114-0010(8)(d). The OAH has final order authority in these matters. The final orders must be issued within one day of the hearing or close of record, whichever is later, also with some exceptions. *Id.* Patients and residents who request a hearing have the right to representation by a lay representative or by OAC. Since hearings started in December 2007, most patients and residents have been represented by OAC; the few who were not represented themselves. The hospital is represented by an

assistant attorney general. All administrative law judges who preside over these matters must complete training developed by the agency in consultation with Oregon Advocacy Center.

The work group continues to meet on a bi-weekly basis to examine, discuss, and refine the process to

ensure that it provides due process and that it does so in an effective and efficient manner. Further revisions to OAR Chapter 309, division 114 are currently under way and are aimed at streamlining the hearing process. The group hopes to have the new rules in place before the temporary rules expire at the end of May 2008.

OAALJ Assumes Advocacy Role Before Oversight Committee

By Steve Rissberger



Steve Rissberger

In an effort to promote greater ALJ independence, a long time organizational goal, the Oregon Association of Administrative Law Judges (OAALJ) has taken on an advocacy role at recent meetings of the Employment Department's Oversight Committee—a steering group responsible for overseeing the Office of Administrative Hearings.

Two issues have provided the primary focus for OAALJ's participation: a proposal to give ALJs final order authority in most, if not all, matters heard by the Office of Administrative Hearings and a proposal to eliminate or modify the so called "recusal rule" contained ORS 183.645 so as to limit perceived abuses.

John DiLorenzo, a prominent attorney and lobbyist, has proposed changes that would require state agencies to either cede final order authority to ALJs or, as an alternative, challenge ALJ hearing orders in Oregon Circuit Court. According to Di Lorenzo, this would place state agencies in the same position as private litigants when they disagree with an ALJ's order. Many state agencies—particularly professional and occupational licensing boards—limit Office of Administrative Hearing ALJs to issuing only proposed orders, thus preserving the agency's ability to reverse the ALJ if the agency disagrees with the ALJ's order.

Larry Smith, vice president of OAALJ, said that his organization supports DiLorenzo's proposal because it would enhance the independence of ALJs and provide

some assurances of impartial decision making to private citizens who challenge agency determinations. Smith also said that he agrees with DiLorenzo that the proposal represents an evolutionary change in the powers and responsibilities of ALJs that would be consistent with the fair decision making policies that prompted the legislature to create the Office of Administrative Hearings.

OAALJ representatives have also voiced concerns about disproportionate use of the "recusal rule" contained in ORS 183.645 by state agencies. ORS 183.645 allows each party one free opportunity to change the ALJ assigned to their case without a showing of good cause. However, Smith said that the rule has been used far more frequently by the Department of Justice than any other party. He stated that OAALJ had concerns that the recusal rule could provide an unfair advantage to state agency representatives who are familiar with individual ALJs and might use the rule as a means to forum shop.

"This statutory provision (ORS 183.645) tilts the field to the agencies, because it is the agencies and their representatives who acquire knowledge of individual ALJs and their past rulings," said OAALJ board member, Steve Demarest in prepared remarks he delivered to the Oversight Committee on March 3. "It is predominantly the agencies that exercise this option to remove an ALJ from a case without a showing of cause. Besides the issue of fairness and equity, it is the agencies' predominant exercise of this option that

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Section to Host AG Candidates Debate

The Administrative Law Section is hosting a debate between Greg Macpherson and John Kroger, candidates for Oregon Attorney General, on April 17, 2008. The forum will give members a first-hand opportunity to assess the candidates. The candidates will be taking questions from the moderator, Lane Shetterly, the audience—and each other.

What the next attorney general advocates is crucial to our practices and our clients' interests. Don't miss this opportunity to interact with the candidates.

John Kroger and Greg Macpherson Candidates for Oregon Attorney General

7 p.m. April 17, 2008

Oregon State Bar Center
16037 SW Upper Boones Ferry Rd
Tigard, OR 97224

**To reserve a place, please reply to:
janicekrem@involved.com**

creates a concern for ALJ independence.”

