

Administrative Law

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NEWSLETTER

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From the Chair

By Janice Krem*



Janice Krem

One of the reasons we started the Administrative Law Section in 2000 was to bring balance to the discourse about Oregon's administrative law system. State agencies, the Attorney General's office, and the Governor's office were all very well represented at the legislature when administrative law issues were being considered--as they should be. What we did not hear in these discussions, however, were the voices of the private bar responsible for representing those adversely affected by agencies' decisions. We did not hear the perspective of administrative law judges who were responsible for ensuring the objective application of policy and procedure in contested case hearings. We initiated the formation of the section because we wanted the section to improve the practice of administrative law in Oregon by reflecting *all* of these perspectives and responsibilities.

Over the next seven years, the section supported a number of law improvement initiatives. The section supported:

- the establishment of the Office of Administrative Hearings, so that contested case hearings would be conducted by an independent corps of objective, professional adjudicators, rather than by agency staff;
- the right of a person subject to adverse agency action to discover information about their case *prior* to the hearing, with standards for discovery to be applied by objective administrative law judges, rather than by the agency staff prosecuting the case;
- requiring due process before subjecting professionals to invasive mental and physical exams based on mere accusations and without the ability to provide rebuttal evidence;
- curtailing an agency's unilateral authority to assess its attorney fees, as well as its investigation and hearing costs, against someone requesting a contested case hearing because of the chilling effect this assessment has on the person's right and ability to request a hearing;
- the disclosure of *ex parte* communications made to agency decision makers to ensure that their decisions are based on information actually in the hearing record, rather than on secret information provided by agency staff.

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All of these section positions included the recognition and respect for an agency's need to set policy and the need for efficient and cost-effective proceedings.

Does that mean the compromises reflected in the section's law improvement agenda were met with universal praise? No. Some agencies and their legal counsel still regarded the changes as going too far, unnecessary, and thwarting their mission of protecting the public. Some private practitioners complained the proposed changes accomplished far too little and the hearing process continued to be little more than a charade when the outcome is a foregone conclusion. Some administrative law judges questioned the efficacy of a hearing system where professional adjudicators do not issue the final order. Some practitioners also questioned a system where the hearing procedures are written by the attorney for the prosecution, the Attorney General, rather than by the Office of Administrative Hearings, the entity charged with providing a fair and impartial hearing process.

In my thirty years of experience dealing with a variety of agencies--as an agency executive, as an administrative law judge, and as a private practitioner--I saw that agencies sincerely strived to do their jobs with integrity and they generally succeeded in their efforts. But, I also saw that agencies made mistakes. I have seen agencies lose objectivity in matters long before the hearing records were ever compiled and they could not regain their equilibrium even in the face of an objective review by an administrative law judge. I learned, as one might expect, that the current administrative law system was not perfect and it should and could be improved. I concluded that the section could contribute to the improvement of Oregon's administrative law system by marshalling a larger perspective on administrative law issues.

The Administrative Law Section has tried hard and generally has succeeded in balancing an array of perspectives in its quest to make the administrative hearing process procedurally fairer, more objective, and more credible in the eyes of the public. As chair of the section, I want to continue the section's tradition of balancing different perspectives and ensuring that the discourse on law improvement includes the private bar and administrative law judges, as well as the other crucial government voices. A fair hearing process is simply good governance.

My only request of my fellow practitioners is to show forbearance and take a broader look at an issue when your position does not prevail, whether you are an administrative law judge, representing the government, or practicing in the private sector. Advocating for a particular position works fine when you are supposed to be advocating for your client or defending your decision. However, law improvement is about seeing the bigger picture, assessing the issues fairly, and compromising.

**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. In addition to being a founding member of the Administrative Law Section, she has served on the Executive Committee since the section's inception. She has also served as editor of the section's newsletter and as chair of the section's Legislation and Rules Committee. She can be reached at 503 697-8042*

2008 Legislative Changes

By Loree Freeman* and Dan Olsen*

The following excerpts are taken from *2007 Oregon Legislation Highlights*, which covers the spectrum of 2007 legislative changes and is available through the Oregon State Bar's Continuing Legal Education Department. This material is reprinted, with permission, from Chapter 1, "Administrative and Government Law," which was written by Lorey H. Freeman and Dan R. Olson.*

Unless otherwise noted, all legislation is effective January 1, 2008.

PUBLIC RECORDS

SB 554 (ch 467) Response to Records Requests

SB 554 amends ORS 192.440 to require public bodies to respond to records requests as soon as practicable and without unreasonable delay. The response must:

contain the records; indicate that the government is searching; indicate that the government does not have the records; indicate that it has some or all of the records and estimate the time and cost of obtaining the records; indicate that information about the time and cost of disclosure will be provided within a reasonable time; or specify the state or federal law that prohibits disclosure. Public bodies also are required to make available a copy of their procedure for obtaining public records and the amounts and manner of calculating fees for public records.

SB 671 (ch 513) Release of Information Protected by Attorney-Client Privilege

SB 671 specifies that factual information contained in a public record that is exempt from disclosure because of attor-

ney-client privilege may be disclosed under certain conditions. SB 671 also allows a public body to release a condensed version of the factual information in the record in lieu of disclosing the record. A person receiving a condensed version may petition for review of the denial to inspect or receive a copy of the record. The Attorney General or district attorney or court conducting the review is required to compare the record to the condensation to determine whether the condensed version adequately describes the record. The disclosure of the record does not waive attorney-client privilege. SB 671 took effect on June 20, 2007, and applies to records created on or after its effective date.

PROPERTY

HB 2478 (ch 549) Building Inspections

HB 2478, §4 (amending ORS 455.148). The staff measure summary indicates that the purpose is to permit the Department of Consumer and Business Services (DCBS) to work with stakeholders to review the current system for oversight of local building programs. HB 2478 authorizes DCBS to adopt uniform permit, inspection, and certificate of occupancy requirements under the state building code. The rules must establish a process to permit local governments to accommodate unique local conditions. HB 2478, §2. Local governments administering the building inspection program must ensure that contractors are properly licensed. Section 6(4) permits DCBS to impose a civil penalty of up to \$25,000 against a local government for failing to properly administer or enforce a building inspection program. HB 2478 took effect on June 22, 2007.

OCCUPATIONS & PROFESSIONS

SB 134 (ch 795) Veterinarians

SB 134, amending ORS 686.260, allows the Board of Veterinary Medicine, during the course of an investigation, to inspect a veterinary facility if the board has evidence that the conditions are deficient or not in compliance with standards established by rule. It also authorizes the board to order an applicant or licensee to undergo a mental or physical examination or a competency examination if the board has evidence indicating the incapacity of the applicant or licensee to practice veterinary medicine safely. The provisions of SB 134 apply to complaints filed and investigations undertaken after January 1, 2008.

SB 135 (ch 316) Occupational Therapists

SB 135, amending ORS Chapter 675, adds a new continuing education requirement for occupational therapists and occupational therapist assistants. It also requires applicants who have been unlicensed for three years or more to complete a board-approved reentry program or retake a board-approved national examination to establish fitness to practice occupational therapy.

SB 433 (ch 335) Nurses

SB 433 amends ORS 678.112 to allow the Board of

Nursing to deny participation in the Nurse Monitoring Program to nurses who pose a threat to public safety and welfare. Currently the law allows the board to withhold discipline and allow a nurse to participate in the Nurse Monitoring Program if a nurse voluntarily enters treatment for chemical dependency or an emotional or physical problem, as long as the nurse does not pose a threat to public health. The change is intended to allow the board to deny participation in the program and impose discipline on a nurse who does not pose a threat to public health but does pose a threat to public safety and welfare by, for example, stealing from a bedridden patient.

