MINUTES
Approved by the Committee
Administrative Hearing Officer Committee
Tuesday, September 20, 2016
9:00 A.M.
EW 42
Boise, Idaho

Co-chair Senator Steve Vick called the meeting to order at 9:05 a.m.; a silent roll call was taken. Committee members in attendance: Co-chair Senator Steve Vick and Co-chair Representative Gary Collins; Senators Bart Davis, Kelly Anthon, and Grant Burgoyne; Representatives Lynn Luker, Stephen Hartgen, and John Gannon. Representative Lance Clow participated via conference-phone. Absent and excused: Senator Mary Souza. Legislative Services Office staff present were: Katharine Gerrity, Keith Bybee, and Ana Lara.

Other attendees: Richard Seamon, University of Idaho; Amy Hohnstein, Idaho Dept. of Labor; Director Rakesh Mohan, Hannah Crumrine, and Amanda Bartlett, Office of Performance Evaluations; Carlie Foster, Lobby Idaho; Richard Eppink, ACLU of Idaho; Wyatt Johnson, Angstman Johnson; Terry Jones, Quane Jones PLLC; Neil Colwell, Avista Corp.; Brian Donesley; Paul Stark; Kail Seibert; and Kahle Becker.

NOTE: presentations and handouts provided by the presenters/speakers are posted on the Idaho Legislature website: https://legislature.idaho.gov/sessioninfo/2016/interim/ahoc/; and copies of those items are on file at the Legislative Services office located in the State Capitol.

Co-chair Vick welcomed the committee members and the public to the first meeting of the Administrative Hearing Officer Committee.

Remarks Relating to Administrative Hearings in Idaho - Honorable Chief Justice Jim Jones

Co-chair Vick called upon the Honorable Chief Justice Jim Jones to introduce himself and begin his presentation. Chief Justice Jones clarified in his introduction that he was presenting to the committee of his own accord, and not on behalf of the Idaho Supreme Court. He explained that in the 1980s, when he was the Attorney General, the issue of whether there could be impartial administrative hearing officers if agencies were in charge of the hearings was a concern for him. He further explained that, at that time, the attorneys were under the agencies and not under the Office of the Attorney General. In some cases there were disputes between agencies, and if the administrative hearing officer was contracted through one agency, it was questionable whether there would be an impartial hearing. That issue has been resolved now, but there is still the concern about agencies contracting administrative hearing officers of their choosing and the potential bias on the hearing officer's side due to this.

Chief Justice Jones said that the issues he saw while in private practice and, on occasion, in the court, are cases that are disputes between the administrative agencies and licensees or employees. He stated that the Office of Performance Evaluation February 22, 2016 document, Risk of Bias in Administrative Hearings, does seem to address some of the problems. He opined that the system seems to work relatively well for the majority of administrative hearings. He added that he does not believe there is an issue so much with employees of the agency serving as hearing officers; rather the issues seem to be issues with contracted hearing officers.

He opined that there should be a small cadre of hearing officers who understand administrative law. He emphasized that they should not be selected by the agency, but by a rotating system. However, he said, people should have the ability to disqualify without cause the person who is selected, but then the next person should be selected by the rotating system as well. Chief Justice Jones expressed uncertainty regarding whether the judiciary should be in charge of the administrative

hearing system due to conflicting functions, and opined that the function should remain with the agency as part of the executive branch.

Discussion:

Representative Hartgen asked if Chief Justice Jones could offer any insight about what proportion of these cases involve a disciplinary grievance action within an agency, and if these personnel matters are being taken into an arbitration format that was previously performed differently. Chief Justice Jones responded that it appears to be that the number of employee disciplinary matters within the agency has decreased, although there have been quite a number of appeals from counties that seem to have the most problems with employee discipline. The biggest problems are with licensing agencies and whether they are receiving fair proceedings.

Senator Burgoyne asked if Chief Justice Jones could share his thoughts regarding the issue of de novo reviews of administrative decisions by the courts, as well as the absence of de novo review. He referenced the Office of Performance Evaluation's report that stated that all but about 5% of administrative decisions do not receive a de novo review. He also inquired if he believed, in the perspective of a practitioner, that the absence of a de novo review creates practical problems in the terms of filing appeals. Chief Justice Jones responded by stating that there are pros and cons to de novo reviews. He explained that if one has a de novo review it expands the amount of litigation and extends the time frame. He stated that there have been cases when the court has been bound by the record, and he would have liked for the court system to take a more thorough look and do a de novo review. He added that at times the court will learn of things that did not appear in the agency hearing.

