

Administrative Law

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NEWSLETTER

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ALJ Independence and the Issue of Final Order Authority

By David Marcus*



David Marcus

I read with great interest the articles by John DiLorenzo and Philip Johnson published in the Fall issue of the Administrative Law Newsletter. Read together, these articles capture the essence of the debate that has been ongoing since before I began my career as an ALJ (known then as a hearing officer) in 1984. At issue is the appropriate role and authority of the ALJ in the decision making process when a citizen is aggrieved by a proposed action by a state agency.

It was not without some hesitation that I accepted Janice Krem's invitation to submit an ALJ's perspective on the issue. A full history of the issue, dating back to the days when Dave Frohnmayer and Wallace Carson were state legislators, is certainly beyond the scope of this article. However, there has been a noticeable movement toward judicialization of the administrative hearing process over the past decade. That has been applauded by some and decryed by others.

This movement found impetus with the creation of the Office of Administrative Hearings, and with the legislated change in title from hearing officer to Administrative Law Judge (ALJ) as well as the legislated mandate that the Chief ALJ "take all actions necessary to protect and ensure the independence of each administrative law judge assigned from the office." ORS 183.620(3). ALJ independence was directly tied to the goal of assuring Oregon citizens not only a fair and impartial hearing process, but a system that also supports and reinforces the appearance and perception of fairness. The effect of these legislative reforms has been to move the process closer to the judicial model and that has created expectations by parties and attorneys with respect to the outcome of the case—in short, the decision.

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The scenario described by Mr. DiLorenzo serves to demonstrate that the reforms that have been enacted have enhanced the perception of fairness with the hearing process before the ALJ. That has, in turn, perhaps refocused the concern for fairness and the appearance of fairness on the agency's subsequent decision process when it has reserved its authority to enter the final order.

Mr. DiLorenzo's experience of the commission adjourning into an executive session, along with the assistant attorney general who argued the case, certainly creates issues for the appearance of fairness, even if permissible under the law. The concerns Judge Rossman raised in his dissent in *Llewellyn v. Board of Chiropractic Examiners*, 119 Or App 397 (1993), still echo in the halls of the Department of Justice. But these issues are not concerns for ALJ independence; rather, they are concerns about fairness and the appearance of fairness in the agency's final order decision process.

As an ALJ who has conducted contested case hearings involving a variety of agencies, I have held numerous cases in which I was authorized to issue a final order, and numerous other cases in which I was authorized only to issue a proposed order, with the agency involved reserving its authority to issue the final order. In my view, the independence of an ALJ is not affected by the decisional authority delegated to the ALJ in the case.

The "independence" of the ALJ is related to the conduct of the hearing- to develop a full record- and to the preparation of the ALJ's order based solely on that record. Not so long ago, some agencies did not allow ALJ's to issue either a proposed order or a final order without internal review and revision by the agency and/or the assistant attorney general. While further reforms to enhance the independence of the ALJ and the hearing process through the OAH may be needed, there are a number of ways to do so short of transferring final order authority away from the agency to the ALJ.

The expression of concerns for ALJ independence, and the desire to enhance the independence of the ALJ is not a "collateral attack on the historic role of the agency in Oregon having final order authority," as asserted by Mr. Johnson. However, Oregon's APA, and indeed the APA in most other states, vests final decision authority in the agency initiating an action. History is but one reason to balk at establishing the OAH as an executive court.

Based on the data he was provided by the OAH, Mr. DiLorenzo raises legitimate concerns about the final decisions rendered by agencies. In that sample of 452 cases,

ALJ's issued only 42 proposed orders contrary to the agency's original notice of proposed action, and of that number more than half were overturned by the agency in its final order. Those numbers clearly raise concerns about fairness in the final order process. As was noted at the most recent meeting of the OAH Oversight Committee, however, better and broader statistics are needed to form a clearer picture of what is actually happening in all agencies for which the OAH conducts hearings but issues only a proposed order.

ORS 183.650 was enacted at the time of the creation of the OAH, with the intent of limiting the ability of an agency to modify and rewrite an ALJ's proposed order. Although the law is relatively recent, there are several appellate cases worthy of a close reading by those interested in reforms to agency final decision processes. Besides the recent case of *McGee Plumbing, Inc. v. Building Codes Division*, 221 Or App 123 (2008), referenced by Mr. Johnson, these include the following: *Becklin v. Board of Examiners for Engineering and Land Surveying*, 195 Or App 186 (2004); *Corcoran v. Board of Nursing*, 197 Or App 517 (2005); *Teacher Standards & Practices Commission v. Bergeron*, 342 Or 301 (2007); *Papas v. Oregon Liquor Control Commission*, 213 Or App 369 (2007); *Terway v. Real Estate Agency*, ___ Or App ___ (November 5, 2008).

**David Marcus is an ALJ, Arbitrator and Mediator at the Office of Administrative Hearings. He has been an ALJ since 1984. He served as Vice Chair of the Commission on Administrative Hearings, 1988-89, and also served on the Governor's Work Group, 1997-98, formed after the passage and veto of HB 2948. The views expressed in this article are his own and do not necessarily represent the views of the OAH or any other organization.*

From the Chair

By *Chris Cauble*



Chris Cauble

I would first like to thank you for giving me the opportunity to chair this diverse committee in what I expect to be an interesting and challenging year for the members of this section. You may be wondering what a Southern Oregon lawyer, who primarily practices civil litigation, estate planning, and real estate law is doing chairing the Administrative Law section of the bar? I have asked that question a lot too. The answer is that, as a general practice lawyer, administrative law is an increasingly complex area of the law involving many practitioners, not just government lawyers. Additionally, administrative law affects many more clients and citizens of our state, given the passage of Measure 37 and Measure 49, as well as the ever increasing influence of land use and environmental laws. Many lawyers who have complex practices must have increasing awareness of administrative agencies and how they work, the rulemaking process, contested case procedures, and judicial review. Additionally, I find that agency lawyers and decision makers should have increasing awareness of the private bar. As we move forward, I will try to address the concerns of the wide variety of practitioners in this area.