SB 748 (ch 178) Certified Public Accountants

SB 748, amending ORS Chapter 673, permits certified public accountants who are licensed in another state and do not have an office in Oregon to prepare, advise, or assist in the preparation of tax returns for Oregon residents and businesses without a license from the Oregon Board of Accountancy and without registration with the Oregon Board of Tax Practitioners.

HB 2074 (ch 249) Landscaping Contractors

HB 2074 imposes new requirements for obtaining a landscaping business license.

HB 2107 (ch 540) Construction Contractors

HB 2107 requires a licensed contractor to notify the Construction Contractors' Board of any unpaid judgments or arbitration awards that are based on breach of contract or negligence claims involving residential construction.

HB 2240 (ch 273) Board of Tax Practitioners

HB 2240 amends ORS 673.685 and 673.730 to remove the Board of Tax Practitioners' fee schedule from statute and authorize the board to set fees through rulemaking. The fees are subject to approval by the Oregon Department of Administrative Services. HB 2240 took effect on June 1, 2007.

ADMINISTRATIVE ACTIONS & PROCEDURES

HB 2121 Agency Rulemaking

HB 2121, amending ORS 183.335, clarifies that a person who requests an agency to send notices of proposed rulemaking must provide a postal address or an e-mail address. In addition, the bill requires a person to elect to receive (1) paper copies of proposed rules by mail, (2) notices by mail with a reference to a Web site where the proposed rules are available, or (3) notices by e-mail and electronic copies of the proposed rules or a Web site address where the rules can be found.

HB 2122 (ch 116) Agency Adjudication

HB 2122 responds to a "note in passing" in *Marshalls Towing v. Department of State Police*, 339 Or 54, 58 n 5, 116 P3d

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873 (2005), that an agency head has implied authority to enter a final order, but no one else in the agency has such authority. The bill adds a provision to the Administrative Procedures Act to specify that an agency head may delegate to an officer or employee of the agency the authority to enter a final order in a proceeding or a class of proceedings. The delegation must be in writing and must be retained in the agency records.

HB 2423 (ch 288) Contested Case Proceedings

HB 2423 reorganizes the provisions currently contained in ORS 183.413 and 183.415. See the article on page 9 discussing these changes. The provisions of the bill apply to administrative actions commenced by the giving of a notice on or after January 1, 2008.

HB 2702 (ch 142) Plain Language Documents

HB 2702 requires the governor to assign a state agency with the responsibility for developing a plan by November 1, 2007, to ensure that written documents produced by executive department agencies conform to plain language requirements specified in the bill. The agency must report to the legislature regarding the plan by February 1, 2008, and again by January 1, 2009. The contents of the required reports are set out in the bill. HB 2702 took effect on May 17, 2007.

HB 2822 (ch 659) ALJ's Obligation to Develop Record; Judicial Review

HB 2822 responds to the suggestion in *Wahlgren v. DOT*, 196 Or App 452, 458–459, 102 P3d 761 (2004), that the rule established in *Berwick v. AFSD*, 74 Or App 460, 703 P2d 994 (1985), requiring a presiding officer to follow up all favorable lines of inquiry and to assist a claimant in developing the record may not apply to proceedings before the Office of Administrative Hearings. The bill clarifies that both presiding officers and administrative law judges have an affirmative obligation to develop a full and fair record. HB 2822, §§3, 6.

In *Thomas Creek Lumber & Log Co. v. Board of Forestry*, 188 Or App 10, 30, 69 P3d 1238 (2003), and other cases, the court held that ORAP 5.45(1), which requires preservation of an issue in the lower court for consideration on appeal, also applies to judicial review of administrative proceedings. HB 2822 addresses a growing body of cases in which the court of appeals has refused under ORAP 5.45 to consider an issue that was not preserved in an administrative proceeding, even if the petitioner was *pro se* in the proceeding and the presiding officer had failed in the officer's duty under *Berwick* and ORS 183.415(10) to develop the record. The bill requires the court to remand a case to the agency for further proceedings if the fairness of the proceeding or the correctness of the action may have been impaired by the presiding officer's failure to develop the factual record or to apply the correct law to the facts. HB 2822, §§2, 5. *NOTE: On January 1, 2008, HB 2423(8) (2007 Or Laws ch 288, §4(8)) replaces ORS 183.415(10).*

OCCUPATIONAL SAFETY

SB 556 (ch 432) Hearing Requests

SB 556, amending ORS 654.078, increases from 20 to 30 days the time for filing with the Department of Consumer and Business Services a request for a hearing before the Workers' Compensation Board to contest an occupational safety violation citation, a civil penalty, or the time fixed by the Department of Consumer and Business Services to correct a violation.

PUBLIC HEALTH EMERGENCIES

HB 2185 (ch 445) New Authority

HB 2185 is a major overhaul of the statutory system for addressing public health emergencies. The Director of Human Services must appoint a Public Health Director (director), who is granted extensive new authority to impose public health measures and enforce public health laws.

NOTE: Many, but not all, of these requirements are also extended to local public health administrators. For purposes of this summary, only the director is referenced.

Many important new definitions are created in §3 and elsewhere. Section 4 permits the director to impose civil penalties for violating public health laws, restrict access to contaminated property, obtain administrative warrants to search or seize property, and require removal or abatement of toxic substances, among other things. Upon making certain determinations as set forth in §5, the director is given extensive authority to take a variety of public health actions, including coordinating the public health response across jurisdictions; allocating and controlling the distribution of medicines, supplies, and personnel to respond to a public health emergency; proscribing diagnostic and treatment guidelines; and directing a school board to close a school. Sections 6 through 17 provide a process whereby individuals, groups, or specific property may be "quarantined" or "isolated". The director or local public health official may issue an emergency administrative order or obtain an *ex parte* judicial order of isolation or quarantine for up to 72 hours. A longer period requires the filing of a petition in circuit court and a finding by clear and convincing evidence that such action, and perhaps additional health measures, is necessary to prevent a serious health risk. Extensive procedural and substantive safeguards are provided, including service of written notice, right to counsel, and a required hearing within 72 hours of filing of the petition (excluding weekends). In fact, counsel must be provided unless "expressly, knowingly and intelligently" waived. HB 2185, §11(1). Section 12 sets forth principles and condition to be followed by the director when quarantining or isolating individuals. Spiritual objections must be considered and compensation paid for any property taken. HB 2185, §§12(9)–(10), 23(6). Section 13 sets forth conditions for entry onto premises used for quarantine or isolation. Section 17 defines and provides procedures for isolating property, and §18 allows the director to issue an order requiring a person to be treated for communicable

and other diseases affecting public health.

In §23 (amending ORS 433.441), the governor's authority to declare a public health emergency is clarified and strengthened. Powers include ordering the evacuation or decontamination of any facility and regulating or restricting "by any means necessary" the use, sale, or distribution of food, fuel, medicines, or "other goods and services". HB 2185, §23(3). Section 42 repeals a number of statutes that established prior procedures for public health emergencies.

VETERANS AFFAIRS

HB 2161 (ch 44) Department of Veterans Affairs

HB 2161, amending ORS Chapter 406, expands the scope of the responsibilities of the Department of Veterans affairs to extend not only to war veterans and their dependents, but also to non-war veterans, veterans' spouses, and veterans' survivors. The bill requires the department to adopt rules necessary to carry out its statutory objectives. Under current law, the department must adopt only those rules that the department considers "necessary and expedient." ORS 406.030(2).

