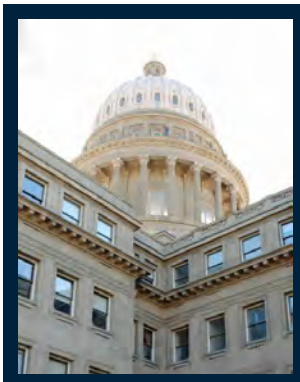
Evaluation report 16-02
February 2016

Risk of Bias in Administrative Hearings

Office of Performance Evaluations
Idaho Legislature



Senator Cliff Bayer (R) and Representative John Rusche (D) cochair the committee.

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From the director

February 17, 2016

Members
Joint Legislative Oversight Committee
Idaho Legislature

A risk of real or perceived hearing officer bias is present in all evidentiary hearings. This evaluation systematically looks at factors that affect the potential for bias in Idaho's administrative hearing process.

We found the overall risk of bias is low because state agencies have implemented a variety of safeguards to mitigate the risk. The question before policymakers is whether the remaining risk is compelling enough to prompt either statewide or agency-specific change.

Our report is designed to help policymakers determine whether change is necessary. If policymakers determine change is necessary, we believe an interim committee may provide an opportunity to identify and incorporate into policy the nuances of hearing procedures within individual agencies.

Sincerely,

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Included in the back of the report are formal responses from seven agencies.

Amanda Bartlett and Hannah Crumrine conducted this study with help from Tony Grange, Lance McCleve, and Ryan Linnarz.

Margaret Campbell copy edited and desktop published the report.

Consultants Bob Thomas and Brad Foltman conducted the quality control review.

Contents

Executive summary

Framing the issue

Administrative hearings are quasi-judicial processes in which agencies may perform the roles of investigator, prosecutor, and judge. Within this process, the responsibility of the hearing officer to be an unbiased decision maker is key to ensuring that citizens' constitutional rights for due process are carried out.

Instances of biased decisions are difficult to prove. Confirmed cases of bias are rare, and the appeal rate of administrative hearings to district court is low. However, real and perceived conflicts of interest can be inherent in the structure of administrative hearings and pose a risk that bias will be present. To the extent that such appearances exist, public confidence in the hearing process can be undermined.

Twenty-seven states have created a centralized system that uses hearing officers housed in an independent agency. Idaho uses a decentralized system where agencies are authorized to conduct hearings. Safeguards against bias are found in statute, rules, or agency procedure.

Legislative interest

In March 2015 the Joint Legislative Oversight Committee approved a study to evaluate concerns about whether Idaho's decentralized system creates conflicts of interest or affects the ability of hearing officers to make unbiased decisions. The requesters wanted to know whether agency practices adhere to federal and state laws and whether these laws provide adequate safeguards to avoid real or perceived conflicts of interest.

Evaluation approach

Overall, agencies have incorporated safeguards to mitigate the risk of bias.

We designed our evaluation with four objectives: (1) determine the essential elements of a fair hearing, (2) identify the sources for potential bias or perceived conflicts of interest, (3) identify the safeguards in place that mitigate the risk of bias, and (4) assess the risk of bias for Idaho administrative hearings.

Knowing the limitations of previous studies, we developed a method to assess the risk of bias within evidentiary hearings. Using a combination of factors representing arguments from proponents of both centralized and decentralized systems, our risk analysis categorizes agency actions as low, moderate, or high risk of bias.

Findings

Although safeguards are in place, a risk of bias still exists in all agency actions.

Overall, agencies have incorporated a variety of safeguards to mitigate the risk of bias. Exhibit 1 lists the nine safeguards we identified and the percentage of actions with those safeguards in place. Some agencies have explicitly built safeguards into procedures. Other agencies use attorneys as hearing officers and rely on the professional standards of the bar to set expectations.

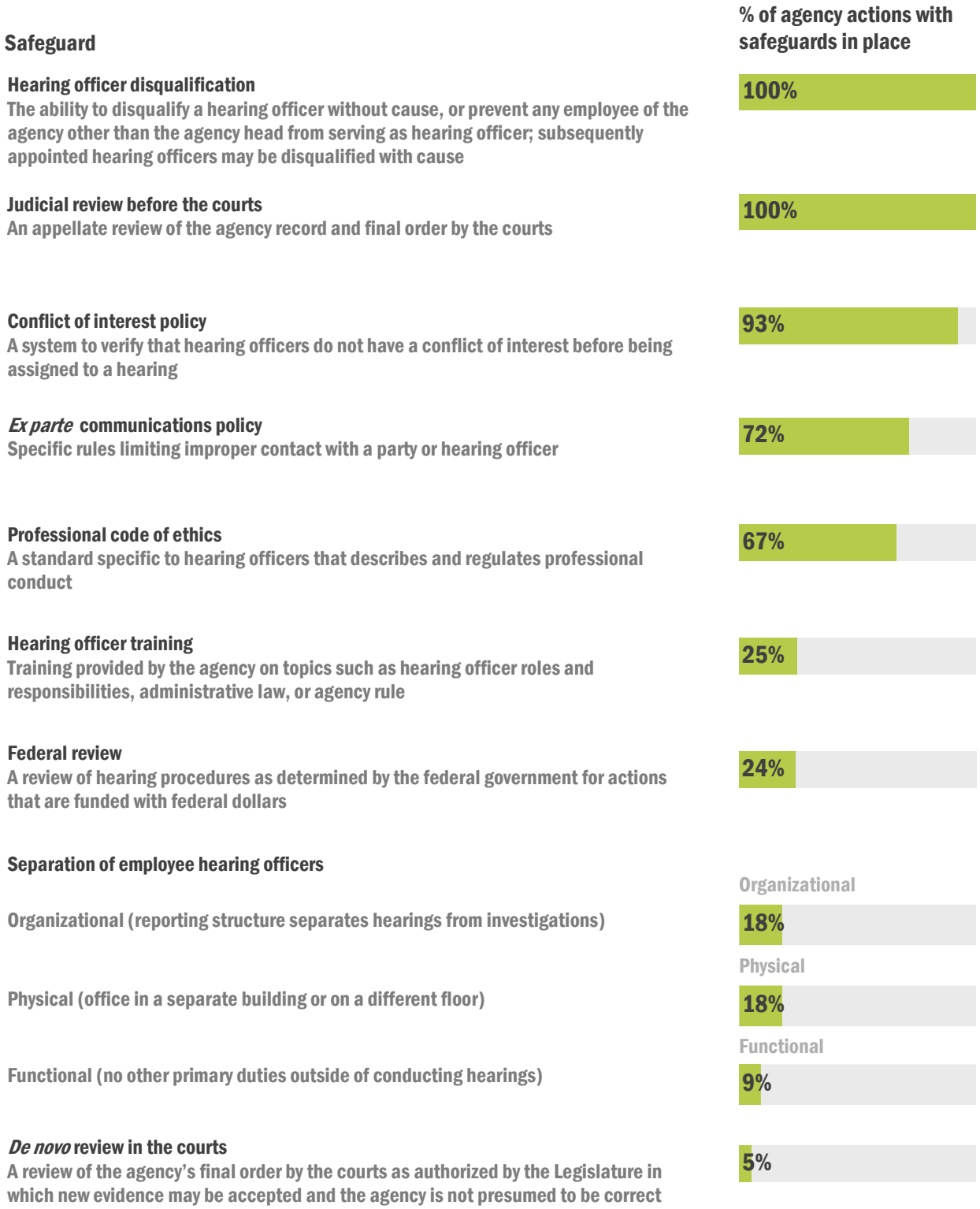
Definitions

An evidentiary hearing is a due process proceeding to gather evidence, create a record, and issue an order.