We face a system in great need of reform and that is facing many pressures, from many sources, for that reform. Many of us who practice in this area see us forced to come to grips with this. All of us must recognize that we all have a common purpose—to serve the citizens of Oregon with the due process and representation they deserve. Many issues are being looked at by our section; including whether ALJ's should have final order authority, questions as to what extent agencies should be able to assess costs to losing parties in contested case proceedings, and contested case procedures in general. Other issues in the legislature directly affecting many citizens involve legislation to allow agencies to compel mental competency exams to licensees without first holding a contested case hearing to determine if there is evidence of impropriety. There are many other issues being looked at by our section. These issues affect many Oregonians and our section is actively engaged in these issues and policy discussions.

I hope that we can come together to help solve these issues and offer common sense solutions. This is why I

have chosen to lead this section as chair and why I am honored that you have chosen me as your chairperson. Our executive committee is comprised of lawyers from many backgrounds and I am confident that we can work together. Let me also announce that this is the last newsletter that you will receive by mail. In order to save costs as well as paper, the executive committee has decided to send this newsletter electronically to all of the section members. This will allow us to prepare a much more colorful and informative newsletter, while allowing us to serve the section members better.

I can also announce that we are putting together a new OSB CLE Book for Administrative Law that will be scheduled for release in 2010. This is a very ambitious project involving several authors who are committing very valuable time to the project so that all practitioners in this area are well prepared. We hope to have some additional chapters and materials to address the major changes in Oregon administrative law that have occurred since the release of the last CLE book.

In closing, I look with excitement towards this new year and legislative session as your chair. I don't expect any groundbreaking legislation but I do hope to move the discussion further along towards reform of our existing system to make it fair for the citizens of Oregon. As general practice trial lawyer from Southern Oregon, I hope that my perspectives and experiences may help in these reforms that many of us know are necessary.

A Response to the Proposal to Judicialize Contested Case Hearings

By Warren G. Foote*



Warren G. Foote

This legislative session will see another effort to take final order authority from regulatory agencies and licensing boards in contested cases and give that authority to the Administrative Law Judges (ALJs) appointed to preside over individual cases. The immediate effect of such legislation would be to transfer authority from the Governor and his executive branch appointees to the ALJs within the Office of Administrative

Hearings. The result would be a judicialized process, where contested cases would more resemble a civil trial than it would an agency decision-making process.

Under the present system, the Governor provides policy direction to departments, agencies, boards and commissions as the state's chief executive officer. Inherent in his authority as chief executive is the authority of the Governor to appoint¹ (and remove²) persons to state public office, to serve as members of state licensing boards and commissions as well as heads of regulatory agencies and departments. Independent of the legislative process, regulatory agencies and professional licensing boards develop policy in two basic ways—through rulemaking, and by deciding questions of law and fact in contested case hearings (and by case settlement). Persons appointed by the Governor to agencies, boards and commissions are directly accountable to the Governor for the decisions that they make. In contrast, the Chief Administrative Law Judge is employed by the Director of the Employment Department for a four year term.³ The Chief ALJ in turn employs administrative law judges and manages the Office of Administrative Hearings. As a result, neither the Chief ALJ nor the ALJs that preside over contested case hearings are directly accountable to the Governor for the decisions that they make. If final order authority were vested in the ALJs by legislation as proposed, the practical effect would be to create an island of autonomous ALJs within the executive branch that can make policy as they decide contested cases that would not be directly answerable to the Governor.

The main impetus for restructuring the way contested cases are decided under the Administrative Procedures Act

(APA) appears to be coming from defense counsel who present laments from a past contested case in which an ALJ issued a proposed order that favored their client, only to find that the agency with final order authority reversed the ALJ's proposed order, to the disadvantage of their client. One proponent for transferring authority to the ALJs has depicted the exercise of final order authority by an agency as the action of "an agency that was hell bent on having things its own way." This depiction mischaracterizes the contested case hearing process as a variant of a civil trial, when the true purpose of a hearing under the APA is to provide respondents with procedural due process while ensuring that the decision maker (the agency head, board or commission) has a complete record upon which to make a decision.

The APA established contested case hearings as a formalized part of a regulatory agency's internal decision making process. Prior to deciding whether to impose administrative sanctions upon a member of the public or a licensed professional, the APA requires regulatory agencies to provide respondents with procedural due process, to include the right to reasonable notice, an opportunity to confront the evidence presented and the right to respond and present evidence and argument on all issues properly raised in the proceeding, see ORS 183.415 and 183.417(1). The hearing serves as the forum where all the evidence that the agency intends to rely upon in making its decision is presented.⁴ The APA also grants the right to judicial review of agency decisions in contested cases.⁵

In contrast to the judicial and legislative branches of government, the decision-making process for executive branch is designed to be informal, fast, and efficient. Agency decisions are also subject to different forms of judicial review, depending upon the form of the action.⁶ The current proposal is an invitation to abandon the current system, which is rooted in the exercise of agency judgment through the contested case hearing process, and to turn contested cases into a variant form of a civil trial that is a judicial process.

