

Minutes of the Joint Legislative Oversight Committee

February 22, 2016

Room EW42, Capitol, Boise, Idaho



Cochair Representative John Rusche called the meeting to order at 3:30 p.m. Attending the meeting were Senators Cliff Bayer, Steve Vick, Cherie Buckner-Webb and Representatives Maxine Bell, Gayle Batt, and Elaine Smith. Senator Michelle Stennett arrived after the meeting had started. Also present were Rakesh Mohan, director, Margaret Campbell, administrative coordinator; and other OPE staff. Audience members included the following:

Senators ProTem Brent Hill and Grant Burgoyne
Representatives Lynn Luker and Tom Dayley
Sharon Harrigfeld, Director, Department of Juvenile Corrections
Kenneth Edmunds, Director, Department of Labor
Jay Engstrom and Doug Werth, Deputy Attorneys General for Department of Labor
Paul Spannkebel, Department of Health and Welfare
Mike Chakarun, State Tax Commission
Jeanne Jackson-Heim, Real Estate Commission
Sandy Evans, Board of Nursing
Alex Adams, Board of Pharmacy
Mike Kane, attorney representing Board of Dentistry and Board of Professional Engineers

Approval of minutes

Senator Bayer moved to approve the minutes of the meeting on January 18, 2016. Representative Smith seconded the motion, and it passed by voice vote.

Report release: *Risk of Bias in Administrative Hearings*

Senator Vick moved to receive the report *Risk of Bias in Administrative Hearings*. Senator Bayer seconded the motion, and it passed by voice vote.

Cochair Rusche called on Rakesh to introduce the report. Rakesh said Senator Burgoyne and Representative Luker had requested the office to study potential conflicts of interest in administrative hearings, particularly when the agency was a party in the case or when an agency head served as the hearing officer. Rakesh said the project was big and included 75 agencies—many agency officials were attending the meeting. He thanked them for their cooperation. He expressed appreciation for two individuals, Kay Christensen of the Attorney General's Office, and Richard Seaman, professor at the University of Idaho, for their expertise in administrative law.

Amanda Bartlett, principal evaluator, Hannah Crumrine, senior evaluator, summarized findings and recommendations of the report. Amanda indicated that administrative hearings, with an impartial decision maker, helped ensure citizens' constitutional rights for due process when state agencies made decisions, such as driver's license suspension, unemployment determinations, or food stamp violations.

In 79 Idaho Supreme Court opinions on appeals from administrative hearings, only one appellant had argued that due process had been violated by a biased decision maker. Cochair Rusche asked how many went to court. Amanda said the overall appeal rate was less than 1%.

Traditional methods for measuring bias were limited and difficult to interpret. Low appeals rates could indicate that parties were generally satisfied with the results, parties were not fully aware of their appeal rights, or parties were disengaged with the system. Parties may have also lacked resources to continue the appeal process.

Because traditional methods of measure were limited and court appeals were few, the team analyzed and ranked the risk of bias for hearing officers in agency actions, which represented the type of decision that could have required a hearing in fiscal years 2011–2015. The analysis incorporated factors (e.g., agencies a party in the case) and safeguards (e.g., ability to disqualify hearing officers) that either increased or mitigated the potential for bias. Of 93 different actions in fiscal years 2001–2015, 85% were either low or moderate for potential risk. The remaining 15% were high.

High risk actions were typically made by agency heads and had fewer safeguards and levels of agency appeal. The high-risk ranking did not necessarily indicate that change was necessary. Cochair Rusche clarified that the risk was not an adverse or improper decision; it was the risk of bias.

The team assessed the overall risk of bias in administrative hearings as low.

Representative Batt asked if agencies could decide which safeguards to use. Hannah said about 50% of the 93 decisions fell under the Administrative Procedure Act, which specified safeguard procedures. The other 50% were identified through literature review and agency survey responses. Many agencies fell within federal review and had additional safeguards built into their procedures.

Representative Batt asked whether the policy of disqualifying hearing officers was practiced consistently among agencies, particularly when the agency head was the hearing officer. Amanda said an agency head could hear or delegate an appeal. If the appeal was to disqualify a hearing officer, the agency head would determine whether the motion would be granted. Representative Batt asked whether this policy was voluntary or required by the Administrative Procedure Act. Amanda said disqualification was part of the act, but agencies not adhering to the act were also consistently applying it.

Senator Stennett asked about the disqualification of hearing officer without cause and if a party could repeatedly request disqualifications in a hearing. Amanda said the party could have one request to disqualify and could include in the request that subsequent hearing officers not be affiliated with the agency.

Hannah discussed three recommendations to reduce the level of any real or perceived bias: improve agency communication to the public, strengthen agency safeguards, and consider establishing an independent agency to conduct hearings. Depending on the steps taken, she recommended an interim committee to coordinate policy changes and consider agency-specific nuances in hearing procedures. She also recommended that the committee invite the Department of Health and Welfare and the Office of the Attorney General to discuss strategies they used in an interagency agreement to conduct Medicaid fair hearings.