The Oversight Committee has not taken any action on either DiLorenzo's final order proposal or the proposal to eliminate the “recusal rule” contained in ORS 183.645. Smith acknowledged that many members of the Oversight Committee held contrary views to those espoused by members of OAALJ. As result, he acknowledged further that it was unlikely that the committee would endorse all of OAALJ's proposals. Nevertheless, he said that OAALJ would likely continue to send representatives to future Oversight Committee meetings.

“The goal of the OAALJ is to increase judicial independence of all ALJs and that's why we support DiLorenzo's proposal and removal of the recusal rule,” said Smith.

Current members of the Oversight Committee include: chair, Phil Schradle, Department of Justice; Laurie Warner, Director, Employment Department; State Senator Doug Whitsett, Senate District 28; Representative Suzanne Bonamici, House District 34; David Reese, Governor's representative; J. Kevin Shuba, Garrett Law Firm; Tom Ewing, Chief Administrative Law Judge for the Office of Administrative Hearings and Christine Chute, Department of Justice.

In addition to the organization's efforts before the Oversight Committee, OAALJ is also offering a \$1,000 scholarship opportunity for its members. Scholarships may be awarded for continuing education at the National Judicial College, administrative law conferences, CLE programs or any other educational opportunity that furthers the interests of ALJs. However, a March 17, 2008 deadline passed without anyone applying. The OAALJ Board will consider whether to extend the application deadline at their next meeting.

Office of Administrative Hearings moves to New Locations

By Thomas Ewing

On December 11, 2007 employees of the Office of Administrative Hearings in the Portland area moved into a facility at 7995 SW Mohawk St., Entrance B, in Tualatin. Prior to the consolidation, they were housed in the Division of Motor Vehicles's facility at Griffith Park and in the Employment Department's facility on

Jenkins Street, both in Beaverton. On March 3 OAH employees in Salem moved into their own building at the Capitol City Business Center, 4600 25th Avenue NE, Suite 140, Salem. They were previously located at the Division of Motor Vehicles (Lana Avenue), in the OAH's office on Cherry Ave., and in the Employment Department's Salem branch office on Union Street. This completes the consolidation of all OAH staff in Portland, Salem, and Eugene (which occurred a year ago). You may find directions to both offices at <http://www.oregon.gov/OAH/>.

Case Notes

By Philip A. Johnson II**



Philip A. Johnson II

*Gordon v. Board of Parole, Case No. S054400 (December 28, 2007)**

In 1976, Gordon was convicted of murder and rape and sentenced to life in prison. At the time of his conviction, Gordon was subject to a discretionary sentencing system, under which he would serve an indeterminate sentence and be considered periodically for release by the Board of Parole and Post-Prison Supervision (“the board”). In 1977, the legislature adopted a new matrix system that evaluated the nature of the crime and the prisoner’s criminal history in determining release dates. The new system required the board assign a parole release date and only allowed postponement under certain scenarios. In 1984, Gordon elected to be treated under the old system. In 1988, Gordon reversed and elected to be treated under the new matrix system. The board set his initial release date as March 15, 2000. In 1998, Gordon was evaluated by a psychologist in anticipation of his release. The doctor did not make a formal determination of severe emotional disturbance in his evaluation. OAR 255-60-006 allowed the board to request a psychological evaluation but stated that the board *shall* affirm the release date (March 15, 2000) and set parole conditions unless the *doctor’s evaluation* determined a severe emotional disturbance that would constitute a danger to the public. Nonetheless, in 1999, the board deferred Gordon’s release for parole for two years because they ruled he suffered from a severe emotion disturbance citing the evaluation and other information in the record. *Peek v. Thompson*, 160 Or App 260, 980 P2d 178 (1999) was decided during that time and required the board to affirm the release date under OAR 225-60-006 unless the *evaluation* determined the prisoner had a severe emotional disturbance. In May 2001, the board again deferred Gordon’s release. Gordon filed an administrative appeal and a habeas corpus petition. In 2003, the board analyzed *Peek* and its own earlier decisions and issued a final order upholding postponement stating:

“In [the 2000 order], the board erroneously applied the rules in effect the second time [petitioner] opted into the matrix system [in] 1988. This was incorrect. [Petitioner] initially opted into the matrix system [in] 1984. He then reconsidered and requested that he be returned to the discretionary system [in 1985]. [In 1988, petitioner] submitted

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a request to once again have his case considered under the matrix system. It is the board's policy, when an offender opts into the matrix system on more than one occasion, to consider the laws in effect at the time that the offender first opts in. The board failed to do so in [petitioner's] case. To do otherwise would allow offenders under the discretionary system to place themselves in a more favorable position with regard to the board's rules than they would otherwise be by opting in and out of the matrix system."

Gordon appealed. The Court of Appeals affirmed without opinion. The Supreme Court analyzed the board's decision under the standards in ORS 183.482(8). The Court stated: "[These] standards reflect a legislative policy that decisions by administrative agencies be rational, principled, and fair, rather than *ad hoc* and arbitrary. [In] addition to the statutory requirement that findings be supported by substantial evidence, agencies also are required to demonstrate in their opinions the *reasoning* that leads the agency from the *facts* that it has found to the *conclusions* that it draws from those facts. In *Green v. Hayward*, 275 Or 693, 552 P2d 815 (1976), this court further explained [why]: 'If there is to be any meaningful judicial scrutiny of the activities of an administrative agency -- not for the purpose of substituting judicial judgment for administrative judgment but for the purpose of requiring the administrative agency to demonstrate that it has applied the criteria prescribed by statute and by its own regulations and has not acted arbitrarily or on an *ad hoc* basis -- we must require that its order clearly and precisely state what it found to be the facts and fully explain why those facts lead it to the decision it makes.' * * * that reasoning applies * * * to our review of agency orders under ORS 183.482(8). [We] review the board's 2003 order in the context of its earlier orders in petitioner's case, to determine if the board's findings, reasoning, and conclusions demonstrate that it acted in a rational, fair, and principled manner in deciding to defer petitioner's parole release." The Court so analyzed and rejected the equal protection argument of the board and further found that the board failed to show how applying the 1988 rules vs. the 1984 rules would subject other prisoners to unfair treatment. The Court ruled the 2003 order was inconsistent with the board's past practices and that it had failed to demonstrate a rational, fair, or

principled explanation for its repeated failures to follow its own rule in Gordon's prior orders.

O'Rourke v. Union County, Case No. A136336 (December 19, 2007)*

O'Rourke appealed a Union County land use decision to the Land Use Board of Appeals (LUBA) within the required 21-day period. This appeal, however, contained minor errors in content and service. LUBA allowed O'Rourke to amend the notice and correct these errors. O'Rourke fixed everything and served the amended petition on LUBA and all other persons entitled to notice. LUBA accepted the appeal. Before O'Rourke filed the amended petition, R.D. Mac Inc. (Mac) filed a motion with LUBA to dismiss the appeal claiming that, since more than 21 days had passed between the county's final decision and O'Rourke's *amended* notice of intent to appeal, LUBA had no jurisdiction to hear the case. LUBA denied Mac's motion and Mac appealed to the Court of Appeals. The Court held the appeal *was* timely filed within 21 days and minor mistakes in the content and service of a notice of intent to appeal are not jurisdictional defects but rather technical defects that LUBA may correct or allow to be amended.