Senator Burgoyne referred to a class of administrative or contested cases where a hearing officer is selected to review an agency's decision, but that hearing officer's decision is in a sense advisory to the agency head who can accept or reject the decision, and then appealable to the courts. In some instances the cases are subject to de novo review and in some instances they are not, but the decision that is on appeal is not from a hearing officer. He asked if this affects the opinions/reviews on the issue of virtues or non-virtues of a de novo review versus a non de novo review. Chief Justice Jones stated that the court asks that the agency state why they have departed from the hearing officer's findings and recommendations, although this does not always happen. He opined that there should be an obligation in every instance where an agency head makes a decision contrary to the recommendation of the hearing officer to explain why this was done.

Co-chair Vick asked Chief Justice Jones what his definition of 'small' was when he suggested a 'small' cadre of hearing officers. He responded that there should be enough hearing officers so that it would allow either side the ability to disqualify a randomly selected hearing officer; the number would also depend on how many hearings are done. He added that there are some agencies that have such specialized areas of law (e.g., water law and Dept. of Environmental Quality) that it would be best not to apply this to them. He recommended 10-20 hearing officers, and added that they would not have to be full-time.

Evaluation Report on the Risk of Bias in Administrative Hearings - Ms. Amanda Bartlett and Ms. Hannah Crumrine

Co-chair Vick called upon Ms. Amanda Bartlett and Ms. Hannah Crumrine, evaluators for the Office of Performance Evaluations (OPE) to begin their presentation about their report findings regarding the risk of bias in administrative hearings. Ms. Bartlett explained that administrative hearings are complex, and they affect a variety of decisions. She said that finding the right balance among fairness, efficiency, accessibility, and economy is vital. Ms. Bartlett explained that they designed their evaluation to:

- Determine the essential elements of a fair hearing;
- Identify sources for potential bias or perceived conflicts of interest;

- Identify safeguards that are currently in place; and
- Assess the risk of bias in administrative hearings.

Highlights and additional facts for OPE's presentation included:

- Any time agencies are making decisions that impact constitutional rights then the 14th amendment applies, which guarantees the right to due process. Some of the elements of due process include: notice of a proposed agency action, the right to know opposing evidence, the opportunity to present your position, and the requirement to produce written findings of fact and reasons for why the decision was made.
- OPE's evaluation focused on evidentiary hearings, which are administrative hearings in which due process is required. Within an evidentiary hearing, an unbiased decision maker is an essential element of due process.
- There is a little bit of ambiguity within the definition of bias (the inability or unwillingness to make a fair decision). Some circumstances that would appear to be a conflict of interest that may not cause a due process violation include: familiarity of the facts prior to the case, a preconception of the rightness or wrongness, or having taken a policy decision.
- In Idaho, agency heads are to act as the unbiased decision makers. Agency heads may delegate the responsibility to act as a hearing officer to someone else. The default in that case is for the hearing officer to issue a recommended order that is reviewed by the agency head, who can make amendments as they see fit, and issue the final order.
- There are a number of hearings where the agency head has delegated the responsibility to issue a preliminary order to the hearing officer in rule. The hearing officer will conduct the hearing and issue their order; unless the agency head acts, the preliminary order will become the final order by default. This typically occurs in decisions where there is a high volume of hearings.
- In Idaho Code, agency actions are the way the code describes those individual decisions, rules, or functions that agencies use to perform legally required duties and its actions that can be appealed through a hearing.
- OPE found that there were 213 actions that required the opportunity for a hearing. Of those 213 actions, 93 actions had an evidentiary hearing in fiscal years 2011-2015.
- Out of those 93 agency actions, there were 52,488 reported administrative hearings. The vast majority of those were held for two agency actions: 60% were for unemployment eligibility determination through the Dept. of Labor and 25% were for administrative license suspensions through the Dept. of Transportation. The remaining 15% are spread out between 91 different agency actions.
- There was only one case found from January of 2011 to June of 2015 where an appellant made the direct argument that a biased decision maker had caused a due process violation.
- Two policy perspectives: decentralized systems (such as in Idaho) and centralized systems.
- Within a decentralized system, the Legislature delegates the responsibility to hold hearings to the agency. Proponents of this system argue that the risk of bias is low and agencies are acting within their statutory authority to make accurate determinations because agencies have the subject-matter expertise to understand the laws and policies that apply to them. In addition, there is due process requirements that act as a safeguard, as well as additional safeguards that will help to mitigate the risk of any bias.
- A centralized system delegates the authority to conduct hearings to an independent agency. Proponents of a centralized system argue that fairness, quality, and efficiency are improved through this process. They also argue that while the risk of bias may be low, it's only a matter of time before bias does cause a problem. Twenty-seven states have adopted a centralized panel.