Actions are the many different decisions, rules, or functions agencies use to perform legally required duties.

Exhibit 1

Agencies have multiple safeguards in place to mitigate the risk of bias.



Hearings for high-risk actions represented less than

1%

of all reported hearings.

We found that 75 state agencies had actions that by statute or rule required the opportunity for an evidentiary hearing. Of those, 42 agencies held 52,488 hearings for 93 actions in the past five fiscal years.

We found 45 actions had a low risk of bias and 34 actions had a moderate risk. The remaining 14 actions had a high risk of bias. Typically, the agency head acted as the hearing officer for these high-risk actions. Hearings for these actions represented less than 1 percent of all reported hearings. High-risk actions had fewer safeguards in place and fewer layers of agency appeal to mitigate the risk of bias.

Recommendations

Our risk analysis provides policymakers with a framework for discussing whether current safeguards adequately address the risk of bias in evidentiary hearings. The question before policymakers is whether the risk of bias discussed in this report is compelling enough to prompt changes to the current system. Should policymakers determine action is warranted, we describe a range of measures that could be considered. Safeguards could be strengthened to provide additional protections, communications could be improved to address issues of public perception, or a central hearing system could be implemented.

State policy on evidentiary hearings has far-reaching effects. Any efforts to implement change could benefit from the establishment of an interim committee. The committee could be a useful mechanism to coordinate changes to statute and rule and ensure agency perspectives are well represented.

Acknowledgments

We extend our sincere appreciation to two individuals for providing legal expertise in the area of administrative law.

Kay Christensen, Chief of Contracts and Administrative Law Division, Office of the Attorney General

Richard Seamon, Professor of Law, University of Idaho

1 Introduction

Legislative interest

Idaho has a decentralized system for conducting administrative hearings. Administrative hearings are quasi-judicial proceedings in which agencies may play the role of investigator, prosecutor, and judge. Within the decentralized system, individual agencies have a large degree of discretion in selecting who will act as the hearing officer in a given case. Hearing officers are responsible for presiding over all aspects of a hearing.

In March 2015 the Joint Legislative Oversight Committee approved a study to evaluate concerns about whether Idaho's hearing structure created conflicts of interest or affected the ability of hearing officers to make independent decisions. The requesters wanted to know whether agency practices adhered to federal and state laws and whether these laws provided adequate safeguards to avoid real or perceived conflicts of interest. Appendix A is the study request.

Evaluation approach

This evaluation required a thorough review of the underpinnings of administrative law to address the questions raised by the study requesters. A problem arises when a hearing officer, acting in a quasi-judicial capacity, is not capable or willing to make a fair decision. This lack of independence is also referred to as bias.

Correctly confirming the presence of bias is challenging. For every method used by researchers to measure the prevalence of bias, a possibility existed to underestimate or inflate instances of bias.

There was no central agency responsible for monitoring administrative hearings in the state. At the outset of this evaluation, it was unknown how many hearings were conducted in a year, how many agencies conducted hearings, and how many agency decisions required the opportunity for a hearing.

We designed our evaluation to address these challenges and to accomplish the following objectives (see appendix B):

1. Identify the essential elements of a fair hearing.
2. Identify the sources for potential bias or perceived conflicts of interest.
3. Identify the safeguards in place to mitigate the risk of bias.
4. Assess the risk of bias for Idaho administrative hearings.
5. Identify the possible policy alternatives which incorporate ideas that have been implemented by other states.

This evaluation provides a list of agencies that have held a hearing in the past five fiscal years (see appendix C).[1] We identified four hearing officer models among Idaho agencies and developed a method to assess the risk of bias that incorporated arguments for and against Idaho's current system. The result of our analysis was a rank of low, moderate, or high risk. Our methodology is in appendix D.

1. We did not include the Public Utilities Commission or the Industrial Commission in our scope because the Idaho Supreme Court hears appeals from these agencies and the Legislature provides a specific exemption for these agencies within the Idaho Administrative Procedure Act.

2 Essential elements of a fair hearing

The Legislature has authorized administrative agencies of the executive branch to provide four types of public services: (1) benefits, (2) licenses, (3) enforcement, and (4) management of public property.[1] We refer to the delivery of these services as actions. For example, the Department of Health and Welfare has the authority to make eligibility determinations for food stamps and Medicaid programs. The Department of Environmental Quality may grant or deny permit applications.

Some of these actions are similar to functions reserved for the legislative and judicial branches of government. The Legislature enacts state law, but administrative agencies have the authority to promulgate rules. The courts are constitutionally responsible for the final interpretation of the law, but agencies have the authority to resolve disputes or make decisions by conducting a hearing. The range of authority and responsibility varies from one agency to the next, but agencies may only act within the boundaries of power delegated by the Legislature.

1. Seamon, Richard Henry, *Administrative Law: A Context and Practice Casebook* (Durham: Carolina Academic Press, 2013), 357–358.

Definition

Actions are the many different decisions, rules, or functions agencies use to perform legally required duties.

The US Constitution requires due process when administrative actions affect life, liberty, or property rights.

Section 1 of the Fourteenth Amendment to the US Constitution reads that no state shall "deprive any person of life, liberty, or property without due process of the law." This due process clause was originally associated with criminal trials when government was relatively small and limited in the services it provided. The role of administrative agencies grew with the need for government regulation of private industry, which emerged at the beginning of the twentieth century. By the 1930s, government programs had expanded the role of administrative agencies to have greater impact on the rights of citizens, particularly property rights. With this expansion, the courts ruled that the due process clause applied to any action that affected the rights of citizens, including administrative actions.

Generally accepted elements of due process

An unbiased decision maker

Notice of the proposed action and the grounds asserted for it

Opportunity to present reasons why the proposed action should not be taken

The right to present evidence, including the right to call witnesses

The right to know opposing evidence

The right to cross-examine adverse witnesses

A decision based exclusively on the evidence presented

Opportunity to be represented by counsel

Requirement that the decision maker prepare a record of the evidence presented

Requirement that the decision maker prepare written findings of fact and reasons for the decision

The US Constitution guarantees an opportunity to a due process hearing when government action affects an individual's rights.