Under this proposal, decision-making authority in contested case hearings would be stripped from the agen-

cies and professional licensing boards that are charged by statute to protect the public and to regulate the profession, and placed into the hands of ALJs that are appointed on a case by case basis to preside over a contested case hearing. Implied with this function is the transfer of authority to the ALJs to authorize pre-hearing depositions.⁷ Under this civil trial model, boards would retain the authority to engage in rule-making, to investigate complaints, issue licenses, issue notices of intent to impose discipline and to approve settlement agreements; but would lack the authority over discovery or to modify ALJ decisions in contested cases.⁸

In 1980, Governor Victor Atiyeh issued Executive Order 80-9, which ensured that all state agencies, except those expressly mentioned, retained the ultimate decision-making authority for adjudicating contested cases. His reasoning was that: “The citizens of Oregon expect department heads and agency governing boards to accept the responsibility for decisions with which they have been charged. I have surveyed the agencies of state government, and they concur that this should be their responsibility.” This Executive Order recognizes that accountability to the public is indelibly linked to the responsibility for making decisions where there is often the most controversy—issuing final decisions in contested case hearings. It is in this context that regulatory agencies or licensing boards must apply their expertise and decide issues of professional standards of practice and ethics. And regulatory agencies and licensing boards do this knowing that they must live with the long term consequences of their decisions, both in terms of protecting the public and articulating standards of practice and ethics.

The underlying premise of the current proposal is that full ALJ independence would serve as an effective check on the authority of regulatory agencies and licensing boards. But this premise overlooks the checks that are already in place—including the right to judicial review for every contested case final order, as well as oversight by the Governor, the legislature, which must review and approve every agency and board bi-annual budget, and the public—both through the media and direct citizen interaction with state agencies and boards as well as through their elected representatives, professional associations, and citizen action groups. In contrast, ALJs approach each contested case without experience or training in the licensed profession or regulatory subject matter, and are not answerable either to the public or the profession for their decisions.

Before abandoning the present model of agency decision-making under the APA, policy makers should consider the advantages of the current system, which include the following:

- Presently, persons appointed to agencies and boards are drawn from the licensed profession and the public—this provides “in house” expertise to evaluate the evidence presented, review complex technical issues, evaluate expert testimony and interpret data.
- Agencies and boards must live with the results of each case, because decisions on these issues in contested cases become the standards of practice and ethics that protect the public and reflect policy choices that may have long term consequences for the profession and the public.
- Respondents in the present system are afforded the protections of procedural due process.
- Board deliberations are a synergistic process that results in consensus decision-making.
- An expanded pre-hearing discovery process under ALJ control could lead to extensive delays and greatly increased legal fees, thereby undermining the ability for agencies with limited resources to protect the public.

A hypothetical case may serve to illustrate the policy choice that the proposal presents: An engineer is under review by the Oregon State Board of Examiner for Engineers and Land Surveyors (OSBEELS). The engineer appears before the Board’s law enforcement committee and speaks directly to engineers and land surveyors about a controversial engineering design that led to the collapse of a bridge in Oregon. The Board subsequently decides to issue a notice of proposed discipline against the licensed engineer for having engaged in negligent engineering. Prior to the hearing, the defense files a motion to depose all the witnesses to be called at hearing by the Board. Despite objections because of the time and expense of deposing witness, in particular consultants that charge an hourly rate (as does board counsel), the ALJ grants the motion, thereby greatly increasing the litigation costs for the Board. At the contested case hearing, consultants testify on behalf of the Board to the effect that no reasonable engineer would have done so little research before deciding on the particular plan, that the plan was faulty, and the engineer’s actions were negligent. The engineer calls consultants to

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testify that the engineering was done within the broad standards of acceptable practice within the engineering community at large. The question is—who should make that decision? An ALJ would approach the case with no engineering training or experience, and would not answer to the public for the decision in the case, even if the decision could result in further public harm if other engineers were to incorporate the same design into their engineering plans. In contrast, the Board would have the benefit of six registered professional engineers with decades of combined experience, two registered professional land surveyors, one member who is both a registered engineer and land surveyor, and two public members to review the case, consider the competing testimony of the consultants, review the engineering documents, and render a final decision. It is the Board with its expertise and mandate for public protection that should set the acceptable standard of practice in Oregon.

The current system of agency contested case decision-making represents a balance between the exercise of agency judgment and expertise while protecting the procedural due process rights of applicants and licensees. Before championing any significant change to the APA, policy makers should assure themselves that the proposed change will not impair either component of that balance, while ensuring that the public's interest in having well regulated professions that protect the public from unethical and incompetent practitioners is advanced.

**Mr. Foote is a Senior Assistant Attorney General serving in the Oregon Department of Justice, Business Activities Section, and provides legal services to three professional licensing boards. The opinion expressed in this article are his own, and do not necessarily reflect the opinion of the Attorney General, the Oregon Department of Justice, or the professional licensing boards that he represents.*

Endnotes

- 1 Article III, Section 4, Oregon Constitution provides that "...all appointments and reappointments to state public office made by the Governor shall be subject to confirmation by the Senate."
- 2 ORS 236.140.
- 3 ORS 183.610(1).
- 4 See ORS 183.450; see also *Spray v. Board of Medical Examiners*, 50 Or App 311, 320 (1981).
- 5 ORS 183.482.
- 6 ORS 183.484 (orders in other than contested cases).
- 7 See HB 2058, which was introduced during the 2003 Legislative session.
- 8 SB 459 would have authorized ALJs to issue final orders. Agencies that disagreed with the ALJ's findings and sanctions would have had to file an appeal with the Court of Appeals.

It's Time For Water Court

By *Laura A. Schroeder** and *Courtney Duke**



Laura A. Schroeder

Water use increases in value annually in Oregon as areas traditionally considered “wet,” such as the Willamette valley, face growing population pressures, groundwater restrictions, and competition among municipal, environmental and agricultural interests. The growing demand on the state’s water supply and the collective interest of stakeholders has sparked legislative action – including funding from

the state legislature to study long term water supply and storage options. However studying future needs without first determining existing rights puts, “the cart before the horse.” If the state has not first determined its existing uses, it cannot adequately determine what is available for future use. The Oregon Water Resources Department cannot enforce in favor, or against, fish in the Klamath Basin because water uses existing before the water code (ORS Chapter 539) were not adjudicated.