- Systemic review of factors that contribute to the potential for bias are: multiple agency roles and the relationship of the hearing officer to the agency.
- OPE recognizes that the assessment could not capture every nuance or individual safeguard that is unique to agencies and that some agencies are statutorily bound to conduct the duties that might be contributing to the potential for bias. It's important to understand the report is not meant to indicate any wrongdoing on the part of any agency or indicate that a particular proceeding needs to be changed. The risk assessment is merely a framework created for policy makers to have this discussion.
- Agency actions were categorized into four hearing officer models: agency not a party to the hearing, employee, contractor, and agency head.
- The risk of bias was either low or moderate risk in 85% of the actions reviewed; 14 of those actions were categorized as high-risk. Risk is low or moderate because agencies have safeguards in place to mitigate risk.
- OPE found that all 93 actions had the opportunity to have a hearing officer disqualified and are subject to a judicial review. Most agency actions have in place a conflict of interest policy, ex parte communication policy, and a professional code of ethics.
- Only 25% of agency actions had received hearing officer training. Specifically speaking of employee acting as hearing officers for those agency actions, 18% were separated organizationally or physically and 9% were separated functionally. While these numbers may appear low, only 11 of the 93 agency actions were heard by an employee hearing officer.
- Agencies do not have control over federal review and de novo review safeguards. Most agency actions did not have any involvement with federal oversight or a federal agency; the Legislature decides which agency actions will be subject to a de novo review.
- Within the agency head model, there were 15 actions and 14 of those were categorized as high-risk for bias. Some of the reasons for this are: the power of the agency is concentrated in the agency head, fewer safeguards are in place to mitigate the risk of bias, the statute does not require the agency head to appoint a separate hearing officer when an individual seeks to disqualify the hearing officer with or without cause, and there are fewer layers of agency appeal before the record and order become final when the agency head acts as the hearing officer.
- Some reasons an agency head may act as a hearing officer include:
    - The Legislature has delegated the authority to the agency head to act as the hearing officer and issue the final order;
    - Some outcomes from hearings could have significant policy implications and it's important for the agency head to be involved in the entire process and base the final order on direct observation from the proceedings; and
    - Some small agencies have less frequent hearings, and it would be cost-effective for the agency head to act as the hearing officer.
- Less than 1% of hearings were for high-risk actions. 52,488 hearings were reported by agencies and only .5% (255) of those hearings were found to fall under the high-risk category in the five fiscal years that were examined. The overwhelming amount of hearings were found to fall under moderate to low-risk categories.
- Policy makers could either accept, mitigate, or transfer the potential risk for bias.
- If policy makers decide that the risk for bias does not warrant changing from the current system to a centralized system, a recommendation is for agencies to publish comprehensive information about their hearing processes.
- If policy makers decide that the risk for bias could be mitigated without moving to a centralized system, a recommendation would be for agencies or the Legislature to consider whether current safeguards could be strengthened to help mitigate the risk for bias.

- Policy makers may decide that the risk for bias is too high and consider whether a central panel is necessary to mitigate the risk of bias within evidentiary hearings.
- Other strategies for the Legislature to consider include: creating an interim committee and inviting the Office of the Attorney General and the Dept. of Health and Welfare to present a status report to JLOC.