The intersection of agency actions and constitutional rights guarantees the opportunity to a due process hearing. However, no single set of due process procedures applies to all hearings. In *Williams v. Bd. of Real Estate Appraisers*, the Idaho Supreme Court stated, "For all its consequence, 'due process' has never been, and perhaps can never be precisely defined." The court continued that due process "is not a concept rigidly applied to every adversarial confrontation, but instead is a flexible concept calling for such procedural protections as are warranted by the particular situation."[2] To determine what constitutes due process in a given situation, the courts generally consider five factors:

1. Rulings in similar cases
2. The nature of the individual's right affected by the agency action
3. The probability that the wrong decision will be reached using the agency's procedure
4. The feasibility and value of implementing an alternative or substitute procedure
5. The government's interests and the impact that an alternative procedure would have on the agency

Some agencies were not certain which actions required the opportunity for an evidentiary hearing.

Our evaluation focused on agency actions that by statute or rule required the opportunity for a due process hearing. We refer to these hearings as evidentiary hearings. We found that some agencies were not certain which actions required the opportunity for an evidentiary hearing because statute did not always clearly define the requirement. We initially reviewed 132 agencies and determined 75 agencies fell within our scope. These agencies reported 213 actions. Of these actions, 120 (56%) had no hearings in past five fiscal years. Agencies reported that 93 of these actions had an evidentiary hearing in fiscal years 2011–2015.

2. *Williams v. Bd. of Real Estate Appraisers*, 337 P. 3d (2014) quoting Matter of Wilson, 128 Idaho 161, 167, 911 P. 2d 754, 760 (1996).

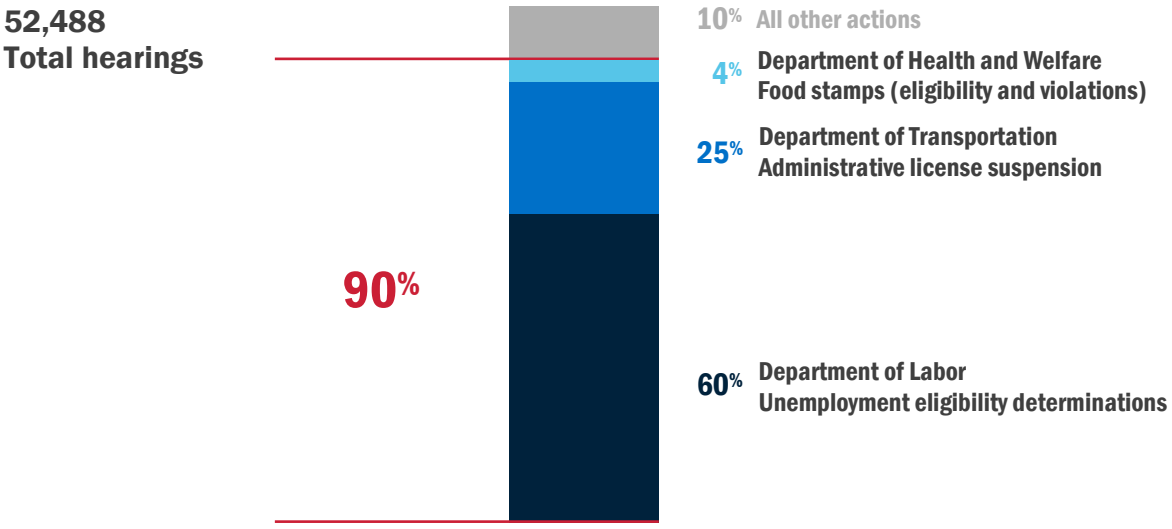
Definition

An evidentiary hearing is a due process proceeding to gather evidence, create a record, and issue an order.

Agencies reported that 52,488 evidentiary hearings were conducted in fiscal years 2011–2015. As shown in exhibit 2, we found that four separate actions accounted for 90 percent of all hearings. The remaining 10 percent were dispersed between 89 actions. More than half of these actions (62 percent) had ten or fewer hearings in the past five fiscal years. Twenty actions had only one hearing in five years.

Exhibit 2

90% of hearings were conducted for 4 actions in fiscal years 2011–2015.



Note: Percentages do not sum to 100 because of rounding.

An unbiased decision maker is an essential element of due process.

No single set of due process procedures exists; however, an essential element of due process is an unbiased decision maker.[3] Bias is often used synonymously with partiality, conflict of interest, or prejudice. However, not every circumstance characterized as biased rises to the level of a due process violation. Exhibit 3 lists specific conditions found in US and Idaho Supreme Court opinions that delineate a violation of due process resulting from bias.

From a review of these cases, we concluded that bias is the inability or unwillingness of a decision maker to reach a fair conclusion based solely on the facts presented in the case and to apply the existing law evenhandedly.

The Legislature delegates the responsibility to act as an unbiased decision maker to the agency head.

In Idaho, the Legislature delegates the responsibility to act as an unbiased decision maker to the agency head, who may choose to preside over a hearing or appoint a hearing officer. The agency head or hearing officer conducting a hearing is responsible for (1) ensuring proper procedures are followed during the hearing, (2) making determinations concerning any motions or petitions, (3) compiling the record, and (4) issuing an order based on findings of fact and conclusions of law.[4] Given the large amount of responsibility and discretion afforded to hearing officers, the ability of the hearing officer to make a fair decision is essential.

3. *Goldberg v. Kelly*, 397 US 254 (1970).
4. For simplicity, we use the term hearing officer in place of any agency-specific title.

Exhibit 3

Decades of court opinions provided standards for assessing what is and what is not a violation of due process caused by bias.

Bias IS . . .

Monetary interest
Withrow v. Larkin, 421 US 35 (1975).

Personal grudge
Withrow v. Larkin.

Probability that the decision maker will not be fair
Johnson v. Bonner Cty. Sch. Dist. No. 82, 887 P 2d. 35 Idaho Supreme Court (1994).

Unwillingness to listen to the evidence with an open mind
Eacret v. Bonner Cty., 86 P. 3d. 494 Idaho Supreme Court (2004).

Unwillingness to apply existing law
Eacret v. Bonner Cty.

Predetermination of the outcome of the hearing
Eacret v. Bonner Cty.

Bias is NOT . . .

Conducting an investigation and holding a hearing under the same agency umbrella
Withrow v. Larkin.

Familiarity with the facts
Hortonville Joint Sch. Dist. No. 1 v. Hortonville Ed. Assn., 426 US 482 (1976).

Taking a public policy position without additional evidence of bias
Hortonville v. Hortonville.

A preconception
Turner v. City of Twin Falls, 159 P. 3d 840 Idaho Supreme Court (2007).

An unequal chance to change the decision maker's mind
Turner v. City of Twin Falls.

Definitions

Bias is the inability or unwillingness to reach a fair decision.

The **agency head** is an individual or body of individuals in whom the ultimate legal authority is vested.

An **order** is an action that determines individual legal rights, duties, privileges, immunities, or other legal interests.