SAIF Corp. v. Iliifar, Case No.: A129686 (December 19, 2007)*

Iliifar was injured in 1995 and unable to continue employment as a car salesman. During litigation over compensability, Iliifar began leasing a cab and working as a taxi driver, making approximately \$40 a day. Once Iliifar's claim was accepted in 2000, he requested temporary partial disability benefits (TPD) for the period of time he was driving the cab. SAIF requested documented evidence of Iliifar's wages as a cab driver under OAR 436-060-0030(4) to establish a basis for the TPD. Iliifar provided tax returns that had not yet been filed. He subsequently did file them. SAIF denied Iliifar's TPD request due to improper documentation of wages earned. Iliifar appealed. An ALJ awarded TPD. SAIF appealed to the Board. The Board reversed the ALJ. Iliifar sought reconsideration. The Board reconsidered testimony, tax documents, and bank records, and ultimately concluded that Iliifar was entitled to TPD. SAIF appealed to the Court of Appeals arguing that OAR 436-060-0030(4) required the Board to only consider

the documented evidence that a claimant provided to the insurer. The Court rejected such a strict interpretation of OAR 436-060-0030(4) and held that under ORS 656.283(7) the Board is not confined solely to the rules of evidence and may consider additional information.

Cuff v. Department of Public Safety Standards and Training, Case No. A132424 (December 26, 2007)*

Cuff failed a drug screening test and lied about his marijuana use. His basic corrections certificate was revoked by the Department of Public Safety Standards and Training (DPSST) pursuant to OAR 259-008-0010(6). Cuff requested a hearing and the ALJ affirmed the DPSST revocation. Cuff appealed to the Court of Appeals arguing that because ORS 181.662(1)(c) was the authorizing statute and because it was not in effect at the time of his conduct, it could not be applied retroactively to his case. DPSST argued that ORS 181.662(1)(c) simply made explicit what was already implicit in the law regarding standards for corrections officers. The Court analyzed the text, context, and legislative history of the statutes and rules at issue and found them unhelpful in resolving the issue. The Court turned instead to “maxims of statutory construction.” Retroactive effect may be given to statutes that are enacted as ‘remedial’ or ‘procedural’, as opposed to ‘substantive’ in nature. Substantive statutes affect existing rights, obligations, and duties. Remedial statutes often pertain to “housekeeping,” such as enacting the authority to enforce minimum standards. ORS 181.662(1)(c) was such a “housekeeping” statute, because the standards of moral fitness outlined in ORS 181.640(1)(a) (1997) and OAR 259-008-0010(5) (1998) were already in place at the time of Cuff’s conduct. ORS 181.662(1)(c) simply made explicit implicit standards already present in the law. Cuff’s behavior fell below those standards, so the Court affirmed the revocation.

Rooklidge v. DMV, Case No. A122472 (December 26, 2007)*

Mary Rooklidge’s (Rooklidge) car was damaged in a collision. Her insurer declared the vehicle a total loss and notified the Department of Motor Vehicles (DMV). DMV flagged her vehicle records and notified Rooklidge by letter that her registration was cancelled under ORS 819.030 because her car was a total loss. She requested a contested case proceeding regarding

whether her vehicle was properly declared “totaled” under ORS 819.030. DMV denied Rooklidge’s request by letter and she appealed to the circuit court under ORS 183.484. The circuit court ruled the DMV’s letters as “other than contested case” orders and affirmed the orders. Rooklidge appealed the circuit court’s ruling to the Court of Appeals (the Court). The Court stated: “An order is any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency. ORS 183.310(6)(a). A *final* order embodies “final agency action expressed in writing[,]” but not including any “tentative or preliminary agency declaration or statement that * * * [p]recedes final agency action; or * * * [d]oes not preclude further agency consideration of the subject matter of the statement or declaration.” ORS 183.310(6)(b). The Court then analyzed the letters under these standards and found the letters to be final orders under ORS 183.310(6)(b) because they were issued in writing and precluded further action on the issues in the letters. Determining whether the orders were either “a ‘contested case’ order or an ‘order in other than [a] contested case’ depends not on whether the agency actually provided Rooklidge with a contested case proceeding, but on whether the agency was required by a statutory provision to do so. *Patton v. St. Bd. Higher Ed.*, 293 Or 363, 647 P2d 931 (1982)” The Court then ruled ORS 809.100 required a contested case hearing because that statute states that when DMV “proposes to cancel or refuse to issue or renew title or registration, opportunity for hearing shall be accorded as provided in ORS chapter 183.” The Court also analyzed ORS 183.310(2)(b) under *PGE v. BOLI* and rejected any notion that this case should not be a contested because a test was required. “Test,” in ORS 183.310(2)(b), referred to a formal examination and no such examination was required in this case.