The Current Adjudication Process

Water adjudication (outlined in ORS Chapter 539) is the legal process whereby water rights, which vested prior to the adoption of Oregon’s surface water code in 1909 and its groundwater code in 1955 (ORS Chapter 537), are quantified. Under the current process, a claim for a pre-code water right is filed with the Oregon Water Resources Department (“OWRD”) after a circuit court has declared a water basin to be adjudicated. Each claim is subject to public review and may be protested or contested by any person with a sufficient interest. OWRD compiles all claims and contests and refers them to the Office of Administrative Hearing (“OAH”) for a contested case hearing. OAH groups the claims and contests and schedules each for hearing. At the conclusion of the hearings process, the proposed orders are sent to OWRD’s Adjudicator who issues final order determinations of the water rights. The Adjudicator’s findings are filed with the Circuit Court, which hears all objections to the findings. Once those issues are resolved, the Circuit Court issues a decree that is appealable to the Court of Appeals. In the Klamath Basin Adjudication, for example, OWRD received over 700 claims for pre-code surface rights and over 5,000 contests to those claims. OWRD referred them all to OAH in 1990. OAH grouped the claims into four major categories:

Federal Reserved Claims, Bureau of Indian Affairs/Tribal Claims, Other Claims (Pre-1909, Allottee, Walton), and Uncontested Claims. Today, some 18 years later, OAH is still conducting hearings on those claims. OWRD estimates that approximately 92% of the claims are resolved and approximately 96% of the contests are resolved.

Lessons Learned from the Klamath Basin Adjudication

Among the lessons learned from the Klamath Basin is that Oregon’s current administrative process is not the most efficient way to handle water adjudications. Among the primary motivations of any administrative adjudicatory process is to handle administrative matters more inexpensively and quicker than regular civil litigation. Through the Klamath, we have found that water disputes generally never resolve quickly and are as or more costly than complex civil litigation. The issues raised in adjudications are technical and complicated; each case involves proof of historic development, complicated water facilities, hydrology and other scientific inquires. Typically numerous experts are required to establish various aspects of a water issue. In addition, administrative, state and federal law applies to many of the determinations. Water use, by its nature, affects numerous people at once and thus water cases generally involve multiple parties, thereby multiplying the number of witnesses, experts, lawyers and evidence. Resolving water issues in a contested case process for over a year or more involves numerous opportunities for review and reconsideration. When a water issue is involved, it is not uncommon for the contested case to span two years. In the contested case phase of the Klamath adjudication, some claims were heard by two or more ALJs from OAH. Each new judge resulted in an additional investment of time and expense to all involved including OAH. The assignment of multiple judges leads to a loss of expertise and inconsistent and incompatible decisions that must later be resolved internally at OAH, as may be appropriate, or by the OWRD Adjudicator. This leads to objections, additional review, and further dissatisfaction.

Moving Forward

For these reasons, it is time to set up a task force to explore revamping the present OAH process, either

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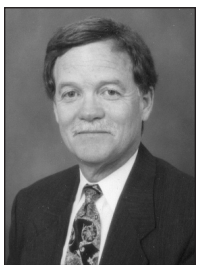
through setting up a dedicated administrative panel (like the PUC or LUBA) or establishing a separate water court to ensure that future cases, including both large scale adjudications and individual water rights are judged consistently and expediently. The task force should produce a white paper to support changes and perhaps new legislation to institute a procedure similar to those in other states that adjudicate water uses existing prior to adoption of the water code. This process may take 3-5 years; however Oregon cannot afford to wait another hundred years to forgo the determination and enforcement of Indian treaty

rights and other existing pre-water code uses of both surface and ground water. For more information, please contact Laura A. Schroeder at schroeder@water-law.com.

**Ms. Schroeder has represented businesses, municipalities, and individuals in water-related issues including water right acquisitions, sales, contract, adjudications and other administrative processes in Oregon for over 20 years. Ms. Schroeder is licensed in Idaho, Nevada and Washington. Ms. Duke focuses her practice on assisting agricultural clients and water organizations with water issues. Ms. Duke is licensed in Oregon and Nevada.*

Q & A: A Dialogue with Tom Ewing

By Janice Krem



Tom Ewing

In the October 2000 issue of this newsletter, I interviewed Tom Ewing about the newly created Hearing Officer Panel and the challenges facing him as the panel's first chief hearing officer. At that time, Ewing had been the centralized panel's chief for only nine months. In the initial interview in 2000, I described Ewing's task as chief administrative law judge as "a daunting challenge" according to all accounts.

Nevertheless, Ewing succeeded in establishing the panel and guiding its evolution into the Office of Administrative Hearings. Ewing recently resigned as Chief Administrative Law Judge of the Office of Administrative Hearings after having served as the centralized panel's first and only chief. Nine years later, Ewing reflects on the OAH and his tenure as its chief.

Krem: *What do you consider the most important achievements of the OAH during your tenure?*

Ewing: It's a very long list. I'm not sure where to begin. Perhaps most important was implementation of the legislative goal: ending the practice of requiring citizens to walk into a hearing room, only to see that the hearing officer presiding over the case was an employee of the very agency proposing to take the action against him or her in the first place. Today, their cases are decided by administrative law judges (I distinguish here between an agency "hearing officer" and an "administrative law judge"), who is competent in administrative law and who decides cases on the basis of the facts and law without regard to outcome.

The OAH has produced savings for Oregon taxpayers. There are economies of scale that inevitably attend a large

central panel such as Oregon's with 66 ALJs and approximately 44 operational staff. We were also tireless in looking for ways to be more efficient in our work—especially through cross-training. I've calculated the savings at about \$4.5 million. There's no better evidence of those savings than the fact that we eliminated 20 positions over a period of time when workload actually increased.