A **hearing officer** is an individual or group who presides over an evidentiary hearing.

A **contested case** is a proceeding that results in the issuance of an order.

The Administrative Procedure Act places limits on actions and incorporates due process.

Idaho enacted, and later revised, the Idaho Administrative Procedure Act to balance and places limits on actions that are similar to functions reserved for the legislative and judicial branches of government. The act governs procedures for rulemaking and contested cases.

Agencies may resolve contested cases through informal methods or formally through a hearing. The act attempted to achieve three policy objectives specific to contested cases:[5]

- Increase transparency and public scrutiny within administrative processes
- Standardize agency procedures
- Encourage the use of informal and simple procedures consistent with fundamental ideas of fairness

The *Idaho Rules of Administrative Procedure of the Attorney General*, associated with the act, recognizes the need to balance multiple values and encourage agencies to interpret the rules liberally to ensure a "just, speedy, and economical determination" of all issues. The rules also incorporate all ten elements of due process.

The Industrial Commission and the Public Utilities Commission are explicitly exempted from the act, and other agencies may opt out of some or all of the contested case procedures. Agencies that choose to opt out must promulgate their own procedures in statute or rule. Some agencies opted out of the act because they are subject to separate federal or state statutory procedures that supersede the act.

Twenty years after the act was revised, agencies reported that 52 percent of actions in which a hearing was held in fiscal years 2011–2015 were subject to the act; 38 percent were subject to separate rules and did not follow the act. The remaining 11 percent were subject to the act with specific exceptions.

Actions subject to the Administrative Procedure Act

Yes	52%
No	38%
Partial	11%

Note: Percentages do not sum to 100 because of rounding.

5. Gilmore, Michael S., and Dale D. Goble, *Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, (1994), 2.

Measuring the prevalence of bias

3

Bias can result in several negative outcomes. First, an individual's rights could be wrongfully deprived. Second, limited resources could be misapplied. Finally, the perception of bias, whether actually present or only presumed, could erode trust in our system of government.

Researchers have generally relied on three approaches to gauge whether and to what extent bias was present within hearing proceedings. However, results were often challenging to interpret. Nationally, policymakers and members of the legal community are divided over whether decentralized hearing procedures adequately protect due process and prevent conflicts of interest.

In response to the ambiguity associated with traditional methods of measuring bias and the persistent debate over necessary strategies to mitigate the risk of bias, we developed a method to assess the risk of bias among hearings conducted by Idaho agencies.

Traditional methods for measuring bias were limited and difficult to interpret.

We found three general approaches whereby researchers have attempted to gauge the extent of bias (appendix E is our selected bibliography). These approaches were (1) confirmed cases of bias, (2) the rate of appeals to district courts, and (3) survey responses from hearing participants. Each method produced data that were limited or challenging to interpret. Often the results did not lead to definitive answers, but rather raised more questions.

Instances of confirmed bias in the courts

Confirmed cases of bias are rare.

In Idaho, we did not find a confirmed case of a biased agency head or hearing officer systematically issuing unfair orders. Confirmed cases of bias specific to a single hearing were rare. We reviewed Idaho Supreme Court opinions on appeals from evidentiary hearings filed January 2010–June 2015. Of 79 cases, only one appellant made the argument that a violation of due process had occurred as a result of decision maker bias.

Confirming that a hearing officer came to the wrong decision because of bias is difficult. Without evidence of a monetary interest or a negative personal resentment, a party has to demonstrate the likelihood that the hearing officer was unable or unwilling to come to a fair decision. Consequently, a party could have the perception that the hearing officer is biased or bias may actually be present, and still the party may choose not to make the argument of bias in court.

2014 Idaho Supreme Court opinion that discusses bias

We found one opinion where a party argued that the decision maker was biased. A licensing board took disciplinary actions following an evidentiary hearing, and one of the board members was found to be biased. However, three factors contributed to the court finding that the final decision of the board did not violate due process: (1) the board member who was biased recused himself, (2) the board used a hearing officer that both parties acknowledged was impartial, and (3) the remaining board members unanimously voted to accept the recommended order of the hearing officer.

In other states, instances of agency heads and hearing officers unfairly influencing the results of multiple hearings have been confirmed through a variety of court cases and audit reports. These instances demonstrate that decision makers can systematically influence the outcome of a hearing. Proven cases of bias are not representative of all hearings; nevertheless, they provide useful examples of what agencies should avoid.

Rate of appeals to the district courts

The appeal rate of evidentiary hearings to the district courts was low in Idaho. We asked agencies to provide a list of hearing decisions appealed to a district court in fiscal years 2011–2015. Agencies reported 173 appeals. During that same time, agencies reported conducting 20,586 hearings, excluding the Department of Labor unemployment hearings, which were appealed to the Industrial Commission. The number of court appeals compared with the number of hearings was less than 1 percent. Evidentiary hearings in other states also had low appeal rates, typically less than 5 percent.

Low appeal rates are difficult to interpret. They could indicate that parties were generally satisfied with the results of their hearing. The low rates could also indicate that parties were not fully aware of their appeal rights or disengaged with the system. Parties may have lacked the resources to continue the appeal process.

Surveys measuring stakeholder perceptions of bias

Using survey instruments, other states have found that agencies and hearing officers were more likely to perceive the hearing as fair than were other parties. Additionally, parties who successfully argued their case before a hearing officer were more likely to perceive that the hearing was fair than those who lost. For example, a 2001 survey reported by the Colorado Office of the State Auditor found that workers' compensation claimants who won their case were five times more likely to rate the hearing process as fair than claimants who lost their case.

These survey results likely reveal more about the satisfaction with outcomes than the strength or weakness of state policy to prevent bias.

In Idaho, the appeal rate of evidentiary hearings to district court was less than 1%.

Stakeholders disagree whether the potential for bias necessitates statewide change.

The ambiguous interpretation of the traditional methods for measuring bias has left room for an ongoing national debate. Some in the legal community question whether states are doing enough to adequately protect due process or prevent conflicts of interest in evidentiary hearings. Over the decades, two general arguments have emerged:

> A decentralized system that allows agencies to conduct hearings provides adequate safeguards to mitigate the risk of bias.
>
> A centralized system that removes agencies from the hearing process is necessary to provide additional assurances of fairness.

Knowing the limitations of previous studies, we developed a method to assess the risk of bias among agencies conducting evidentiary hearings. Our analysis was unique in that we built the arguments of proponents on both sides of the debate into the assessment.

Although a degree of risk is always present, overall risk is low.