IN-HOME CARE FOR DISABLED CHILDREN

HB 2406 (ch 751) Medically Involved Home Care Program

HB 2406 creates the Medically Involved Home Care program within the Department of Human Services to offer in-home services to children with significant physical or developmental disabilities, but who do not satisfy the means test for Medicaid, so that they may be cared for at home instead of in nursing facil-

ities or foster care. The department must adopt eligibility criteria by rule, and the criteria may not include a consideration of the income of a parent or legal guardian. HB 2406, §§4–6. Section 7 requires the department to request from the Department of Health and Human Services a waiver of federal law so that the department may obtain federal matching funds to operate the program. Subject to federal approval, the department is directed to begin enrolling up to 125 children on January 1, 2008.

HB 2406, §6. HB 2406 took effect on July 12, 2007.

NEEDY FAMILIES

HB 2469 (ch 861) Temporary Assistance to Needy Families

HB 2469 overhauls the Temporary Assistance to Needy Families (TANF) program, ORS 418.035–418.149, in Oregon. Among other things, it makes extensive amendments to numerous statutes; mandates improved screening, assessment, and case planning; expands employment and training services available to TANF families; creates a new program to assist families that transition from TANF to employment; and also creates a new program for families with persons who are seeking federal disability benefits from the Social Security Administration. The bill reinstates the child support pass-through for TANF families and expands transitional medical assistance. HB 2469 took effect on October 1, 2007.

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The Legacy of Hans Linde in the Statutory and Administrative Age

By Shirley S. Abrahamson^{1*} & Michael E. Ahrens^{2**}

The following is an excerpt from an article published in 43 Willamette Law Review 175-189 (2007). Used by permission.

Interpretation of a statute and application of the statute to disputed facts are the bread and butter of judicial business. As Justice Marshall explained in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."³

Yet in the 20th and 21st centuries, federal and

state legislatures have created specialized administrative agencies. These agencies have quasi-legislative powers, adopting rules under generally worded legislatively delegated authority. These agencies also act like courts, interpreting and applying the statutes and their rules in deciding disputes.

Thus, the continuing issue facing courts in our regulatory society is the extent of judicial oversight of agency interpretation and application of laws.

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Administrative agencies play an important role in our complex world of regulation, but checks and controls on the agencies are also needed. These checks and balances can be provided by the executive, legislative and judicial branches. What should the role of judges be in providing these checks and controls through judicial review?⁴

Justice Linde has suggested thought-provoking approaches to this problem in his scholarly writings and in his opinions.⁵ Let me give you two examples.

In *Megdal v. Oregon State Board of Dental Examiners*, the Board of Dental Examiners revoked dentist Megdal's license on the ground of "unprofessional conduct," a ground set forth in the statute but not fully defined.⁶ Megdal's alleged unprofessional conduct was committing fraud on his dental malpractice insurance company by listing dental employees as working in Oregon when they really worked in California.⁷

After chastising counsel for not citing a specific constitutional provision in arguing the unconstitutionality of the statute—a typical Linde comment—Linde nevertheless explored whether the vague phrase "unprofessional conduct" constituted deprivation of liberty or property without due process of law.⁸ Justice Linde concluded that federal law was inconclusive.⁹ (I have never heard anyone say Justice Linde was a fan of much of the U.S. Supreme Court's constitutional doctrine.) So the Justice turned to the question of what the statutory phrase meant.

Linde wrote that the statutory standard "unprofessional conduct" could be interpreted in one of three ways.¹⁰ First, the statutory phrase could refer to norms of conduct that were recognized in the profession or occupation apart from the views of the agency.¹¹

Second, the phrase could express the legislature's own licensing standard in general, inexact terms.¹²

The third option was that the legislature delegated to the Board of Dental Examiners the power to define "unprofessional conduct" by adopting and enforcing rules for regulating the practice of dentistry.¹³

And on what basis did Justice Linde choose among the three alternatives? Each alternative was possible, but only one would appear to best fit the legislative plan.

Justice Linde examined other Oregon statutes creating licensing boards.¹⁴ He was dismissive of the differences in the texts of these statutes, saying: "Sometimes differences in statutory drafting represent deliberate differences in policy. We see no reason to believe that this was the case here."¹⁵ I'm still trying to figure out how he knew this. Rather, he inferred from these other statutes that "[w]hen a licensing statute contains both a broad standard of

'unprofessional conduct' that is not fully defined in the statute itself and also authority to make rules[,] . . . [the] legislative purpose is to provide for further specification of the standard by rules"¹⁶

This legislative delegation required the Board to adopt a rule rather than confront the issue of unprofessional conduct on a case-by-case basis, concluded Justice Linde.¹⁷ Because the agency erroneously applied the standard to ad hoc facts, the revocation of the petitioner's license was reversed.¹⁸

This approach was revisited in *Ross v. Springfield School District No. 19*.¹⁹ In *Ross*, the Fair Dismissal Appeals Board sustained a school district's dismissal of a teacher who engaged in sexual conduct in an adult bookstore.²⁰ The statutory standard for dismissal was "immorality."²¹ Applying the teachings of the dentist case, Justice Linde concluded that "immorality" should not be determined by reference to the views of "the public," an indeterminate standard that would fluctuate with the morals, standards, and pressures of the community.²² Linde reasoned that even if public views were the standard, a record would have to be made before the agency of these public views.²³ A repeated refrain in Linde's opinions is that if empirical information is relied upon, that data should be made part of the record.

According to Linde (and his cohorts), the statute—like the one in the dentist case—placed primary interpretive responsibility with the Board to determine immorality.²⁴ The court concluded that in this instance the Board could interpret the statutory standard of immorality either by an interpretive rule or by adherence to reasoned interpretations in a case-by-case approach.²⁵

I wondered how Linde was going to decide between requiring an interpretive rule and allowing case-by-case agency decision making and how he was going to apply the dentist case. Not easy! His opinion tip-toes through the nature of determining "immorality," examines the court's decision in a prior appeal of the same case, differentiates between a legislative delegation (as in the dentist case) and a complete legislative expression in inexact terms (as in the teacher case), and looks at the nature of the particular administrative entity and its responsibilities.

I'm not sure a bright line exists between the two approaches that I could easily apply in the next case, but the opinion poses an interesting approach to interpreting statutes delegating power to administrative agencies.

According to Linde, the Board could proceed in the absence of an interpretive rule if it articulated in the contested case a tenable basis for the legal conclusions by

which it applied a statute to the facts.²⁶ A reasoned decision would guide persons governed by the statute and would guide agency personnel and allow them to maintain consistency in future cases.

Because the Board did not set forth its interpretation of “immorality,” the case was remanded.²⁷ It was a do-over. The teacher was to be heard based on criteria set forth pursuant to the Board’s interpretation of immorality, but no further evidence needed to be taken unless a criterion adopted by the Board required it.²⁸

Linde’s opinion raised a conundrum pointed out by the dissent. If the Board was not to interpret “immorality” by considering the prevailing moral standards, what standard was the Board to use on remand?²⁹ Would a remand merely delay resolution of the dispute and engender more appeals?³⁰

Perhaps Linde, ever the teacher and wordsmith, provided an answer when he ever so gently gave drafting advice to the legislature. His advice: Legislature, please pause before using such words as “moral” or “immoral” without further elucidation.³¹

Again, interpretation of law is the quintessential judicial activity. The legislature has, however, recognized the expertise and powers of administrative agencies. The Wisconsin Administrative Procedure Act provides that upon judicial review, “due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.”³² Because of these kinds of statutory provisions, and because the interpretation of the statutes is “so bound up with successful administration of the regulatory scheme,” the pull is “to give principal interpretive responsibility to the ‘expert’ agency that lives with the statute constantly.”³³

One of my colleagues observed ruefully this year, in a concurrence to an opinion giving deference to an administrative agency’s statutory interpretation, that “[t]he legislature and the courts have worked in tandem to dilute the role of the courts in protecting substantial rights and interests in agency cases. Property rights become tenuous when they are subject to largely unreviewable ad hoc decision-making—even if by well-qualified, dedicated administrative officials.”³⁴ Another of my colleagues condemns the Supreme Court’s judicial deference to an administrative agency’s interpretation of a statute, characterizing judicial deference to an administrative agency as judicial decision-avoidance.