There was also a relentless emphasis on the quality of decision-making. From the very inception of the OAH, we established rigorous hiring standards for ALJs—on average, only one out of nine applicants, attorneys all, succeeds in becoming a permanent employee. The only training provided by agencies to their hearing officers was subject-matter specific. The OAH went further, emphasizing training in order-writing and the general principles of administrative law. In my opinion, the quality of our orders has really become outstanding.

Krem: *What were the toughest challenges you faced over the years?*

Ewing: There were cultural issues. The hearings units of six different agencies were consolidated in the Employment Department with the department's own hearings unit. Each of the hearing units brought with it different practices and priorities. Individually, these differences may have been minor, but cumulatively they posed real obstacles to genuine integration. There was also the physical location of staff—most continued to remain where they were, either home-stationed or housed in their former agency offices. It was only in the last two years that we finally succeeded in consolidating everyone in Tualatin,

Salem, and Eugene (there are two small satellite offices in Medford and Bend).

Related to culture was the fact that these ALJs had for years specialized in one kind of agency case. The central panel came along, and now ALJs were expected to cross-train in a variety of different subject-matters. This was an unwelcome shock for some.

But perhaps my greatest challenge personally over the years was dealing with the Employment Department. Some state central panels are housed in agencies for support, such as budget and personnel, but those agencies have no hearing needs. Oregon's OAH is unique in this respect, in that 60 percent of all referrals come from the Employment Department. To say the least, the department has not been indifferent to the OAH.

Krem: *Can you give me some examples?*

Ewing: This has a sorry and complicated history. I'll try to summarize.

There was a variety of issues—some trivial, others less so—with the Employment Department's first director. But the final straw was her instruction to make the OAH a career path for Employment Department adjudicators. This was not merely a detour but a complete reversal of my goal of creating a professional corps of attorney-ALJs expert in administrative law. The dispute went all the way up to the director of Department of Administrative Services. One day, the DAS director summoned both the Employment Department's director and me to a meeting. I walked into his office. He was standing beside a white board. On it he had drawn a rough organizational chart, showing the governor at the top, under that the DAS director, under that Employment Department's director, and directly under that the chief ALJ. He looked at me: "Tom, what about this don't you understand?" The conversation was over. Fortunately, the director was replaced soon afterwards, and I was able to bury the idea.

Which brings me to the last two years. This administration, the third I've worked under, was even more "hands-on" with the OAH than the first. Again, lack of space prevents me from adequately describing the problems. Here is one brief example: The OAH's structure on the hearings side was comprised of two geographical regions, northern and southern, each headed by a deputy chief ALJ who reported directly to me. One day, without any prior discussion, the administration instructed me to eliminate a deputy position. The reason: It wanted the OAH to look like the rest of the department. I recall thinking to myself at the time: "Where will that end?"

But the worst involved the recent demotion of 37 ALJs. In 2007 DAS had implemented a new ALJ series: ALJ 1, 2, and 3. The distinction turned generally on the variety and complexity of subject matters heard by ALJs. OAH management reviewed the new class specifications. It determined, based on the nature of OAH's work, that to be consistent with the specifications we would allocate most of the ALJs to the ALJ 2 tier, the remainder to ALJ 3.

Months later the Employment Department decided that, in fact, ALJs doing a combination of unemployment insurance and motor vehicle hearings should have been allocated to the lowest ALJ 1 tier. The fig leaf was that OAH management had misclassified these ALJs. The real reason, I am convinced, was to save the department money by having the "cheapest" ALJs doing unemployment hearings. I believed then, as I believe now, that our classification decisions were the right ones. A collateral effect is that now hearings for the remaining agencies served by the OAH will be presided over by the more "expensive" ALJs.

Krem: *What do you think should be done to achieve genuine independence for the OAH?*

Ewing: There is probably not a single employee of the OAH who isn't desperate to see the organization separated from the Employment Department. In these economic times, however, I seriously doubt that this is possible. There may be another way. Currently, ORS 183.605 simply states that the OAH "is established within the Employment Department." That statute could be amended to read that the OAH "is established within the Employment Department *for support purposes only.*"

One other change must occur. Currently, the chief ALJ is appointed for a four-year term. This of course provides some security for four years, but any chief who would like to be reappointed will still be vulnerable to pressure. The position should be converted to management service, effectively making the chief a "for-cause" employee.

Krem: *What do you regret the most about leaving the OAH?*

Ewing: Leaving my staff utterly and thoroughly demoralized. For the ALJs especially, the demotion made them feel that their services were disrespected. This is deeply regrettable. You will not find a more competent, more professional corps of administrative law judges, operational staff, or managers anywhere. It has truly been the greatest privilege of my life to lead them for nine years. They are, to my mind, the best of the best. They deserved better.

Case Notes

By Irene B. Taylor*

NOTE: These summaries are edited versions of those originally published by Willamette University's College of Law in Willamette Law Online.



Irene B. Taylor

SUPREME COURT DECISIONS

In re Complaint as to the Conduct of Jacqueline L. Koch, 345 Or ___ (December 11, 2008) (OSB 06-116, 06-117) (SC S055631)

Holding: (Per curiam opinion)

– Although an order of default deems as true all factual allegations in a complaint, the trial panel must still find that the facts establish the charged violations by clear and convincing evidence.

The Bar charged Koch, in connection with matters involving two separate clients. Koch did not respond to the Bar's complaint and a default order was entered against her. The Bar requested a trial panel to determine the appropriate sanction. The trial panel did not determine whether the accused committed the charged violations and limited its decision to an appropriate sanction. In a unanimous per curiam decision, the Oregon Supreme Court noted initially that the trial panel should not have limited its findings to an appropriate sanction. Although an order of default deems as true all factual allegations in a complaint, the facts must still establish the charged violations by clear and convincing evidence.