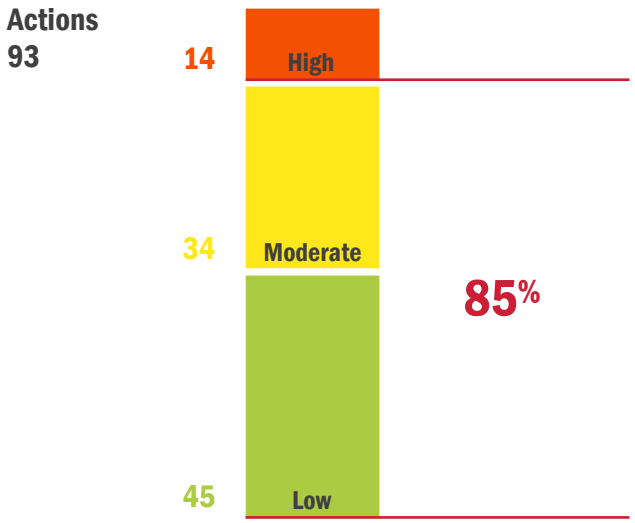
Our risk analysis had two parts. First, we took the arguments presented by critics of a decentralized system and assessed the potential for bias. We analyzed the multiple roles of the agency and the relationship of the hearing officer to the agency. Second, we looked to the arguments presented by proponents of a decentralized system and assessed the extent to which safeguards were in place to mitigate potential bias.

We applied this analysis to each of the 93 actions that had an evidentiary hearing in fiscal years 2011–2015. The result of our analysis was a rank of low, moderate, or high risk of bias. We provide a detailed list of the actions included in our analysis and their risk ranking in appendix C.

As shown in exhibit 4, we found that 45 actions were low risk and 34 actions were moderate risk. When agencies perform roles similar to legislative and judicial functions, there is a greater potential for real or perceived bias. We also found that agencies have implemented many safeguards to mitigate the potential for bias.

Exhibit 4

85% of actions were low or moderate risk.



Our analysis serves as a framework for discussing whether Idaho has adequately addressed the risk of bias.

We did not include in our risk analysis the 120 actions that had no hearings.

Agencies have safeguards in place to mitigate bias.

4 The perception of bias

Critics of a decentralized hearing system have two main arguments. First, agencies cannot be neutral if they are expected to fill multiple administrative roles and conduct hearings. Second, an agency may be inclined to select a hearing officer that will give it more deference than is appropriate or the agency will put pressure on hearing officers to rule in its favor. Our risk analysis considered both the multiple roles of an agency and the relationship of the hearing officer to the agency.

Actions fell into four models based on hearing officers' relationship to the agency or the role of the agency.

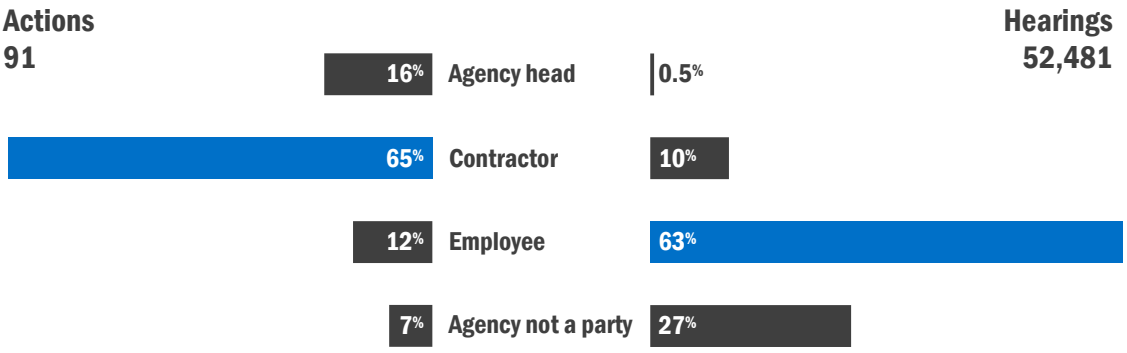
We categorized actions into four models. Three models were based on the relationship of the hearing officer to the agency: agency head, contractor, or employee. The fourth model was based on the role of the agency: agency not a party to the hearing.

Exhibit 5 shows that agencies used contracted hearing officers to conduct hearings for 65 percent of actions (59 of 93). However, employee hearing officers conducted the majority of hearings–63 percent or 32,810. Agencies that were not a party to the hearing conducted 27 percent of hearings and agency heads conducted less than 1 percent.

Employee hearing officers conducted 63% of all hearings.

Exhibit 5

Agencies appointed contracted hearing officers for the greatest number of agency actions, although employees conducted the most hearings.



Note: Percentages do not sum to 100 because of rounding; these percentages do not include the two Department of Education actions that use a hearing panel. See appendix D for more information.

Although the courts have ruled that agencies may perform multiple roles in a single action, critics of decentralized systems continue to raise concerns about due process.

The multiple roles agencies perform within an action contribute to the perception of bias.

Agencies are often delegated multiple roles within the same agency action. The Legislature gives agencies the authority to promulgate rules, conduct investigations, or prosecute individuals. The courts have found that the multiple roles an agency may perform within the same action does not cause a due process violation.

Yet these court decisions have not eased concerns raised by critics of decentralized hearing systems, who believe the opportunity for bias exists and expectations for agencies to self-regulate due process procedures are unreasonable. For example, hearing officers receive payment from a state agency. When that agency has a vested interest in the outcome of the hearing or advocates for a position in the proceedings, an apparent conflict of interest can potentially jeopardize assurances of an unbiased decision maker.

Withrow v. Larkin, 421, US 35 (1975)

In 1973 the State of Wisconsin charged a physician with the unlawful practice of medicine. The state medical examining board conducted an investigation and initiated a hearing to determine whether he had violated state law and should have his license suspended. The physician sought relief from the district court to stop the board's proceedings by claiming a violation of constitutional rights. The district court concluded that the case presented a significant constitutional question: Did the examining board violate due process when it conducted the investigation, presented charges, ruled on those charges, and imposed punishment by revoking or suspending his license?

The case was eventually appealed to the US Supreme Court, and in 1975 the court found that the board had not violated due process. Although a biased decision maker is "constitutionally unacceptable" and the law endeavors "to prevent even the probability of unfairness," the fact that the agency was delegated investigative and adjudicative functions did not pose a risk of bias that should prohibit multiple functions within a single action.

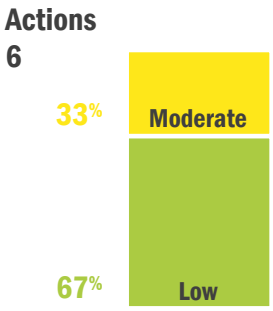
Agency not a party to the hearing

Agency not a party is the term we use for agencies that did not investigate, prosecute, or advocate a position. For these actions, the single role of the agency to conduct hearings mitigated the apparent conflict of interest, and the relationship of the hearing officer to the agency was less significant.

We identified six actions in this model. Of those, four actions were low risk and two actions were moderate risk. Any increase to risk was because of the absence of safeguards and not because of perceptions about risk. As shown in the sidebar, 27 percent of hearings were conducted by an agency that was not a party to the hearing.