Discussion:

Co-chair Vick asked Ms. Bartlett if there was another way to assess if there was bias, given that so few cases are appealed to the Idaho Supreme Court. She responded that they found that the appeal rate in Idaho is roughly 1%, which is typical across the states. She explained that this is a problematic measure; it could mean that administrative hearings are producing good decisions, but it could also mean that individuals believe they will not get a better decision through the appellant process or they simply do not have the resources to appeal. She added that many states tackle this issue by doing perception surveys. However, there is a clear pattern that those who have won their cases find the system to be more fair than those who lost.

Representative Luker asked Ms. Bartlett if OPE had come across any win-loss statistics or percentages. She responded that she did not have precise numbers, but agency decisions are generally upheld. She described a couple of reasons for this, which include: agencies know their procedures very well and some individuals may not have the resources to hire representation. Representative Luker asked if there had been any discussion about categorization. Ms. Bartlett answered that OPE had discussed categorizing the different types of hearings, and it is something that might be able to be done in the future with the assistance from the agencies.

Senator Burgoyne asked if OPE believed that, in order for there to be an impact on the issue of bias, there would need to be an issue of direct interest or could it be an indirect interest issue. Ms. Bartlett responded that the courts have found that the indirect monetary interest (agencies hiring hearing officers) does not in and of itself create a due process violation. However, she said, there is an argument that if a hearing officer is hired by an agency and there is no guarantee of future work, and there is pressure to rule in the agency's favor, the indirect pressure would influence the outcome in an unfair way; this is built into the risk assessment as part of the risk factors.

Senator Burgoyne followed up by asking if she would agree or disagree, that when a hearing officer is making a recommendation and the agency head makes the ultimate decision, and the agency is one of the protagonists in the case, the agency is essentially given the right to veto the decision - a right that the citizen does not have. Ms. Bartlett responded that OPE had discussed this through their risk analysis and those administrative actions that were rated high-risk were actions in which the administrative head generally conducted the hearing. She said that the appearance and the concern that Senator Burgoyne raised definitely contributes to a higher risk for bias.

Senator Anthon asked if the code of ethics for each agency is internally created or if they are based on an internal model that is uniform throughout the United States. Ms. Bartlett explained that what they found is that in Idaho people primarily rely on the fact that their hearing officers are members of the state bar and assume they are using the State Bar's Code of Ethics and requirements that they disclose conflicts of interest. No agency has their own independently constructed code of ethics; they rely on the Bar's Code of Ethics. Senator Anthon asked if those hearing officers who do not work under the code of ethics are not attorneys. Ms. Bartlett responded that employee hearing officers are not necessarily attorneys.

Representative Gannon asked why some agencies have specified procedures while others have not. Ms. Bartlett explained that all administrative hearings have procedures that have to be adhered to; they are found either in the Administrative Procedures Act, or agencies have promulgated their own rules, or have specific statutes that guide how they conduct their hearings.

Senator Burgoyne asked if there was a requirement for administrative hearing officers to join the organizations that have adopted a standard code of ethics and adhere to the code of ethics. Ms. Bartlett responded that there was not a requirement to do so. He followed up by asking if in an administrative hearing officer situation, does a lawyer acting as a hearing officer have a client. She responded that within the code of ethics, there is no discussion regarding the relationship of a hearing officer to an agency. Senator Burgyone asked if there was a legal requirement in the state of Idaho for a hearing officer to be an Idaho licensed attorney. Ms. Bartlett responded that there was no such requirement.

Remarks Relating to Constitutional Concerns - Senator Jim Rice

Co-chair Vick called upon Senator Jim Rice from the Idaho State Legislature to present next. Senator Rice began his presentation by expressing his concern in the areas of administrative hearings and separation of powers considerations. He explained that there are hearings in which courts do not exercise de novo review; if they are bound by the factual findings of the agency then the fact finding function of the judiciary has been removed from itself and placed in the agency. This is a violation of the separation of powers.

He noted that an adversarial system of justice is used in the United States courts, and it is not necessarily necessary for due process and it is not necessarily a problem, unless there is no de novo review. He said cost is a consideration and de novo review does have additional costs. What is not taken into account, he stated, is that de novo review is a function of the courts, and not between agencies and courts. He said that there could be a number of reasons why something is not raised to the agency, such as futility, and the cost of appealing to the courts being too great. Senator Rice opined that a better approach would be to have either de novo reviews or continue with hearing officers, placing their decision after an agency decision and before proceeding into the district court. He said this could be done with hearing officers under the court. He opined that the hearing officer would not have any risk for bias because he would be placed under the judicial branch.