The Court found that Koch's failure to keep her client's informed and Koch's failure to return phone calls or take actions to finalize her client's legal matters were violations of RPC 1.3 and RPC 1.4(a). Additionally, Koch's repeated failure to respond during the Bar's investigation constituted four violations of RPC 8.1(a)(2). The Court further concluded that Koch's failure to provide an accounting of her client's funds despite her client's requests and her failure to return a client's funds promptly violated RPC 1.15-1(d) and DR 9-101(C)(3). However, Koch did not violate RPC 1.15-1(d) for failure to provide an accounting when one of her clients never requested an accounting. Similarly, Koch did not violate RPC 1.16(d), which requires a lawyer to take certain steps upon the termination of representation. The Bar alleged that Koch constructively terminated her representation by neglecting her client's matters. However, the

Bar's allegation merely stated a legal conclusion, and the Bar did not prove constructive termination by clear and convincing evidence, and Koch did not violate RPC 1.16(d). The Bar's allegations regarding RPC 1.4(b) were similarly deficient to find that Koch violated that rule because the allegations stated legal conclusions. The Court found that a suspension of 120 days was appropriate and suspended Koch from the practice of law for 120 days, effective 60 days from the date of the filing of this decision.

COURT OF APPEALS

Marella v. Employment Department, 223 Or App 121 (October 15, 2008)

HOLDING: (Opinion by Wollheim, J.) – The Employment Appeals Board (EAB) can disqualify a claimant from receiving unemployment benefits if claimant's sole reason for refusing a job offer is the lack of medical benefits.

Claimant Marella was disqualified by the EAB from receiving unemployment benefits. Claimant had refused to accept a 16-hour-per-week job offer as a dental assistant instructor because it did not include medical benefits. The final order from the Employment Department, affirmed by the EAB, was that Claimant "had not shown good cause for failing to accept work." The "good cause" standard is applied differently to impaired persons than to unimpaired persons. Claimant argued that she did not take the job because she had long-term impairments, but the Court of Appeals held that she did not raise this argument to the EAB and therefore did not preserve the issue. The Court stated that the definition in OAR 471-030-0038(6) of "good cause" includes the reasonable person standard. The Court concluded that EAB did not err in adopting the reasonable person definition for good cause, and that a reasonable person would not refuse a job for the sole reason of lack of medical benefits. Affirmed.

Knaggs v. Allegheny Technologies, 223 Or App 91 (October 15, 2008)

HOLDING: (Opinion by Landau, P.J.) – The board applied the correct standard of proof, substantial cause, in evaluating the compensability of claimant's condition.

Claimant injured his shoulder while attempting to catch a piece of falling equipment. He consulted with various doctors, who reached different conclusions about his condition and its causes. The ALJ found, and the Board agreed, that the claimant did not establish that work was a material contributing cause of his condition. On appeal, Claimant argued that the Board had used the wrong standard of proof with regards to the “material contributing cause” requirement. Claimant argued that under prior case law, “material” cause meant something less than “substantial” cause. The Court of Appeals disagreed, holding that the meaning rests in ORS 656.005(7) and is a matter of statutory construction. In the previous case, the court was interpreting a separate statute, which applied to medical services claims. Because this case was a matter of causation for the initial compensability, the Court found that the traditional “substantial cause” standard used by the Board was accurate. Affirmed.

Murdoch v. SAIF, 223 Or App 144 (October 15, 2008)

HOLDING: (Opinion by Schuman, J.) – The board’s conclusion that claimant’s diabetes, a condition unrelated to his employment, was the major contributing cause of the disease that required amputation of his toe is not supported by substantial reason. An amputation resulting from the infection of a work-related blister is compensable despite the presence of a non-work-related condition that made the blister more susceptible to infection.

Claimant, Mr. Murdoch, suffers from diabetes and the related conditions of diabetic neuropathy and microvascular disease. At work, claimant wore steel-toed boots for safety reasons, but the boots caused him to develop a blister; the blister became infected and the infection required claimant to have his toe amputated. The Workers’ Compensation Board, however, found that the amputation was caused by Mr. Murdoch’s diabetes-related conditions and refused Mr. Murdoch’s occupational disease claim. The Court of Appeals held that claimant’s diabetic condition “merely render[ed] [him] more susceptible to” the disease and that susceptibility cannot, in accordance with ORS 656.005(24)(c), be considered a “cause” for purposes of determining “major contributing cause” under ORS 656.802(2)(a). Furthermore, because the only other evidence in the record supports claimant’s position that the friction from his work boots caused the disease, the court also concluded that claimant’s amputation is compensable. Reversed and remanded.

Young v. Hermiston Good Samaritan, 223 Or App 99 (October 15, 2008)

HOLDING: (Opinion by Landau, P. J.) – Radiculopathy is a symptom, not an underlying medical condition, and thus is not compensable as a new or omitted medical condition in a workers’ compensation claim.

Claimant appealed Workers’ Compensation Board (Board) ruling upholding denial of a new or omitted medical condition claim. Claimant suffered compensable lower back injury in the course of her employment. After obtaining a doctor’s release to half-time, restricted work, claimant made a new or omitted medical condition claim for radiculopathy (pain radiating along nerve root). Under the relevant statute, a new or omitted medical condition claim must be for a medical condition. Relying on physicians’ opinions that radiculopathy is not a medical condition but a description of symptoms, the Board denied the claim. The Court of Appeals found that the Board’s decision that radiculopathy is not compensable, properly based on evaluation of medical evidence, was supported by substantial record evidence. Likewise, the Court upheld the Board’s denial of claimant’s current combined condition claim. Affirmed.

Blacknall v. Board of Parole and Post-Prison Supervision, 223 Or App 294 (October 29, 2008)

HOLDING: (Opinion by Landau, P. J.) – A petitioner who seeks judicial review of a board decision may be forced to pay prevailing party fees notwithstanding the colorable nature of the petitioner’s claim.