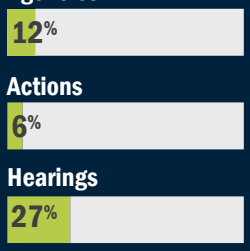
Exhibit 6

Two-thirds of the actions in the agency not a party model were low risk.



Percentage of agencies, actions, and hearings in the model:

Agency not a party



The relationship of the hearing officer to the agency contributes to the perception of bias.

The remaining three hearing officer models were based on the relationship of the hearing officer to the agency.

Employee as hearing officer

As shown in the sidebar, agencies typically appointed an employee hearing officer to conduct hearings for 12 percent of all actions (11 of 93). Critics of a decentralized system question whether employees can be trusted to render an impartial decision because of (1) direct pressure from the agency head or management or (2) more latent pressures such as the desire for career advancement or loyalty.

We identified 11 actions in this model. Three actions were low risk and eight were moderate risk, as shown in exhibit 7. We reviewed the payroll data in Idaho Business Intelligence System (IBIS) and found that all employee hearing officers in this model were classified. A classified status provides protection against being arbitrarily fired but does not fully alleviate the other potential pressures.

Percentage of agencies, actions, and hearings in the model:

Employee

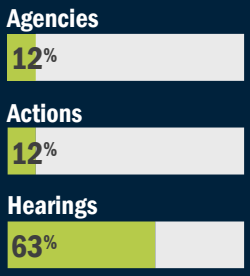
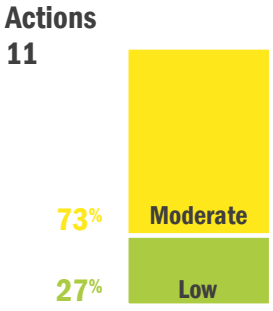


Exhibit 7

Approximately three-quarters of the actions in the employee model were moderate risk.



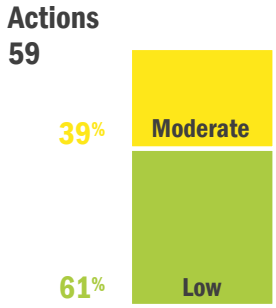
We conducted interviews with employees from different agencies who served as hearing officers. None of these employees indicated that they were concerned about losing their job. However, some employees indicated they felt indirect pressures. For example, agencies may choose to refrain from assigning hearings with similar policy issues to a hearing officer who had submitted an order that was not in keeping with the agency's interest.

Contractor as hearing officer

Similar to the concerns expressed for employees serving as hearing officers, critics of a decentralized system argue the public could perceive that contracted hearing officers are pressured or incentivized to rule in the favor of the agency. As shown in the sidebar, agencies typically appointed a contracted hearing officer to conduct hearings for 63 percent of all actions (59 of 93).

Exhibit 8

More than half of actions in the contractor model were low risk.

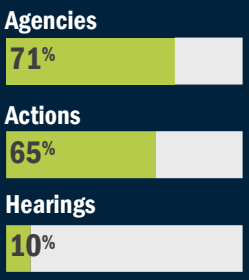


We interviewed nine current and past contracted hearing officers. Two interviewees indicated a belief they were not hired to conduct more hearings after submitting orders that were not favorable to the agency. Neither contractor interviewed had any specific reason or evidence to support their position. Their concern was based on the fact that they were not subsequently contracted.

In this model, 36 actions were low risk and 23 were moderate risk, as shown in exhibit 8. We reviewed contracts submitted to us by agencies. Even annual or multiyear contracts, as opposed to per hearing contracts, did not obligate the agency to assign hearings to a contractor.

Percentage of agencies, actions, and hearings in the model:

Contractor



Percentage of agencies, actions, and hearings in the model:

Agency head

Agencies

24%

Actions

16%

Hearings

0.5%

Agency head as hearing officer

As shown in the sidebar, agency heads typically conducted hearings for 16 percent of all actions (15 of 93). Critics of a decentralized system think the appearance of bias is greater when the agency head acts as the hearing officer because:

1. Power of the agency is concentrated in the agency head and efforts taken to separate the agency head do not fully satisfy doubts about the ability to act impartially.

2. Fewer safeguards are in place to mitigate the risk of bias and many safeguards depend on the enforcement of the agency head.

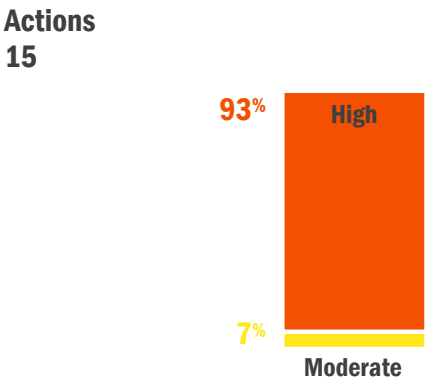
3. Statute does not require agency heads to appoint a separate hearing officer when an individual seeks to disqualify the hearing officer with or without cause.

4. There are fewer layers of agency appeal before the hearing record and order become final.

As shown in exhibit 9, we found 14 actions in the agency head model were high risk. We also found that the agency head for these hearings was a board rather than an individual. When a board serves as the hearing officer, members with conflicts of interest can recuse themselves, allowing the remaining members to come to a fair decision.

Exhibit 9

More than 90% of the actions in the agency head model were high risk.

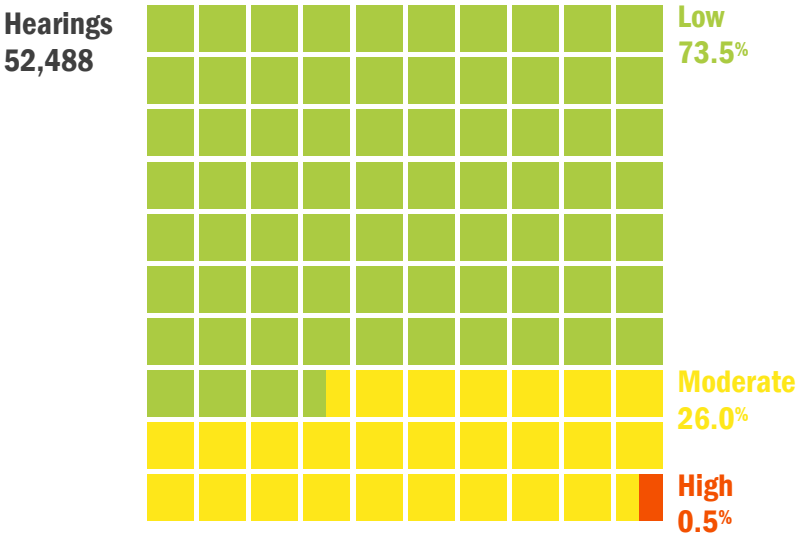


Hearings for the highest risk actions were conducted by the agency head.

We found that high-risk hearings were rare. As shown in exhibit 10, nine agencies conducted 252 hearings specific to these high-risk actions. These hearings represented less than 1 percent of all hearings.