Hood River Valley Residents’ Committee v. Department of Administrative Services, Case No. A135490 (December 26, 2007)*

Hood River Valley filed for judicial review in circuit court of an order issued by Department of Administrative Services (DAS) and the Department of Land Conservation and Development (DLCD) regarding a decision to waive certain land use regulations in lieu of paying compensation under Measure 37. The circuit

court found in favor of DLCD and DAS and Hood River Valley appealed to the Court of Appeals (the Court). While this case was pending, the Court decided Corey v. DLCD, 210 Or App 542, 152 P3d 933 (2007) which held that decisions to waive enforcement of certain land use regulations in lieu of paying compensation under Measure 37 should be reviewed after a contested case under ORS 183.482. The Court asked how the parties would respond to *Corey* in this case. Hood River Valley did not waive their right to a contested case but argued that under ORS 14.165 the Court could still hear the case. The Court agreed that the case was properly before them under ORS 14.165 but that the more appropriate manner to hear the case was following a contested case hearing where a proper record could be established since this case was before them on summary judgment from circuit court. Since the contested case had not yet occurred, the Court remanded the case to first have a contested case hearing.

Sorenson v. LaTour, Case No. A131026
(December 26, 2007)*

Sorenson is involved in farming, ranching, horse training, and stabling businesses. He obtained a building permit to build a house on his land and listed himself as the project contractor. Sorenson hired LaTour to install siding and LaTour hired Madsen to help. Madsen was then injured and sought worker's compensation benefits. The Workers Compensation Board (the board) found Sorenson to be a statutory employer under ORS 656.029(1) because Madsen was injured on a construction project that was intended to improve and increase the value of Sorenson's house on his farm, which was part of the "trade or business" in which Sorenson was engaged. Sorenson appealed to the Court of Appeals (the Court). The Court analyzed ORS 656.029(1) under PGE and found that "trade" or "business" means engaging in something regularly for profit and found that there was no evidence in the record to support a finding that Sorenson's personal homebuilding was in any way connected to his farming business other than the simply being on the farm property. "Trade or "business" under ORS 656.029(1) was meant to be a separate trade of commercial construction business. The activities of Madsen were not necessary to carry out the day-to-day activities of Sorenson's trade. The Court reversed the board under ORS 183.482(8)(c).

Frank v. DLCD, Case No. A134704
(January 23, 2008)*

Clara Frank sought a "Measure 37 waiver" to receive compensation for the diminished value of her land because land use regulations prohibited her from turning her farmland into a subdivision. Measure 37 claims only applied to land purchased before the land use regulation went into effect – in her case: 1975. Although she originally owned the land in 1957, the land was briefly conveyed to an attorney in 1978, before being conveyed back to Frank. A Department of Administrative Services and Department of Land Conservation and Development order concluded the date of acquisition was in 1978. Frank appealed, but the Court of Appeals held the case moot because the recently enacted Measure 49 changed the law and Frank could now apply under Sections 6 and 7 of the new law.