Petitioner sought judicial review after the Board of Parole and Post-Prison Supervision (board) denied his request for re-release on parole. Petitioner, however, was ultimately re-released before the case was submitted. The court subsequently dismissed the petition for review as moot and awarded the board a \$100 prevailing party fee and \$39.90 for printing costs. Petitioner objected to the fees, arguing that since the statute authorizing judicial review of board decisions explicitly authorizes fees when a petitioner has failed to state a colorable claim for review, the statute implicitly denies fees when petitioner has successfully stated a colorable claim. The Court of Appeals disagreed. Three statutes authorized prevailing party fees and the Oregon Supreme Court has allowed fees for review of board decisions even where the petitioner successfully

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stated a colorable claim. Costs allowed.

***Terway v. Real Estate Agency,*
223 Or App 501 (November 5, 2008)**

HOLDING: (Opinion by Edmonds, P.J.) – Because the words “apparent” and “readily ascertainable” in ORS 696.805(2)(c) are inexact terms, the Court of Appeals reviewed the commissioner’s interpretation for errors of law and was required to discern the policy underlying the use of those words. The commissioner’s interpretation of the terms carried out the legislature’s policy that real estate buyers have available the information known by the seller’s agent that would be necessary to making an informed decision to purchase.

Petitioner Terway, a seller’s agent, failed to disclose to buyers that real property was within a 100-year flood zone based on information in her possession. Terway was sanctioned for failing to disclose the information because the flood plain information was a material fact and not “apparent” or “readily ascertainable” to the buyers. The Real Estate Commissioner upheld the sanction, concluding that the information was not apparent or readily ascertainable because discovering it would require knowledge of flood plain terminology and the use of a Federal Emergency Management Administration map. The Court of Appeals held that the words “apparent” and “readily ascertainable” are inexact terms subject to agency interpretation. The Commissioner’s decision was consistent with legislative intent, and therefore, proper. Affirmed.

***Rushing v. SAIF, 223 Or App 625*
(November 12, 2008)**

HOLDING: (Opinion by Landau, P.J.) – A property interest acquired through continuous employment with a state entity does not extend beyond an employee’s resignation from the position in which he was continuously employed and transfer to a different position with an entity that is not subject to the state’s personnel laws.

Petitioner Rushing sued Respondent State Accident Insurance Fund Corporation (SAIF) for breach of contract and denial of due process after his offer of employment as a trial service employee with SAIF was withdrawn before he began work because of his lack of communication regarding his intention to begin work on the agreed upon day. Rushing had resigned from his position with the Department of Environmental Quality (DEQ) immediately prior to receiving notification that SAIF’s offer had

been withdrawn. The trial court granted SAIF’s motion for summary judgment, holding that Rushing’s job with SAIF was at will and could be terminated at any time. Rushing appealed, and the Court of Appeals affirmed, holding that SAIF had not contracted to hire Rushing permanently but had made an offer of at will employment, and that any property interest that Rushing had in continued state employment did not extend beyond his resignation from DEQ and transfer to SAIF, which is a state instrumentality but which is expressly exempted from state personnel laws. Affirmed.

***Carter v. Board of Parole and Post-Prison Supervision, 223 Or App 745*
(November 12, 2008)**

HOLDING: (Opinion by Ortega, J.) – Two doctors’ opinions that a prisoner lacks insight into his psychological functioning, along with the prisoner’s denial of an abusive history, constitute substantial evidence supporting deferral of a prisoner’s release date.

Petitioner, Mr. Carter, sought review of a Board of Parole and Post-Supervision (board) order deferring his prison release date for two years. The board had determined that petitioner suffered from a severe emotional disturbance constituting a threat to the health or safety of the community. Petitioner alleged that the board’s order was not supported by substantial evidence. The Court of Appeals held that two doctors’ opinions finding that petitioner lacked insight into his own psychological functioning, in addition to petitioner’s denial of his physically abusive history, established substantial evidence to support the board’s finding. Affirmed.

Cheeseman v. Jackson & Perkins Wholesale, Inc., 224 Or App ____ (November 19, 2008)

HOLDING: (Opinion by Edmonds, P. J.) – There is no statutory requirement that a conceded payment from an employer must expressly state that it is tendered as the conceded amount.

Plaintiff Cheeseman, and other plaintiffs were former sales associates for Defendant Jackson & Perkins Wholesale, Inc. (Jackson). Plaintiffs believed they were due paid vacation and holidays in addition to normal commission. However, Jackson contended that paid vacation and holidays merely meant no reduction in normal commission. Prior to litigation, Jackson tendered the amount it believed was due to plaintiffs who rejected it, claiming

Jackson needed to expressly state the payment was for the conceded amount. Plaintiffs then commenced this action alleging three claims relating to additional holiday and vacation pay and a fourth relating to Jackson's refusal to expressly state that the amount tendered earlier was the conceded amount. Both sides moved for summary judgment and the trial court ruled in favor of Jackson for the first three claims and plaintiffs for the last claim. Both parties appealed and the Court of Appeals reversed, holding that the first three claims related to disputed issues of fact and should not have been decided on summary judgment. As for the final claim, the Court held that there is no statutory requirement for an employer to expressly state that a conceded payment is for the conceded amount. Reversed and remanded for entry of judgment in favor of Defendants on Plaintiffs' fourth claim for relief; supplemental judgment for attorney fees reversed. On cross-appeal, judgment reversed and remanded.

Studor, Inc. v. State of Oregon,
224 Or App ___ (December 3, 2008)

HOLDING: (Opinion by Schuman, J.) – The Circuit Court does not have jurisdiction over an appeal of an agency decision without a final agency order.

Studor, Inc. appealed from a decision by the Department of Consumer and Business Services (DBCS) that denied Studor's code change proposal to the Oregon Plumbing Specialty Code. Studor's claim arose because the company used an Air Admittance Valve (AAV) as an alternative method to prevent sewer gases from passing through plumbing fixtures into buildings. Studor's method was one of multiple methods excluded from acceptable uses to prevent this flow of gasses and Studor wanted the code changed. The DCBS issued a letter denying Studor's request that the code be changed. Studor appealed the agency's decision to the trial court. The trial court reviewed the denial and remanded the agency's decision.