Exhibit 10

Less than 1% of the hearings conducted were for high-risk actions.



Regardless of the perception of bias, several compelling reasons would prompt an agency head to act as the hearing officer. First, the Legislature has delegated authority to agency heads to both act as the hearing officer and issue the final order. Second, the outcome of some hearings could have large policy implications. In these instances, conducting the hearing allows the agency head to base the final order on direct observations of the entire proceeding. Third, some agencies are small, have limited resources, and hearings are infrequent. These agency heads might find conducting the hearing themselves to be more cost-efficient.

5 Factors mitigating the risk of bias

Proponents of a decentralized hearing system argue that the implementation of multiple safeguards can adequately address the risk of bias. We identified safeguards that agencies in Idaho have built into their policies and procedures for evidentiary hearings.

Bias is only one of several possible reasons that a hearing could result in an incorrect decision. Inexperience, misinterpretation of the law, inconsistent procedures, or a lack of managerial oversight may all contribute to a poor quality hearing. The safeguards we have identified may help to address these other potential sources of an erroneous decision as well.

Safeguards help prevent bias from influencing a fair decision.

We identified nine safeguards that agencies used to mitigate the risk of bias. The Legislature has established judicial review for all actions in our evaluation, even those not subject to the Administrative Procedure Act. Additionally, agencies provided parties the opportunity to disqualify a hearing officer for all actions. The remaining seven safeguards are implemented to some degree in a portion of reported actions.

Disqualification of a hearing officer

Parties may disqualify the hearing officer in all actions.

The disqualification of a hearing officer was a safeguard for all actions. This safeguard helps to balance the power between the agency and the other party. The agency initially appoints a hearing officer, and the other party has the opportunity to disqualify that hearing officer.

As in most states, hearing officers in Idaho may be disqualified for cause, which includes reasons such as the presence of bias, prejudice, interest, substantial prior involvement, or lack of professional knowledge. Unique to Idaho is the ability to disqualify a hearing officer without specific cause. This includes the ability for parties to request that the appointed hearing officer not be an employee of the agency. This request would be granted, unless the agency head decides to conduct the hearing.

Judicial review before the courts

All actions were subject to judicial review.

All actions also had the opportunity for judicial review in the courts. Judicial review gives either party the opportunity to be heard by the district court, which provides an independent review of the case.

Judicial review of most administrative actions is based on two principles that provide limited oversight of agencies:

1. As an appellate process, judicial review is confined to the record created by the agency.

2. The court "shall affirm the agency action unless the court finds the action" unconstitutional, outside the agency's authority, procedurally unlawful, or arbitrary, capricious, or an abuse of discretion.[1]

Even with procedural errors, if the agency's decision is reasonable, the court should affirm. "The Court does not reweigh evidence or consider whether it would have reached a different conclusion based on the evidence presented unless substantial and competent evidence is lacking or the findings of fact are clearly erroneous."[2]

Conflict of interest policy

The majority of agencies reported having a conflict of interest policy or procedure for each action. These procedures are intended to verify that hearing officers have no potential disqualifying circumstances before their appointment. Agencies reported that 6 of the 93 actions did not have a conflict of interest procedure.

Actions with a conflict of interest procedure

Ex parte communications policy

Agencies reported that approximately three-quarters of actions had a specific policy limiting *ex parte* communications or the action was subject to the Administrative Procedure Act. The act prohibits *ex parte* communications that occur between the hearing officer and either party without providing all parties notice or an opportunity to respond. The *ex parte*

Actions with policies to prohibit *ex parte* communications

1. Michael S. Gilmore and Dale D. Goble, *Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273 (1994), 28.
2. See *Ginther v Boise Cascade Corp.*, 244 P.3d 1229 (2010) or *Peck v Dep't of Transp.*, 278 P.3d 439 (2012).

Definitions

Ex parte **is Latin meaning "from one party" and refers to improper contact between the hearing officer and either party.**

communications section is part of "the core of the act's impartiality requirements" and ensures "that the decision maker bases the order solely on the facts and arguments contained in the record created at the evidentiary hearing."[3]

Professional code of ethics

Agencies reported that two-thirds of actions had a code of ethics or standard of professional conduct that hearing officers were expected to follow. A code of ethics communicates expectations for conduct in a specific setting. Acting as a hearing officer can present unique challenges. Having a code of ethics to adhere to ensures that hearing officers know the principles and values that should guide decision making.

Agencies reported that one-quarter of actions did not have a code of ethics but did require the hearing officer to be an attorney. Eight actions had neither a code of ethics nor statement of professional conduct. Additionally, hearing officers were not required to be attorneys for these actions.

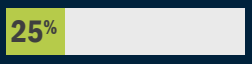
Hearing officer training

Agencies reported providing training to hearing officers for one-quarter of actions. Presiding over an evidentiary hearing requires familiarity with administrative law and the ability to interpret all state laws as they apply to the facts of a case. Hearing officers must have an understanding of the procedures and requirements specific to the agency action in question.

Most agencies expected hearing officers to have a requisite understanding of administrative law and agency-specific rule and law. Given the intricacies of these laws, this expectation may be too high to place on an attorney, particularly a contracted attorney with little experience. Agencies can screen for hearing officers with experience. However, without any state-sponsored training, building the necessary skills and experience may be difficult.

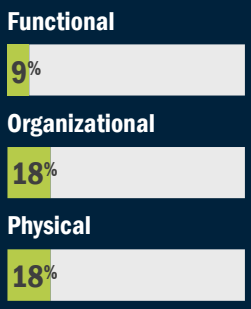
Actions with a code of ethics for hearing officers

Actions with training for hearing officers



3. Michael S. Gilmore and Dale D. Goble, *Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 IDAHO L. REV. 273 (1994), 16.

Actions with separation of employee hearing officers



Separation of employee hearing officers

Functional separations are intended to remove ancillary duties from employees, allowing them to focus on conducting hearings. Organizational separations are intended to divide the reporting and managerial structures of investigations and hearings. Physical separation may include an office location on a different floor or building to separate employees who conduct hearings from employees in other positions in the agency.

Agencies reported that they used employee hearing officers for 12 percent of actions (11 out of 93). Within these actions, a small percent reported that they implemented functional, organizational, or physical separations of employee hearing officers. Agencies that indicated they did not have these separations in place reported that they had *ex parte* communication restrictions that should prevent employees from inappropriately discussing the details of a hearing with other agency employees. *Ex parte* restrictions are an important safeguard; however, they do not protect against agency pressures or other influencing factors that may create a conflict of interest.

Definitions

De novo **is Latin meaning "from the new." The court decides the case without reference to conclusions made by previous courts or agencies.**

Two safeguards help mitigate bias but are determined by the Legislature or the federal government.