In contrast, Justice Linde’s approach to judicial review of statutory interpretation by administrative agencies reinforces legislative supremacy and the power of administrative agencies to make decisions.

By adhering to the legislative delegation of power to administrative agencies, Justice Linde grants the agency—rather than the courts—the first crack at defining the meaning of the legislative words.

Justice Linde’s decisions prevent judicial usurpation of administrative functions, yet facilitate meaningful judicial review.

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Winter 2008 Executive Committee

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EDITORIAL POLICY

The Administrative Law Section welcomes articles and opinions for publication in the newsletter. To be considered for publication, articles must contain the author’s name and photo. Selection for publication depends on relevance, clarity, timeliness, expertise and authority, and whether the article or opinion presents a new perspective, rather than reiterating a previously published one. Submissions are subject to editing. Personalized attacks on individuals will not be published. With few exceptions, 800 words are the maximum length of an article expressing the opinion of the writer.

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They assure proper and consistent agency application of the law and careful administrative consideration. These decisions require agencies to provide a source of guidance by adopting a rule or by articulating a connection between the facts the agency finds and the legal conclusions it draws from them.³⁵ The agencies remain accountable to the legislature and to the courts through agency rule-making and carefully crafted decisions. A court retains the ability to review an agency's rules and decisions to ensure that they comply with the legislative enactment.³⁶ The court thus carefully cabins regulatory agencies and plays an important role in statutory interpretation in the regulatory state.

* *Chief Justice, Wisconsin Supreme Court; J.D., Indiana University Law School, 1956; S.J.D., University of Wisconsin Law School, 1962. The article speaks in the first person, referring to Chief Justice Abrahamson, as did the speech. Michael E. Ahrens joins her as an author of this article in recognition of his significant efforts in developing this topic and in writing and editing of the article.*

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- 1 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
- 2 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 363 (1986).
- 3 See, e.g., Donald W. Brodie & Hans J. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537 (1977).
- 4 605 P.2d 273, 274 (Or. 1980).
- 5 *Id.*
- 6 *Id.* at 274-75.
- 7 *Id.* at 278.
- 8 *Id.*
- 9 *Id.* at 278-79. This interpretation was not appropriate, wrote Justice Linde, because the application of the words would depend not on interpreting the law but on finding what the existing standards are in fact. *Id.*
- 10 *Id.* at 279.
- 11 *Id.*
- 12 *Id.* at 282-83.
- 13 *Id.* at 283.
- 14 *Id.*
- 15 *Id.* at 284-85.
- 16 *Id.* at 287. The opinion drew a concurrence of three justices who would have preferred to apply common law principles to reach the same result. They argued that the majority engaged in a "very strained interpretation of a

- statute." *Id.* at 287-88 (Denecke, CJ., concurring).
- 17 716 P.2d 724 (Or. 1986).
- 18 *Id.* at 725.
- 19 *Id.*
- 20 *Id.* at 730-31.
- 21 *Id.* at 727.
- 22 *Id.* at 728-29.
- 23 *Id.* at 729-30.
- 24 *Id.* at 729.
- 25 *Id.* at 731.
- 26 *Id.*
- 27 *Id.* at 731-32 (Campbell, J., dissenting).
- 28 *Id.* (The dissent objected that the decision dealt with issues not briefed by the parties and that if the Board is not to interpret immorality considering the prevailing moral standards, what standards is the Board to use on remand? Furthermore, the case had already comprised a full seven years with multiple appeals and, according to the dissent, the decision only further delayed the resolution of the dispute and might engender more appeals.)
- 29 *Id.* at 728.
- 30 WIS. STAT. ANN. § 227.57(10) (2006).
- 31 Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453 (1989).
- 32 *Hilton ex rel. Pages Homeowners' Ass'n v. Dep't of Natural Res.*, 717 N.W.2d 166, 184 (Wis. 2006) (Prosser, J., concurring). The Wisconsin Supreme Court gives varying weights of deference to an agency's interpretation and application of a statute depending on such factors as the statutes governing the agency, the agency's expertise on the subject, and the agency's consistency in interpreting the statute at issue. *Id.* at 169.
- 33 Administrative agencies are not limited simply to interpreting statutes. In *Cooper v. Eugene School District No. 4J*, 723 P.2d 298 (Or. 1986), the court addressed whether the Superintendent of Public Instruction, as head of an administrative agency, had the authority to declare an act of the legislature to be contrary to federal and state constitutions. *Id.* at 301. The act prohibited a teacher from wearing religious dress in a public school. Linde suggested the reason judicial opinions have not allowed agencies to pass on the constitutionality of the laws entrusted to them was not because agencies err in considering such a challenge, but rather was based upon whether a litigant had exhausted all administrative remedies. Linde stated:

If an agency decides a constitutional issue, though needlessly, the only result is that it will be affirmed on judicial review if the decision was right and reversed if the decision was wrong. It would be pointless to reverse an agency for correctly deciding a legal question on

the ground that the agency should have waited for the reviewing court to decide the question.

Long familiarity with the institution of judicial review sometimes leads to the misconception that constitutional law is exclusively a matter for the courts. To the contrary, when a court sets aside government action on constitutional grounds, it necessarily holds that legislators or officials attentive to a proper understanding of the constitution would or should have acted differently. Doubt of an agency's obligation to decide constitutional challenges to its governing statute is itself a question of interpreting

the agency's statutory duties. The agency's duty to decide such challenges would not be doubted if the legislature provided for it expressly rather than doing so implicitly under the general term "law" in the Administrative Procedure Act

An agency ordinarily can interpret a statute so as to exclude unconstitutional applications before it is forced to question the statute's validity.

Id. at 303.

34 See Wald, *supra* note 7, at 222.

2008 Brings Revised Notices and Procedure for Contested Cases

By Karen A. Berkowitz*

The 2007 legislature enacted two bills that will impact contested case procedure and judicial review of contested cases. HB 2423 and HB 2822 provide protection to parties to a contested case by establishing clarity around contested case notice and hearing provisions, and codifying the duty of an Administrative Law Judge to fully develop the record in contested case hearings. Representative Dennis Richardson sponsored both bills at the request of the Oregon Law Center. The Department of Justice and the Administrative Law Section of the Oregon State Bar were actively involved in the numerous revisions of the bills.

HB 2423 reorganized the contested case notice statutes, ORS 183.413 and 183.415, and created a new statute, ORS 183.417, for the hearing procedure provisions that were previously part of ORS 183.415. ORS 183.415 is the notice of agency action, and must include information about how to request a hearing, or, alternatively, the time and place of the hearing if the agency procedure does not require the party to request a hearing. ORS 183.413 is the notice of hearing. If the agency does not require a hearing request, the agency may issue one notice that includes all of the information required by both statutes. HB 2423 made several substantive changes to ORS 183.413 and 183.415.