Discussion:

Senator Burgoyne asked Senator Rice for his thoughts about the potential for just one hearing within the courts that allows the agency to make its investigation determination, and if there is a dispute about the determination, then an appeal; the hearing would be held in the courts. Senator Rice answered that this would be the best option to avoid crossover. Senator Anthon asked if applying the same principles to local government would be analogous. Senator Rice responded that it would not necessarily be analogous because there is a separate set of constitutional provisions that set the authority of local government and how the Legislature determines what they may and may not do.

Administrative Hearings: Options for Idaho - Professor Richard Seamon

Co-chair Vick called upon Mr. Richard Seamon, Professor of Law at the University of Idaho, to present next. Professor Seamon introduced himself and provided a brief professional background about himself. He began his presentation by providing historical context for administrative law.

Highlights and additional facts for Professor Seamon's presentation included:

- Regulatory programs involve issuing licenses, permits, and other forms of approval to individual people and businesses; and enforcing rules for the holders of these licences and penalizing rule breakers.
- Administrative hearings in regulatory programs may address if a business owner is eligible for a permit, or if a license holder should lose his license because he has violated rules governing license holders.
- Administrative hearings may occur to determine initial eligibility for benefits and continuing eligibility.
- Administrative hearings occur to make determinations regarding public services and public land programs and resolve any disputes.
- Constitutional issues regarding administrative hearings: separation of powers and due process. Idaho Constitution, Article II, Section I addresses separation of powers.

- Administrative agencies are part of the executive branch, yet administrative hearings held by these agencies are "quasi-judicial."
- Idaho courts have found that agencies' exercise of quasi-judicial powers does not violate the separation of powers with the following reasoning:
    - It is not always possible to draw a clear line between each branch's powers or functions;
    - Quasi-judicial decisions concern matters over which the Legislature and the Executive Branch have constitutional powers; and
    - Quasi-judicial decisions must be subject to adequate judicial review to comply with separation of powers.
- Due process generally requires the government to give a person notice and an opportunity to be heard before finally depriving him/her of liberty of property. Property and liberty that are protected by due process include: driver's licenses, occupational and professional licenses, and certain ongoing government medicaid benefits.
- An impartial decision maker is essential to a fair hearing. There is a danger of structural bias when the hearing officer works for the agency for whom he holds the hearing.
- There is a question of whether judges could hold contested case hearings that are currently held in administrative agencies with the following approach example:
    - Agencies would continue to make first level decisions;
    - Requests for review would go to a new court within the Judicial Branch, which would review the matter de novo; and
    - That court's decision could be appealed to a district court.

    Professor Seamon's preliminary answer is that this may be a potential possiblity depending on legal restrictions, practical restrictions, and political considerations.
- Legal restrictions include: laws that subject administrative hearing decisions to administrative review and potential violation of the separation of powers, if administrative hearing decisions by judges were to be subject to review and modification by an executive branch official.
- Practical restrictions include: costs and transitioning existing hearing officers who are agency employees to judicial positions.
- Political restrictions could come from judges, agencies, and existing hearing officers and law firms who hold hearings under contracts with agencies.
- About half of the states have created a separate agency that employs hearing officers to hold hearings in contested cases for other state agencies. These central panel states differ widely in determining what state agencies are exempt from the central panel requirement.

Discussion:

Senator Davis asked if Professor Seamon could comment about a statutory provision that would preclude judicial review. Professor Seamon responded that it would be unconstitutional; he noted that a predicate of allowing executive branch agencies to exercise quasi-judical power is that ultimately courts have the final say - not the agency. He said that, from a practical perspective, many individuals cannot afford to pursue the matter any further.

Representative Luker asked Professor Seamon what his opinion is about whether the doctrine of deference to factual findings undermines the judicial power in terms of whether it is done in an administrative setting versus a judicial setting. Professor Seamon emphasized that his response is only his personal opinion, and stated his personal belief that modern doctrines of deference are unconstitutional. Representative Luker asked if he had an opinion about whether that rule of deference affects the appeal rate. Professor Seamon responded that his own personal belief is that it's futile to pursue the matter further, if the case was lost during the agency hearing; he added that it's difficult to get the court's attention, unless an egregious error has been made by an agency.