Polk County v. Department of Land Conservation and Development, Case No. A122385
(January 30, 2008)*

This case returned to the Court of Appeals (the Court) for reconsideration following the Supreme Court's decision in *Kellas v. Dept. of Corrections*, 341 Or 471, 145 P3d 319 (2006). Both Polk County and 1000 Friends of Oregon had sought review of a Land Conservation and Development Commission (DLCD) order that approved in part and remanded in part Polk County's amendment to its comprehensive plan as part of its periodic review. The County sought to apply the "unincorporated communities rules" (OAR 660-022-0010 to 660-022-0070) to surrounding unincorporated communities following a Regional Problem Solving (RPS) process that had included Grande Ronde, Fort Hill, Valley Junction, and the county. DLCD did not allow the petition as an RPS process petition and approved the petition in part and remanded it in part. All parties appealed to the Court. The Court's initial opinion in the case affirmed [DLCD's] order on the county's petition, but dismissed 1000 Friends of Oregon for lack of standing. The Court reconsidered 1000 Friends' standing in light of *Kellas*, accepted their appeal, and ruled on the merits. "[DLCD] exempted EFU-zoned trust lands from the remand order. [DLCD] explained that the location and extent of existing and planned development on the trust lands supported the county's decision to include those acres within the unin-

incorporated community boundaries. [The DLCD order] explained that the approved sections of the county's submittal were not affected by the remaining portion of the submittal that was remanded. OAR 660-025-0150(1)(d).” It was this ruling that 1000 Friends had appealed. The Court stated “[1000 Friends] contend that in approving unincorporated community boundaries for Grand Ronde, Valley Junction, and Fort Hill, [DLCD] improperly disregarded the criteria of OAR 660-022-0010 to 660-022-0070 and that [the] decision is not supported by substantial evidence. [They further argued] that the county's allow[ed] uses are inconsistent with the identified function, capacity, and level of service of transportation facilities * * * [and] fail to comply with OAR 660-022-0030(7). [They argued] that the residential zoning applied to the three communities is inconsistent with the adopted population projection for the area, and therefore violates Goal 2 and ORS 195.025 and 195.036. [Lastly] 1000 Friends asserts that the decision to approve rezoning of land * * * from EFU to rural residential does not comply with OAR chapter 660, division 004, and that [DLCD] has acted outside the permitted range of its discretion, contrary to ORS 183.482(8)(b)(A).” The Court found substantial evidence in the record to support the decision. The Court distinguished *Jaqua v. City of Springfield*, 193 Or App 573, 91 P3d 817 (2004) and found the county had properly provided mitigating factors under OAR 660-012-0060(2). It further found that OAR 660-022-0030(2) allowed the county to act as it had and there was no conflict with Goal 2 and finally that DLCD had not acted outside the scope of its discretion in this case.

Hildenbrand v. City of Adair Village, Case No. A136850 (February 6, 2008)*

Hildenbrand (and others) appealed a decision by the Land Use Board of Appeals (“LUBA”) that remanded city and county ordinances adopted to expand an urban growth boundary (“UGB”). While LUBA agreed with Hildenbrand that the local governments’ findings had improperly discounted other available land within the UGB in violation of Goal 14, it affirmed the other parts of the city and county amendments. Hildenbrand appealed to the Court of Appeals and argued that LUBA erred by approving the local governments’ findings concerning the amount of land to be added to the UGB and the location of the UGB expansion. He argued that

LUBA had erred by approving the local governments’ calculation of the quantity of land to be added because the determination was based on an average lot size of 6,000 square feet in contradiction of the comprehensive plan which set a maximum lot size average of 6,000 square feet for the entire city.

The Court agreed that because the existing average lot size in the city is already above 6,000 square feet, the UGB expansion must be less than 6,000 square feet to achieve an average lot size that complies with the comprehensive plan. It remanded the case to the counties and cites on that issue. The Court also held, however, that the location for the UGB expansion was consistent with the criteria set out in Goal 14 and ORS 197.298 and affirmed LUBA on that issue.

*This summary is an edited version of one previously published by the Willamette University College of Law’s Willamette Law Online. The unedited summary is found at:

<http://www.willamette.edu/wucl/journals/wlo>

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