ORS 183.413: The notice of hearing must be in writing and mailed or served personally. The original language did not require written notice of the hearing procedure. The agency has the flexibility to choose the method of delivery whether personal service or by mail. The notice must include; the time and place of the hearing, jurisdictional information, and the right to legal representation, including information about legal aid representation for people with limited resources. The notice must identify generally the issues to be considered at the hearing. The word

"generally" was included to ensure agencies may use standard language for the statement of issues when appropriate to do so. This is intended to help agencies who conduct hearings where the issues in every hearing are substantially similar and don't require a detailed explanation. However the hearing notice must include a statement of the issues sufficient to put parties on notice of what the hearing will be about.

The notice will inform the parties that everyone has the right to respond to all issues properly before the presiding officer and present witnesses and evidence on those issues. This clarifies that parties may only present evidence related to the issues that are the subject of the hearing. It ensures that when a party is required to file an answer, for example, the evidence presented at the hearing will be limited to those issues raised in the pleadings. The notice must inform the parties whether discovery is permitted and how it may be requested.

All notices will now describe the hearing procedure, including burden of proof, order of presentation of evidence and the kinds of objections that may be made. Under *former* ORS 183.413, this information was only required if a party was unrepresented. Now it is required regardless of whether the party has legal representation.

ORS 183.415. The notice of agency action will inform the party of the right to request a hearing, the time to request a hearing, and the procedure for requesting a hearing. The statute retains the authority to include a statement of the time and place of the hearing as an alternative for those agencies that do not require a party to request a hearing. The notice will inform parties whether and under what circumstances an order by default may be entered.

continued next page

HB 2423 moved the remaining sections of ORS 183.415, addressing informal dispositions, default, and hearing procedure, into a new statute, ORS 183.417. Several substantive changes were made. An order that is adverse to a party may be issued upon default only if a *prima facie* case is made on the record, and the record must include materials submitted by all parties. The prior law did not specify what the “agency record” is. It also did not address what would be included in the record when a party submits documents to the agency or to the Office of Administrative Hearings (OAH) before a default order is entered. This new change guarantees that the record will include materials submitted by any party.

A final order entered after an informal disposition of a contested case must be sent to the both the parties and their attorneys. Former ORS 183.415(5)(b) only required the agency to send the order to the attorney if the party was represented. At the hearing, the presiding officer must ensure the record “shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case and the correct application of the law to those facts.” HB 2423, Sec. 4(8). This language clarifies the duty of the presiding officer to fully develop the record. It extends that duty by requiring full development of the legal issues as well as the factual issues.

HB 2822 amends ORS 183.615 to clarify that the duty to fully develop the record, found in HB 2423, Sec. 4(8), extends

to cases heard by a presiding officer from OAH. The need for this change arose when the applicability of *Berwick v. AFSD*, 74 Or App 460, 703 P2d 994, *rev den*, 300 Or 332 (1985), to cases heard by the Office of Administrative Hearings, was questioned by the court in *Wahlgren v. Dept. of Transportation*, 196 Or. App. 452 (2004). The *Berwick* case affirmed the presiding officer’s duty to fully develop the record in a contested case. In *Wahlgren*, the court questioned whether the duty to assist a party to develop the record still applied once OAH was established and the presiding officer was no longer an agency employee. HB 2822 insures that the same record development standards set out in HB 2423 will apply to hearings conducted by OAH. The bill further provides that failure to fully develop the record in any contested case hearing conducted by an agency or by OAH is possible grounds for remand on appeal if the court of appeals determines that it is a material error that affects the fairness of the proceeding or the correctness of the action. This applies to all contested cases subject to judicial review under the Administrative Procedures Act. It will provide a meaningful remedy, particularly for pro se parties who need the assistance of the presiding officer in order to have a full and fair record.

**Karen A. Berkowitz is an attorney with the Oregon Law Center. She can be reached at 503 473-8321*

Annual Meeting and CLE a Success

By Irene B. Taylor*



Irene B. Taylor

This year’s Annual Meeting and CLE, “The Good, The Bad, and The Ugly” held on November 9, 2007 at the Wilsonville Holiday Inn, was a resounding success with over 90 attendees. Our 2007 section chairperson, Steve Rissberger, opened the meeting with the introduction. The day started with Court of Appeals Judge, David Schuman, leading a discussion panel regarding the current status of administrative law in Oregon. Thomas Ewing, chief judge for the Office of Administrative Hearings, gave an overview of the progress of the Office of Administrative Hearings from its inception to the present. John DiLorenzo, an attorney with Davis Wright Tremaine LLP, advocated for giving final order authority to the administrative law judges with the agencies reserving the right to appeal. Christine Chute, an assistant attorney general with the General Counsel Section, Government Services and Education Division representing various state agencies, acknowledged the position taken by Mr.

DiLorenzo has been an ongoing issue that needs a final resolution. This panel gave many of us food for thought on what changes, if any, section members would like to see in the administrative law arena.

Our next speaker was the irrepressible Justice Michael (Mick) Gillette. He capitalized on our Clint Eastwood theme, while giving his view of the Supreme Court’s decision in *Teacher Standards and Practices Commission v. Bergerson*, 342 Or 301, 153 P3d 84 (2007). And, by popular request, he also gave us his view of the significance of the Supreme Court’s decision in *Marshall’s Towing v. Department of State Police*, 339 Or 54, 116 P2d 873 (2005). Helen Hierschbiel, assistant general counsel for the Oregon State Bar, covered a variety of ethics topics, including *ex parte* contacts, communicating with represented parties, and conflicts in general.

Our keynote speaker was the Honorable Hans Linde, former Oregon Supreme Court Justice. He was a major proponent of legislation implementing our Administrative Procedures Act. He also discussed recent international efforts to expand the

implementation of administrative law to other countries.

After a delicious buffet lunch, we held our annual meeting. The section elected the following Executive Committee members to the following positions: Chairperson – Janice Krem, Chair-elect – Chris Cauble, Secretary – Frank Mussell, Treasurer – Thomas Ewing, Immediate Past-Chair – Steve Rissberger. The following section members were elected to Executive Committee Members-at-Large for terms beginning January 1, 2008 through December 31, 2009: Ann L. Fisher, William J. Boyd, and Phil Johnson. The following are continuing Executive Committee

Members-at-Large with terms end 12/31/08: Karen Ann Berkowitz, Thomas M. Cooney, Kyle J. Martin, Frank T. Mussell, Jonathan M. Norling, Steven R. Schell, and Irene Bustillos Taylor.

Following the annual meeting, we were fortunate to have Richard Whitman, of the Attorney General's General Counsel Natural Resources Division, give us a preliminary update on the impact of the passage of Ballot Measure 49 and its effect on earlier changes implemented by Ballot Measure 37.

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Case Notes

By Philip A. Johnson II**



Philip A. Johnson II

ETU v. Environmental Quality Commission, S53634 (June 28, 2007).*

When an agency knows a party is represented by counsel, it creates an obligation on the agency to notify the attorney of any important communications between the agency and the client. The Department of Environmental Quality (DEQ) issued ETU a notice of non-compliance. ETU retained an attorney who requested that he be notified of any future action taken against ETU.

DEQ issued ETU a notice of violation without notifying the attorney. Because the attorney was not notified, ETU missed the deadline to request a hearing. ETU requested reconsideration and was denied. The Court of Appeals found the request for the hearing untimely and that the agency did not have a responsibility to notify the attorney or grant the reconsideration request. ETU appealed. The Supreme Court overruled the Court of Appeals and held that when a party is represented, an agency has a responsibility to provide the attorney with copies of any important communications and their failure to do so justified granting the late hearings request. Reversed.