Senator Burgoyne asked, regarding the example of the executive branch review of judicial decisions, if the potential problem of executive branch review would be corrected if the administrative court's de novo review only occurs after the final administrative determination but before the appeal, and there is no opportunity for the agency to review or question the judicial ruling. Professor Seamon answered that it would avoid the problem of a judge's decision subject to review and possibly rejection by an executive branch official. He noted that there is a similar system in South Carolina.

Senator Burgoyne asked for his thoughts regarding the premise that only agencies have expertise and that courts cannot have expertise. Professor Seamon opined that he does not favor increasing specialization of decision makers and that any intelligent individual can develop expertise as the occasion arises. Senator Burgoyne followed up by asking if he was aware of any issues with having hearing officers with claimed expertise in the centralized function. He responded that he was not aware of any issues, and in fact, this practice is done in many central panel states.

Senator Burgoyne inquired about the concept of "minimal due process" and asked if 'adequate' in the law is defined as 'minimal' and if there should be an effort to achieve more than the minimum, which is expressed by the concept of no de novo review and deference. Professor Seamon replied that the court itself has never defined it.

Senator Davis provided a scenario and asked if Professor Seamon believed the training process for hearing officers might be discoverable in this particular scenario. Professor Seamon responded that he did not believe that this material would be discoverable as a routine matter in the context of a proceeding to get judicial review of an agency decision.

The committee adjourned for lunch at 12:35 p.m.

The committee reconvened at 1:40 p.m.

Mr. Richard Eppink's Presentation

Co-chair Collins called upon Mr. Richard Eppink to present. Mr. Eppink began his presentation by introducing himself as the Legal Director of ACLU of Idaho. He described his work on a class action lawsuit regarding due process protections and the Dept. of Health and Welfare. He explained that this lawsuit provides examples of due process issues that seem to exist across the Dept. of Health and Welfare (DHW) and other agencies. Part of the class action lawsuit has been about the hearing officers the DHW used.

Highlights and additional facts according to Mr. Eppink's presentation included:

- Found a troubling amount of volume of communications between the DHW and hearing officers that instructed them on how to deal with particular issues.
- Discovered that in some cases when the hearing officer ruled in a way that the DHW didn't like, they immediately called the hearing officer to ask him to issue an amended decision and then instructed the hearing officer firm to never use this particular hearing officer again due to the decision that was issued.
- The federal government stepped in and began to indicate to the DHW that it would disapprove the state's regular medicaid certification if it did not change its hearing officer regime. CMS has now required the DHW to certify that the agency head can no longer overturn hearing officer's findings of facts.
- DHW moved to end its contractual hearing officer regime, and instead have a group of attorneys within the Attorney General's Office to provide the hearing officer services in at least certain cases.

Representative Gannon inquired if this disapproval was based on a federal regulation or case law that might be applicable to other hearing officer situations. Mr. Eppink responded that it would be fair to say that it was based on both. He further explained that there are particular Medicaid regulations that address how a hearing officer system must be set up and those regulations expressly refer to federal case law regarding due process.

Mr. Terri Jones's Presentation

Co-chair Collins called upon Mr. Terri Jones to present next. Mr. Jones began his presentation by introducing himself and expressing concern regarding this topic. He opined that the selection of hearing officers for select state agencies should be done independently of and separately from agencies or boards. He emphasized the tremendous amount of power that boards have over those individuals with licenses. He said that to protect the property rights of those licensed professionals, the state should employ the use of a neutral and detached decision-maker, which the state of Idaho does not currently provide. He opined that there is an inherent unfairness to allow the agencies to be the investigator, prosecutor, judge and jury to determine if those professionals should lose their license.

He also opined that the two primary safeguards identified in OPE's report are insufficient to overcome the inherent bias associated with the contested actions before some state agencies. Mr. Jones described an experience where a hearing officer ruled in favor of one of his clients, a licensed doctor, and was never retained as a hearing officer by the Board of Medicine again. The board elected to reject the findings of the hearing officer in this case, and ruled against his client and revoked his medical license. Mr. Jones appealed it to the district court, and they ruled in his clients favor. It was then appealed to the Idaho Supreme Court where they reinstated two of the 30 charges, but ruled that they could not revoke his client's license. His client was unable to practice medicine for three years and subsequently lost his practice.