Cochair Rusche clarified that if the Legislature were concerned about the 0.5% of administrative hearings that were conducted for high-risk actions, it could look at the recommendation to appoint an interim committee. Otherwise, an interim committee was not in order. Amanda indicated that an interim committee may be appropriate not only for high-risk but low- and moderate-risk actions.

Cochair Rusche invited Michael Kane, administrative law for the Board of Dentistry and the Board of Professional Engineers, to address the committee. Mr. Kane said he was surprised that agency heads had been ranked as high risk. The Legislature had charged the boards to make these decisions. Cochair Rusche said he had intentionally asked if high risk meant risk for a bad decision and the answer was no—risk was for bias. He urged Mr. Kane not to take the report as casting aspersions on the boards but to look for ways to mitigate perception of bias.

Cochair Rusche invited Jay Engstrom, deputy attorney general for the Department of Labor, to address the committee. Mr. Engstrom described Labor's levels of review required by federal regulations and expressed concern about implementing a centralized system. He said a centralized system could not employ hearing officers with the same level of subject-matter expertise as Labor currently used.

Cochair Rusche said he would like to have the Attorney General's Office and the Department of Health and Welfare speak to their alliance at a meeting next year. He would also like to hear more about due process rights and whether agencies' written information could be clearer to help the public through the process.

Rakesh said he could have the Attorney General and Health and Welfare provide information in a follow-up or he could incorporate their comments into a status report. Aside from those two facets, Senator Bayer asked if a follow-up would include anything else. Rakesh said there was not much more the office could do. Senator Bayer asked about a timeframe, and Rakesh said he could have the follow-up done in January or February 2017.

Representative Batt said she also wanted to hear from the Attorney General and Health and Welfare. Referring to recommendations, she asked whether safeguards in place could be strengthened and how agencies would be asked to strengthen communication. Rakesh said the office could ask agencies about changes to publications or safeguards to processes during the follow-up.

Cochair Rusche asked whether all agencies had received a copy of the report so they could understand how to reduce the risk of bias. Rakesh said he had sent the report electronically to the agencies.

Senator Bayer moved to conduct a follow-up report in approximately one year. Representative Batt seconded the motion, and it passed by voice vote.

Follow-up report release: *Confinement of Juvenile Offenders*

Senator Bayer moved to receive the follow-up report *Confinement of Juvenile Offenders*. Senator Stennett seconded the motion, and it passed by voice vote.

Cochair Rusche called on Rakesh to introduce the report. Rakesh said the report brought good news to the committee.

Tony Grange, senior evaluator, summarized recommendations and implementation of the report. He said the 2014 evaluation had looked at the entire continuum of the juvenile justice system and directed nine recommendations to stakeholders. Tony summarized action taken to meet the intent of the recommendations. Three recommendations were complete and six were in progress. Of the six, three had legislation for consideration this session and three were being addressed by ongoing projects.

Cochair Rusche asked how susceptible Juvenile Corrections would be to removal of Millennium Fund support. He said there was a proposal by a legislator to take levy funds off the table. Tony said he did not discuss this issue with the department and deferred to the question to Director Herrigfeld.

Senator Buckner-Webb asked whether families had input into whether diversion happened. Tony said statute gave authority to a county prosecutor to divert. In some counties, the prosecutor made the decision, and in other counties, a team decided whether to divert and some included the family in the decision. Senator Buckner-Webb asked what would happen if a child were put in diversion but the family was fragmented and could not support the child. Tony said the probation officers would be better suited to answer her question.

Cochair Rusche called on Sharon Herrigfeld, Director, Department of Juvenile Corrections, to address the committee. Ms. Herrigfeld said the department understood the value of families. Through continuum of care, she had been working with family engagement. Some families may not have necessary skills, so through available funding, the department provided additional services.

Cochair Rusche said the follow-up showed good response.

Representative Bell moved to have a follow-up conducted for release during the next session to resolve the remaining recommendations. Representative Batt seconded the motion, and it passed by voice vote.

Representative Bell said that juvenile justice and the efforts they had made in the community were a success story. She expressed appreciation for their efforts.

Other business

Rakesh said he had three follow-up reports to release by mid-March: water quality, contracting for legal services, and taxpayer advocacy. In addition, the committee needed to meet for topic selection. He said he would notify all legislators tomorrow about submitting requests and allow two weeks before the meeting. In talking with legislators, he was aware that several topics were pending: foster care, Tribes and Public Law 280, and a surplus property one-stop shop.

Senator Bayer said the committee needed to know the office's current workload and asked Rakesh to assess requests by size, complexity, and the number or mix that the office could handle. Rakesh said he would provide that information and hold a meeting in two to three weeks.

Senator Stennett moved to adjourn. Representative Bell seconded the motion, and it passed by voice vote.

The meeting adjourned at 5:00 pm.