Jordan v. SAIF Corp, S53844 (August 30, 2007).*

In 1986, Jordan received workers' compensation for a knee injury. In 2000, the claim was reopened because of Jordan's need for more knee surgery. Following that surgery, he failed to follow his physical therapy treatment. Under OAR 438-012-0035(5), SAIF requested a suspension of Jordan's disability benefits because of his failure to follow his recovery plan. It was granted and the Court of Appeals affirmed the denial. The Oregon Supreme Court reversed. Analyzing ORS 656.278, the Supreme Court held that the Board's authority did not include the power to suspend Jordan's benefits (as allowed by the rule) because the

Director of DCBS held that right, not the Board. Reversed.

Grobovsky v. Board of Medical Examiners Case, A129438 (May 30, 2007).*

Dr. Grobovsky (Dr. G) sought review of an order issued by the Board of Medical Examiners (Board). The Board investigated Dr. G when Dr. G's colleagues complained of the smell of alcohol on her breath at work. The Board ordered her to undergo an evaluation that would assess her physical and mental capacity to practice medicine. Dr. G, who was licensed in other states besides Oregon, replied that she did not intend to renew her Oregon license and refused to submit to the test. Her license subsequently expired. The Board filed a complaint stating that she had failed to comply with the evaluation order and to suspend her license for refusing to obey the order. Dr. G subsequently requested a hearing and demanded the factual basis supporting the allegations of her alleged alcohol use. The Board moved to quash that request at hearing arguing the evaluation order was an order in an other than contested case and that she had failed to timely apply for judicial review. The ALJ agreed and did not allow Dr. G to challenge the order because she had failed to timely seek review under ORS 183.480(3). Dr. G appealed arguing (among other things) that the evaluation order was not a final order and thus she should be allowed to challenge the underlying basis of the order in a contested case hearing. The Court of Appeals agreed that the evaluation order was not a "final order" under ORS 183.310(6)(b)(B) because it did not preclude further agency consideration or action on the subject matter of the order. The Court rejected and questioned Dr. G's remaining arguments without much discussion. Reversed.

Papas v. OLCC, A129769 (June 13, 2007).*

Ted Papas (Papas) conducted Greek events at a Greek deli in Portland. One of these events consisted of Papas standing above his guests dribbling liqueur into their mouths while other spec-

tators counted and cheered. The person who held their mouth open for the longest count received a T-shirt. The Oregon Liquor Control Commission (OLCC) issued an order finding Papas violated OAR 845-006-0345(11)(c), which prohibits drinking contests that are “designed to increase consumption,” and proposed to suspend Papas’ liquor license. Papas requested a hearing and argued that the contest was not intended to increase drinking, but rather was for fun and to emulate Greek traditions. After a hearing before the Office of Administrative Hearings (OAH), the ALJ ruled that the preponderance of the evidence did not establish a violation of OAR 845-006-0345(11)(c) and recommended a 12-day suspension and small fine instead. OLCC amended that order and found Papas violated OAR 845-006-0345(11)(c) explaining “that the relevant conduct constituted a “contest” that had the “object” of consum[ing] the greatest amount of alcohol of all the contestants,’ [and] that [contest] involved the declaration of a winner who was awarded a prize, [this contest] involved “increased quantities” due to the unlimited nature of the consumption of the alcohol, regardless of whether the alcohol was dribbled or poured in a steady stream.”

Papas appealed to the Court of Appeals (the Court) and argued that unlimited consumption was not prohibited by the rule and challenged the factual basis for the OLCC’s interpretation because there was no standard with which to measure an “increase” in consumption, as required for a violation of OAR 845-006-0345(11)(c). OLCC argued that their interpretation was consistent with their rule under *Don’t Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132 (1994). The Court disagreed. After a lengthy PGE analysis of the rule, it stated; “In determining that [Papas] violated the rule, OLCC in effect interpreted the rule to mean that conduct involving “competition” and “free pouring” constitutes a “drinking contest designed to increase consumption” of alcohol “in increased quantities,” regardless of the licensees’ intent in conducting such a contest or any measurement of the amounts consumed during the contest relative to amounts otherwise consumed . We conclude that interpretation of the rule is inconsistent * * * * particularly [given] the plainly stated limitation as to which drinking contests are subject to the rule and the plain meanings of the words “increase” and “design.” It also is inconsistent with contextual evidence [in ORS Chapter 471] that OLCC knows how to refer to all contests or competitions without qualification.” The Court therefore reversed and remanded to OLCC to reconsider under a more plausible interpretation of OAR 845-006-0345(11)(c).

SAIF v. Ramirez, A131981 (June 13, 2007).*

SAIF sought review of a Workers’ Compensation Board (Board) order affirming an ALJ’s award of unscheduled permanent partial disability for a chronic condition impairment. SAIF argued that the arbitrator’s statement that Mr. Ramirez has limitations in the repetitive use of his spine was not supported by objective findings. The Court of Appeals (Court) applied the objective findings standard defined in *SAIF v. Lewis*, 335 Or 92 (2002) that “objective findings” are “reproducible, measurable, or observ-

able.” The Court held that it was reasonable for the Board to find (based on the evidence presented) that Dr. Kane’s report was supported by “objective findings” evidencing Mr. Ramirez’s injuries.

Phillips v. Polk County, A134575 (June 27, 2007).*

Phillips had three contiguous parcels in EFU- zoned land. ORS 215.780(1)(a) requires that a parcel must be 80 acres, even after a lot line adjustment. Polk County (County) approved a lot line adjustment that would have created, from the three contiguous parcels, two parcels that did not meet this requirement. The Land Use Board of Appeals (LUBA) overturned the county’s approval, holding that any property affected by a lot line adjustment must meet the statutory acreage requirement, regardless of whether the parcel had previously been large enough. The County appealed, arguing that, through its own ordinance, it had met the requirements of an exception to the parcel-size rule. The Court ruled that the procedures to gain an exception from ORS 215.780(1)(a) were clearly outlined in the statute and that to allow the county to proceed would alter the legislative intent behind the law. Reversed.

Liberty Northwest Ins. Corp. v. Norton, A129770 (June 27, 2007).*

Mr. Norton began working in the steel industry in 1956 and was later employed by Columbia, a steel company insured by Liberty Northwest (Liberty). Prior to his start at Columbia in 1988, Norton took an audiogram test. Norton took another audiogram test in 2000, which showed moderate to severe hearing loss. A doctor later confirmed the primary cause as occupational work exposure since 1956. Liberty attempted to offset from Norton’s workers’ compensation claim the amount of hearing loss incurred prior to 1988 based on the first audiogram. The Workers’ Compensation Board (Board) determined that the first audiogram did not meet the standards outlined in OAR 436-035-0250 and rejected the offset. Liberty appealed, arguing the standards only apply to the most recent audiogram for purposes of measuring hearing loss at a time the claim is closed. The Court of Appeals affirmed the Board, holding that the OAR 436-035-0250 standards for audiograms unambiguously apply to all audiograms when documenting hearing loss.

Specialty Risk Services v. Royal Indemnity Co., A130618 (July 5, 2007).*

Both Specialty Risk Services (Specialty) and Royal Indemnity Co. (Royal) provided workers’ compensation insurance coverage to separate employers with similar names. A claim involving Royal’s insured was mistakenly submitted to and accepted by Specialty. Once Specialty realized the mistake it attempted to get Royal to take the claim. Royal refused. Specialty attempted to issue a backup denial letter under ORS 656.262(6)(a) to the insured, but was barred by an ALJ and eventually paid the claim. Specialty then brought an unjust enrichment claim in circuit court against Royal. Royal did not timely answer and the circuit court entered a default judgment.