He said it is very difficult to expose this type of bias at the agency or board level, much less at the trial level. He noted the limited discovery tools that are available at the discovery level preclude and limit much discovery, making it almost impossible to explore the potential bias of the board members rendering the ultimate decision. He opined that the only fail-safe in the entire process is the involvement of a neutral and detached decision-maker at the hearing officer level.

He suggested that senior status judges, who are already employed, could serve as hearing officers in these cases. He said that if this is not a possibility, then licensed professionals deserve to at least have a neutral, unbiased hearing officer.

Mr. Kahle Becker's Presentation

Co-chair Collins called upon Mr. Kahle Becker to present next. Mr. Kahle Becker introduced himself and provided some background history regarding his employment as a deputy attorney general for the Dept. of Lands. He said at the time, certain agencies had in-house counsel including the Dept. of Lands. He explained that while serving as inhouse counsel for the Dept. of Lands, he never participated in any ex parte communication. However, he said it often created problems when there was a lack of staff to address representing the agency, advising the hearing officer, advising the head of the agency whenever one of the two in-house attorney generals was appointed.

He stated that if there isn't an inherit bias, then there is certainly a perception of bias given the close working proximity/relationship between the deputy attorney generals (DAG) and their assigned agencies. Mr. Becker emphasized that it is extremely expensive for an aggrieved applicant or objector to a permit to go through a hearing officer contested hearing process. He added that there is a risk of appealing the decision and facing attorney's fees for not only their own counsel, but the attorney's fees for the agency as well. He went on to say that these types of cases take a tremendous amount of time.

Mr. Becker suggested considering the system in Pennsylvania where there is a standing administrative law judge who specializes in certain areas and there is a perception of an absolute, unbiased third-party. He also suggested that the committee might consider researching the amount of money that agencies are using to hire outside hearing officers, and perform a cost-benefit analysis to determine if it is best to continue with the process. He said they might consider hiring a former judge to act as a neutral hearing officer.

Discussion:

Senator Davis asked what would be some of the factors Mr. Becker believes should be in the statute to give the court the authority to revisit at least portions of the record. Mr. Becker suggested lowering the standard of deference whenever there is an in-house agency staff member would be useful.

Mr. Jim Plane's Presentation

Co-chair Collins called upon Mr. Jim Plane to present next. After introducing himself, Mr. Plane described his experience with the hearing process of the Department of Lands and expressed his discontent. He opined that there was bias on the agency's part and that the process was exacerbated by the Office of the Attorney General. He expressed that there was at least perceived bias, given that one deputy attorney general represented the hearing officer and the other represented the agency. He said before the second hearing, the department's deputy attorney general filed a motion to exclude his testimony which cost him a lot of time and money. However, Mr. Plane noted that the hearing officer did point out that he had a legal right to attend.

Mr. Plane opined that the third hearing officer, who was contracted by the agency, demonstrated bias and found that this hearing officer had cited exhibits in his final decision that were never accepted. He added that the hearing officer also reversed key testimony from an IDL witness that was unfavorable to IDL. He said the hearing officer in his final report incorporated a false survey concerning his property and his neighbor's property.

Mr. Plane opined the fact that the agency determines the findings of fact makes it difficult for a citizen to take the case to the Idaho Supreme Court. He emphasized that it could cost someone tens of thousands of dollars to take a case to the Idaho Supreme Court, and added that it should not be so costly for citizens to appeal their cases.

Ms. Kail Seibert's Presentation

Co-chair Collins called upon Ms. Kail Seibert to present next. She introduced herself and provided her background in both legal work and as a former hearing officer. She opined that there is tremendous bias in the hearing process and many citizens cannot afford the process. She added that many administrative rules in and of themselves are biased.

She described a scenario in 2008 in which she found against the Dept. of Environmental Quality and in 2009 she also found against the Dept. of Health and Welfare. The Idaho Supreme Court upheld her rulings both times. After these two cases, she was never hired as a hearing officer again; she was recused each time. Ms. Seibert expressed her agreement that there should be independent hearing officers. She emphasized that as a hearing officer she was provided no training or instructions. She stated that she was no longer a hearing officer due to her unbiased rulings.