This case presents three questions resulting from a state agency's decision not to amend the state building code: First, did the Marion County Circuit Court have jurisdiction to review the denial? Second, if so, did the circuit court correctly remand the agency's decision? Third, did the circuit court err in awarding petitioner \$50,000 in attorney fees? The Court of Appeals found that the trial court did not have jurisdiction to hear the appeal and did not consider the other two issues on appeal as a result. Reversed and remanded; Supplemental Judgment vacated.

Funkhouser v. Wells Fargo Corp,
224 Or App ___ (December 3, 2008)

HOLDING: (Opinion by J. Schuman) – In replacing an original employment contract with a new one, the employer commits breach of contract when the replacement denies the employee a vested right to an employment benefit.

Plaintiff Funkhouser's original employment contract with Defendant Wells Fargo allowed her to build up unused sick leave. The bank merged with another company and terminated the original contract. Wells Fargo replaced the original contract with one where Plaintiff could not use accumulated sick leave. Plaintiff argued that she had already earned the accumulated sick time and taking it away was a breach of contract. The trial court granted Defendant's motion for summary judgment. The Court of Appeals found that, under the terms of the original contract, the Plaintiff was not entitled to use her accumulated sick leave after the contract ended. Therefore, she only had a vested right in the sick leave during the time the original contract was in effect. Therefore, Wells Fargo was not in breach of contract by denying accumulated sick leave under the new contract because Plaintiff did not have a vested right in that employment benefit. Affirmed.

Waste Management v. Pruitt,
224 Or App ___ (December 3, 2008)

HOLDING: (Opinion by Wollheim, J.) – In an occupational disease claim, the last employer responsible for contributing to the condition is responsible for compensating the claim.

Claimant Pruitt suffered a knee injury in 1976 while working for an un-joined party and subsequently underwent knee surgery. Later, Pruitt began working for Defendant SAIF Corporation. In 1999, working at SAIF, Pruitt fell and injured his knees. A physician diagnosed Pruitt's knees as permanently impaired. In November 2002, Pruitt began work for Waste Management (WM), however, after three weeks, Pruitt began suffering back and knee pain. After being diagnosed with degenerative arthritis, Pruitt brought this occupation disease claim against SAIF and WM. An ALJ determined that neither WM nor SAIF was responsible, because the condition was a consequence of Pruitt's 1976 injury. On appeal, the

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Worker's Compensation Board (board) reversed, holding that the injury was a degenerative disease. The board held that, although SAIF is presumptively responsible because it employed Pruitt when he first sought treatment, WM is actually responsible, being the last employer to actually contribute to Pruitt's injury. The Court of Appeals agreed, holding that substantial evidence existed to support the Board's decision that the injury was an occupational disease and, therefore, the last injurious exposure rule applied. Affirmed.

***Mortgage Galeria, LLC v. Employment
Department, 224 Or App ____
(December 10, 2008)***

HOLDING: (Opinion by Landau, P. J.) – Because employer's request for a hearing did not comply with applicable statutory requirements, the department did not err in rejecting employer's hearing request.

This is an unemployment insurance tax assessment case in which the Employment Department determined that employer owes unpaid taxes. Employer asked for a hearing on that determination, but the department declined to hold one because employer's hearing request did not comply with applicable statutory requirements. Employer filed for judicial review of the department's final order rejecting its request for a hearing. Affirmed.

**Irene B. Taylor is an attorney with the Office of Public Defense Services and is a member of the section's Executive Committee.*

News & Events

DOJ appointments

John Kroger, Oregon Attorney General, announced that Mary Williams, former Solicitor General, will serve as Deputy Attorney General. David Leith, former chief of the Special Litigation Unit, will serve as Associate Attorney General. Don Arnold was appointed counsel to the attorney general, a new position designed to help the office better serve state agencies.

Section Revising Text on Administrative Law

The Administrative Law Section will be publishing a revised edition of *Oregon Administrative Law*, the section's text on administrative law. Steve Schell, Chris Cauble, and Bernadette House will be the editors. According to Linda Kruschke, OSB Legal Publications Manager, the revision is expected to be published by May of 2010.

Forsythe Appointed Chief ALJ of OAH

Karla Forsythe has agreed to become the next Chief Administrative Law Judge for the Office of Administrative Hearings. Forsythe's appointment will become effective upon her having been granted active membership status by the Oregon State Bar.

Forsythe has served as Chapter 13 Standing Bankruptcy Trustee for southwest Washington since January 1998. Her other positions in public service include administering campaign and personal financial disclosure laws as the Executive Director of the Alaska Public Offices Commission, General Counsel to the Alaska Court System, and Ombudsperson for the Municipality of Anchorage. She also has held management positions with non-profit trade and business organizations in Oregon. She began her career as a legal services attorney. Forsythe holds a J.D. from Northeastern University Law School and a B.A. from Yale. She lives in Portland with her husband James S. Crane, who is a trial lawyer.

Administrative Law Program Scheduled for February 20, 2009

The Oregon Law Institute will present a comprehensive continuing legal education program, "Administrative Law: Staying Current with the Latest Developments", on Friday, February 20, 2009, at the Oregon Convention Center. Justice Gillette, Judge Landau, Professor Bill Funk, and Gorge Commission General Counsel Jeff Litwak will track recent state and federal law developments. Administrative law practitioners, former and current hearings officials, and the Department of Justice will trace practical developments. Registration information may be obtained from OLI at www.lclark.edu/org/oli. Questions? Call OLI at (503) 768-6580 in Portland or toll-free in Oregon at (800) 222-8213 or e-mail: oli@lclark.edu.

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