Royal appealed to the Court of Appeals (Court) and argued that DCBS and WCB had exclusive jurisdiction because the judgment was based on payment of a workers compensation claim. The Court held that, since the claimant had already been paid, the issue no longer constituted a matter over which DCBS and WCB had exclusive jurisdiction. Since no other statute indicated legislative intent to divest the circuit court of jurisdiction of an unjust enrichment claim, the judgment was not void.

North East Medford Neighborhood Coalition v. City of Medford, A134897 (July 11, 2007).*

Cedar Landing (Cedar) submitted a preliminary planned unit development (PUD) application to the City of Medford (city) in 2005. In 2006 the city discovered that Cedar's land included an exclusive agricultural (EA) overlay zone that had not appeared earlier due to an error with the city's zoning maps. Cedar then submitted a zone change to remove the EA zone, which was consolidated with the PUD application. The city council and planning commission both approved the consolidated application and the North East Medford Neighborhood appealed to the Land Use Board of Appeals (LUBA). LUBA remanded the case to the city due to the lack of notice given to the Department of Land Conservation and Development (DLCD), which was required by ORS 197.610(1). LUBA otherwise affirmed the application. The city appealed and argued that small tract zoning amendments are an exception to "land use regulations" requiring notice to DLCD under ORS 197.610(1) and are so recognized in OAR 660-018-0010(11). The Court analyzed ORS 197.015(12) and concluded that the legislature expressly deleted small track zoning from the definition, thus making OAR 660-018-0010(11) invalid.

Kirby v. SAIF, A132244 (July 11, 2007).*

Kirby experienced pain after driving over a substantial bump traveling 30 to 40 miles per hour in the course of his employment. His physician determined that the pain was equally caused by this incident and an incident that happened several years earlier in an out-of-state accident. Kirby filed a workers' compensation claim and an independent medical examination concluded that the prior injury was the major cause of the injury. Kirby's employer denied the claim and an ALJ affirmed the denial because the preexisting injury was at least equally responsible for the current condition. Kirby appealed and the Workers' Compensation Board (WCB) affirmed the denial because the recent occurrence was not the major contributing cause of the injury. Kirby appealed arguing that the Last Injury Rule (LIR) compelled accepting the claim. The Court of Appeals affirmed the WCB decision, holding that LIR does not establish compensability, it only helps assign responsibility for liability.

Sedgwick Claims Management Services v. Jones, A129373 (August 15, 2007).*

In 1978, Mr. Jones suffered a work-related injury that confined him to a wheelchair. In 1986, Mr. Jones's physician

prescribed a modified van to allow Mr. Jones to drive independently. A referee determined that a van is a prosthetic appliance covered by workers' compensation and ordered the company assigned to process Mr. Jones's claim to provide a van. In 2003, Mr. Jones's physician prescribed a new van and Sedgwick Claims Management Services (Sedgwick), the current company assigned to Mr. Jones's claims, appealed to the Court of Appeals (Court) the ruling by the Medical Review Unit (MRU) and an administrative law judge (ALJ) ordering it to buy a new van. Sedgwick argued the van was not a prosthetic appliance and that MRU and the ALJ failed to consider OAR 436-010-0230(1) and (10) in determining whether a new van was necessary because of a lack of evidence in the record supporting the need for it. The Court held the van was a prosthetic device because Mr. Jones's injuries necessitated it. As to the second argument, the Court analyzed the record and agreed that MRU and the ALJ had failed to consider the limitations imposed in OAR 436-010-0230(1) and (10) to determine if a new van was necessary. Reversed.

SAIF v. Bowers, A131702 (September 12, 2007).*

Bowers maintained workers' compensation insurance through SAIF. On March 12, 2004 SAIF notified Bowers that coverage would be terminated on April 15th unless SAIF received Bowers' payroll report prior to that date. SAIF did not receive the report until May 17th, the day it credited Bowers' \$17 check. On July 12, 2004 one of Bowers' employees was injured at work. Bowers called SAIF on July 16th and SAIF immediately reinstated coverage. SAIF, however, claimed that there was no coverage between April 16th and July 15th and DCBS fined Bowers for failing to maintain coverage. Bowers requested a hearing and an ALJ concluded that, under ORS 656.419(3), Bowers' report and fee was an application for coverage. Coverage was thus effective when SAIF accepted the application on May 17th. The Court of Appeals agreed, holding that a report and fee may constitute an "application" for workers' compensation coverage.

Foland v. Jackson County, A135937 (September 26, 2007).*

Dom and Joyce Provost submitted a preliminary development plan (PDP) for approval by Jackson County for a proposed destination resort development. The county approved the PDP but Paul and Constance Foland appealed the county's decision to the Land Use Board of Appeals (LUBA). LUBA remanded the case back to the county where it remained inactive for over 10 years. When the Provosts finally submitted a modified PDP, the Folangs again opposed the PDP arguing that pursuant to the Jackson County Land Development Ordinance (LDO), the three-year deadline for approval had expired. The county rejected the Foland's argument, interpreting the LDO to allow a tolling of the deadline during a remand from LUBA by inserting language that was not in the LDO. The Folangs once again appealed to LUBA. LUBA found the county's decision violated the LDO by inserting concepts not expressly stated in the LDO, and held the interpretation to be inconsistent with the express language of the

LDO. On appeal to the Court of Appeals (Court), the Provosts argued that LUBA erred in not allowing the county deference in interpreting its own ordinance under ORS 197.829. The Court determined that LUBA had properly reviewed the county's interpretation under *PGE* because the county's decision was unsupported by the language it was interpreting and the county was attempting to rewrite the ordinance for this particular case.

DLCD v. Klamath County, A135614 (October 2, 2007).*

The Ankenys filed a claim pursuant to Measure 37. Rather than simply waiving the restricting land use laws, Klamath County chose to amend the existing zoning ordinances applicable to the Ankeny's property from "Forest/Range" to "Suburban Residential". The Department of Land Conservation and Development (DLCD) appealed the county's modification to the Land Use Board of Appeals (LUBA). The Ankeny's challenged LUBA's jurisdiction, arguing that LUBA does not have jurisdiction over land use decisions arising under Measure 37 according to ORS 197.352. DLCD argued that while a decision by a county as to whether or not to modify an existing zoning ordinance is not within the jurisdiction of LUBA, the actual *modification* is not removed from LUBA under ORS 197.352. LUBA disagreed and found that it did not have jurisdiction. DLCD appealed. The Court of Appeals agreed with LUBA's interpretation of ORS 197.352 and held that the county's decision to modify the existing zoning ordinance was a land use decision arising under Measure 37.

Utility Reform Project v. PUC, A123750 (October 10, 2007).*

The Utility Reform Project (URP) challenged a rate schedule of the Public Utilities Commission (PUC) because the schedule declined to reimburse or offset previous unlawful payments made to Portland General Electric (PGE) by ratepayers for the Trojan nuclear power plant. The PUC issued an order declining to change the schedule and disclaiming authority to set rates that reimburse or offset prior payments. The URP challenged this order in circuit court. The circuit court found that the PUC erred by rejecting the rate schedule challenge since it based the rejection on a mistaken interpretation of ORS 757.225. The circuit court, therefore, remanded the order to the PUC with directions to alter the challenged rate schedule to reimburse or offset prior payments as required by ORS 757.225. PUC appealed to the Oregon Court of Appeals (Court). The Court discussed continued ongoing litigation over the Trojan facility (which involves all the parties to this matter) and held that to rule on the merits of this dispute, while that litigation is still pending, would be premature, a disservice to the parties, and an ineffective use of judicial resources. The Court accordingly vacated the circuit court's order to alter the rate schedule and determined that while remand was the correct action, rather than directing the PUC to alter the rate schedule, the circuit court should have instructed the PUC to reconsider the proposed schedule as part of the ongoing litigation. Reversed.