Representative Luker asked if there was additional built-in biases in any of her cases. Ms. Seibert described a case in which the Attorney General made a motion for her to be recused due to his belief that she was targeting agencies.

Mr. Wyatt Johnson's Presentation

Co-chair Collins called upon Mr. Wyatt Johnson to present next. Mr. Johnson introduced himself and provided his background as a private attorney. He opined that at this time we have unfair hearings due to biased hearing officers. He described several cases where he has received the decisions that the agencies were asking for, with no real consideration of the facts.

Mr. Johnson went on to describe a case he had won for one of his clients in front of the Idaho Real Estate Commission. He emphasized that the process was incredibly expensive. He said there is no motivation for a prosecuting agency to hesitate on a claim that is bad or to consider whether they are taking an unfair view of the facts. He suggested that each agency allocate a portion of their

budget to an independent body who would conduct hearings; agencies would have to exercise some discretion on the cases they pursue.

Mr. Brian Donesley's Presentation

Co-chair Collins called upon Mr. Brian Donesley to present next. Mr. Donesley introduced himself and provided his background in both the public and private sectors. He opined that the hearing process has blurred the lines among the executive, judicial, legislative and the private bar into what was essentially a judicial function and should be. He stated his belief that the hearing process is not a proper one due to personal interests of the administrators, private and public sector attorneys, etc.

Mr. Donesley described cases of improprieties on behalf of some Idaho state agencies and opined that personal interests drive these actions, whether it's politics, personal career, etc. He suggested the Legislature consider creating an administrative court and added that perhaps the Legislature could administer it with a subcommittee. He opined that the process is not fair and goes against due process. He suggested that granting attorney's fees should also be considered. Mr. Donesley opined that there was a perceived bias, given that many attorneys go on to become administrators and implied that this is due to biased recommendations.

Discussion:

Senator Davis asked what his recommendations are for the hearing process. Mr. Donesley suggested a third party who is immune to influence from agencies and training for the Administrative Procedures Act, and emphasized that bipartisanship is also important.

Mr. Paul Stark's Presentation

Co-chair Collins called upon Mr. Paul Stark to present next. Mr. Stark introduced himself and emphasized he was there to testify in his individual capacity as an attorney. He stated that he was in favor of creating a uniform system for appointment of hearing officers in administrative hearings. He described cases in which he, as the attorney, had no ability to have discovery, had no subpoena power, and there were no rules of evidence in the process. Mr. Stark stated that all of these factors place citizens at a disadvantage.

He recommended a neutral, random process for nominating hearing officers for these proceedings, allowing the ability to conduct discovery and/or the ability to subpoena witnesses, and also de novo review.

Committee Discussion:

Representative Luker suggested the committee look at four areas: how hearing officers are selected, the issue of the rule of deference, de novo review, and discussion of the agency head. He stated that many of these issues could be addressed with adjustments to the Administrative Procedures Act. He also added that he would like to look into how much the agencies are spending on hearing officers and conduct a cost-benefit analysis to make a comparison between the current system and potentially creating another system. He asked if they could also have the Office of the Attorney General provide the committee with a status report.

Senator Burgoyne reiterated his concern about the fairness in administrative hearings. He emphasized that in order to have fair and ethical proceedings, a system in where hearing officers are attorneys and are selected, trained, and held to a standard by an objective neutral is extremely important. He opined that it would be best to create a central panel that could reside in either the Dept. of Administration or in the courts.

Representative Gannon asked for staff to analyze how much it would cost agencies, with the exception of a select few specifically identified agencies, to have a central panel as described during the meeting.

Senator Davis suggested the committee should hear about the current training practices. He also suggested the committee members look at the uniform act before the next meeting.

Representative Hartgen asked if the committee could hear from agency administrators about the process.

Co-chair Vick stated that while there may not be many problems with the system, it does not mean that the problems are not serious. He also said that while he would not like to see a separate agency created, he would consider the possibility of a panel.

The committee scheduled the next meeting for October 25.

The committee adjourned at 3:57 p.m.