VinCEP v. Yamhill County, A135362, (October 10, 2007).*

Yamhill County approved a comprehensive plan change and zoning ordinance amendment to allow the development of a luxury hotel in EFU land under a "reasons exception" to Goal 3 and Goal 14 as allowed by ORS 197.732(1)(c). VinCEP opposed the county decision and appealed to the Land Use Board of Appeals (LUBA). LUBA held that the county insufficiently justified the decision and remanded it back to the county. Both the county and VinCEP appealed to the Court of Appeals (the Court). VinCEP argued that LUBA erred in how it had applied OAR Chapter 660, Division 4 rules in determining the standards for evaluating the factual basis for the exceptions to Goal 3 and Goal 14. The county argued that LUBA had applied the proper standard, but had erred in concluding that the county's findings were insufficient. The Court agreed with VinCEP and held that LUBA erred by only applying the standard relevant to a Goal 14 exception for the Goal 3 exception as well. The Court held that *1000 Friends of Oregon v. LCDL*, 301 Or 447 (1986) required a separate inquiry into the standards for both Goal 14 and Goal 3. Reversed.

Friends of Columbia Gorge v. Columbia River Gorge Commission, A125031 (October 31, 2007).*

Friends of Columbia Gorge (Friends) challenged sections of the revised management plan for the Columbia River Gorge National Scenic Area adopted by the Columbia River Gorge Commission (the Commission) pursuant to the 1986 Columbia River Gorge National Scenic Act (the Act). Friends argued that the review process culminating in the revised plan was incomplete and that several requirements of the revised plan violated the Act. The Oregon Court of Appeals (the Court) held that, although the Commission is a hybrid regional—as opposed to strictly a state or federal agency—, the standard of deference outlined in *Chevron U. S. A. v. Natural Res. Def. Council*, 467 US 837 (1984) nonetheless applied to the Commission's revised plan. The Court then dismissed most of Friends' arguments as unripe or unreviewable and also because Friends had failed to demonstrate that the provisions of the revised plan would be impossible to implement in accordance with the Act. Friends' additionally argued that permitting some industrial development in certain areas was contrary to the Act's prohibition on industrial development. The Court agreed and the case was remanded for reconsideration of that issue. Reversed.

Harrington v. Water Resources Department, Case A129878 (November 7, 2007).*

The Water Resources Department (Department) denied Mr. Harrington's (Mr. H) applications to use diffuse surface water that he had impounded on his property on March 13, 2003. Mr. H filed a timely appeal to the Department for reconsideration on June 25, 2003 and received a letter informing him that the orders would not be reconsidered on March 19, 2004. The Department subsequently notified Mr. H on April 1 and April 6, 2004, that he was storing water illegally. On May 13, 2004, Mr. H filed in circuit court for review of the

March 19 letter and an order requiring the Department to issue final orders on his request for reconsideration. The trial court granted the Department's motions for summary judgment and Mr. H appealed. The Court of Appeals (Court) ruled that the Department did not need to issue a final order to deny reconsideration because, under ORS 183.484(2), the denial of the reconsideration was deemed final after 60 days. Mr. H also asked for a declaratory judgment. The Court denied it had jurisdiction over Mr. H's claim for declaratory judgment because his sole remedy was to seek agency review under the APA under *Eppler v. Board of Tax Service Examiners*, 189 Or App 216 (2003).

Portland Development Comm. v. State of Oregon, Case A132754 (November 7, 2007)*

The Portland Development Commission (PDC), an urban renewal and development agency, sold some property to National Meeting Company (MNC) in June 2004. Planning to develop the land for the new location of their headquarters, MNC accepted a \$1,160,000 loan from the PDC on the condition that PDC be allowed to approve any significant changes in design to the building before construction. MDC built the building, hired all the contractors and sub-contractors, and otherwise did all the work. In March 2005, after MNC's contractors had all finished the project, BOLI filed suit in circuit court, claiming that the construction project was subject to the requirements of the Prevailing Wage Rate Law. MNC and PDC moved for summary judgment because the project was not a "public work" contract under *former* ORS 279.348(3). The circuit court agreed and granted the motion. BOLI appealed, arguing that the Prevailing Wage Rate Law did apply under *former* ORS 279.348(3). The Court of Appeals affirmed the trial court's conclusion that the project was not a "public work" within the meaning of *former* ORS 279.348(3). The court applied *PGE*, analyzed *former* ORS 279.348(3), and interpreted the statutory language "contracted for" not to include projects on land sold to private developers for a private purpose.

Roseburg Forest Products v. Hardenbrook-Hardy, Case A131857 (November 7, 2007)*

The Workers' Compensation Board (Board) awarded "unscheduled" temporary disability to Terri Hardenbrook-Hardy (Hardenbrook). Roseburg Forest Products (Roseburg) issued a "correcting notice of closure," changing the disability award to "scheduled" disability, and including Hardenbrook's disability status therein. Hardenbrook appealed and an ALJ with the Board considered the extent of the permanent partial disability, increasing the award and thereby denying Roseburg's argument that the Board did not have authority to review the extent of the disability. The issue on appeal was whether, under OAR 436-030-0023, the board exceeded its statutory authority to review the extent of disability. The court found that the "text and context" of the rule clearly required the correcting notice to state "the information being corrected" and "the basis for the correction," but to limit the information in its correcting notice to the correction. Here, Roseburg's correcting notice included "the

extent of the permanent partial disability," so the Board did not exceed its authority in reviewing it.

Gould v. Deschutes County, Case A135856 (November 7, 2007).

Thornburgh applied to Deschutes County for approval of a conceptual master plan (CMP) regarding the proposed building of a resort. After review and hearings, the County approved the application on the condition that Thornburgh include a mitigation plan showing that any negative impacts of the proposed resort would be mitigated leaving no net loss of resources for fish and wildlife. The Land Use Board of Appeals (LUBA) generally upheld the County's approval. On appeal, Gould argued that LUBA erred because it upheld the approval of the CPA based on the fact that the mitigation plan was feasible, despite the fact that the county development ordinance required the mitigation plan be "complete." Gould also argued there was not substantial evidence in the record to support the mitigation plan. The Court of Appeals (Court) held that because the County failed to establish the required content of the mitigation plan and because the mitigation plan must be based on substantial evidence in the CMP record, LUBA's general determination that the plan was acceptable was unlawful in substance under ORS 197.850(9)(a). The Court emphasized that the standard of "feasibility" of the mitigation plan and CPA was inadequate and that under the county development ordinance there must be specific evidence to support a conclusion that the solutions to any negative impacts on the resources of fish and wildlife will be reasonably certain to succeed. Reversed.

Herring v. Lane County, Case A136155 (November 7, 2007).*

Lane County approved an amendment of its Rural Comprehensive Plan to change property from "agricultural" to "marginal land" under the "forest operation" provision of ORS 197.247 (1991). Herring appealed the county's approval on several grounds to the Land Use Board of Appeals (LUBA). LUBA affirmed the county's approval and Herring subsequently appealed to the Court of Appeals (Court) arguing that LUBA erred in affirming the county's use of 1983 prices in calculating the potential gross income of the forest operation because ORS 197.247 (1991) required using *pre* 1983 prices. The Court, applying *PGE* and analyzing the county's 1997 directive (which describes *how* the county would calculate under ORS 197.247 (1991)), agreed and held that the proper determination of the potential gross income of a "forest operation" should be calculated parallel to the treatment of a "farm operation" under ORS 197.247(1991). Thus, timber prices should be based on the five calendar years *preceding* 1983. Reversed.

*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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