Two safeguards had low implementation rates. However, agencies have little to no control over whether the following safeguards are available to them:

1. Appeals subject to *de novo* review in court
2. Compliance with federal regulations

De novo review

De novo review is resource intensive for the courts and not appropriate in all instances. As such, the Legislature determines when actions should be subject to *de novo* review. When the court hears an appeal case *de novo*, new evidence may be submitted to the court if deemed necessary. We found that 5 percent of actions were subject to *de novo* review by the courts on appeal.

Unlike the typical judicial review, *de novo* review allows for a full review, without the presumption of correctness. The court may refer to the agency's record to determine facts but will rule on the evidence and matters of law without giving deference to the agency's findings. The court can come to its own findings of facts and conclusions of law based on the record. In the event an unfair decision is issued, *de novo* review provides a more stringent review process creating a greater likelihood that the unfair decision will be identified and corrected.

Federal review

We found that 24 percent of actions were subject to some degree of federal oversight. Actions that are subject to federal rules and regulation have a layer of review to their hearing processes that would otherwise be absent. For example, the Department of Health and Welfare and the Department of Labor are subject to a systematic federal review of hearing procedures.

Strengthening safeguards will help mitigate the risk of bias among agencies procedures.

We found that most agencies have built some safeguards into their hearing procedures. For those agencies lacking safeguards, strengthening safeguards can serve as an opportunity to improve internal practices while giving the public extra assurances of receiving a fair hearing that promotes due process.

Recommendation 1

The Legislature or agencies should consider whether current safeguards could be strengthened or new safeguards implemented to help mitigate the risk of bias as well as promote greater consistency among hearing procedures.

Option for a centralized system

6

The question before Idaho policymakers is not whether current procedures are fair. Agencies have been delegated the authority to conduct evidentiary hearings, and a decentralized hearing system has withstood the scrutiny of the courts. The question is whether the remaining risk of bias discussed in this report is compelling enough to prompt policymakers to make changes to the current system.

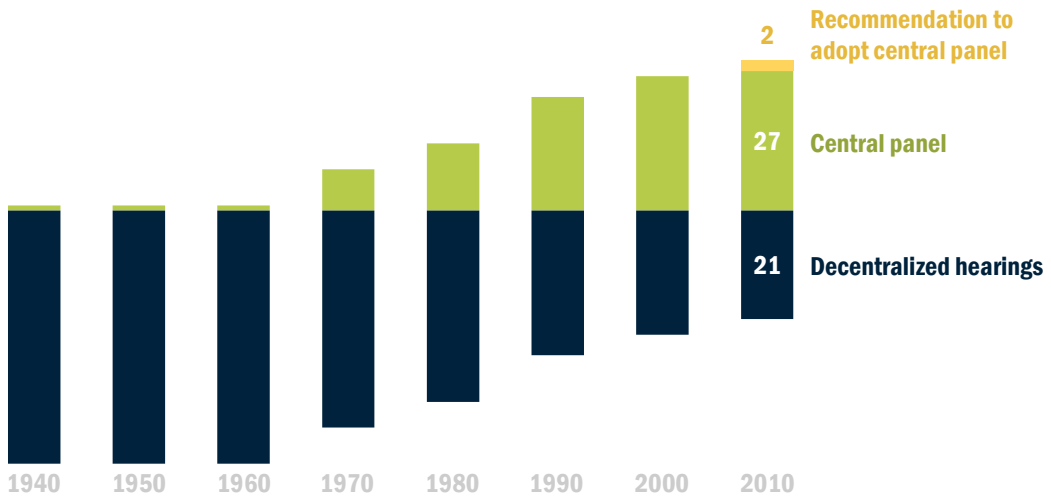
Establishing a central panel of hearing officers is one strategy to mitigate the risk of bias.

A central panel is an independent agency charged with conducting evidentiary hearings. The goal of a central panel is to create a structure that supports and protects the independence of hearing officers. Exhibit 11 illustrates that more than half of all states have adopted a central panel system.

California was the first state to establish a central panel in 1945. The idea began to gain momentum in the 1970s and by 2000, 22 states had adopted a central panel model. To date, 27 states have made the change and two other states have recently been reviewing their policy. Vermont and Pennsylvania published legislative policy reports on administrative hearings in 2014. Both reports recommended moving away from a decentralized system.

Exhibit 11

27 states have adopted a central panel to conduct administrative hearings.



Source: Pennsylvania Joint State Government Commission, *Reforming the Administrative Law of Pennsylvania* (2014).

Arguments for a central panel

Proponents of a central panel argue that the best way to promote the appearance of fairness is to place the hearing process in an independent agency, thus separating agencies with a potential interest in the outcome of a hearing from the role of adjudicator. The creation of a central panel reduces the potential for conflicts of interest and emphasizes the importance of justice.

Additionally, those in favor of a central panel contend that the quality of hearings is improved because hearing officers receive better oversight, training, and support. Performance measures, such as the timeliness of hearings and the quality of record keeping and report writing, are better monitored. Central panels offer a core of professional and experienced hearing officers, which may be of particular benefit to small agencies or agencies with few hearings. The public benefits from more standardized procedures across multiple hearing types. Proponents also argue that states may save money, as fewer hearing officers may be needed statewide and support services may be consolidated.

Proponents argue that central panels improve the fairness, quality, and efficiency of evidentiary hearings.

Arguments against a central panel

Critics of the central panel raise several objections. First, agencies are acting in accordance to the authority delegated to them by the Legislature. Agencies are responsible to establish policy and implement laws and are held publicly accountable for the results. The concern of critics is that the use of central panel hearing officers transfers part of this authority away from the agency, which loses control over certain aspects of the hearing process.

Second, critics maintain that hearing officers in a central panel lack subject-matter expertise or may not appreciate the complexity of certain policy issues. The loss of this expertise may compromise the accuracy and efficiency of hearings in an effort to improve fairness—an expensive proposition without sufficient evidence to justify the change.

Concerns for the appearance of a lack of fairness can be addressed through better communication with the public. Often, perceptions of bias are the result of a lack of understanding about the role the agency is authorized to fill and the existing safeguards in place to ensure a fair decision.

Finally, critics argue that claims about the efficiency or economic savings that result from a central panel are questionable. These claims may not take into account the increased time and effort

Critics argue that central panels remove authority from agencies, reduce hearing officer subject-matter expertise, and may cost more.

that will go into a hearing so the agency can educate a generalist hearing officer who lacks subject-matter expertise. In addition, potential cost savings are offset by the cost of establishing a new agency.

Variations among state central panels

Central panel systems vary in structure, authority, and funding.

We found no single system of central panel adopted by other states. Among states that have implemented a central panel, several variations exist:

Most states have created a new agency to house the central panel. A few states have placed the panel under the authority of an existing agency, such as the secretary of state, the state legislature, or the department of personnel.

States have different requirements about which evidentiary hearings must be conducted by the central panel and which are exempted.

Some states have granted authority to issue a final order to central panel hearing officers in specific instances. In other states, final order authority is retained by the agency head.

Funding strategies vary by state and typically fall into one of three categories: (1) direct appropriation to the central panel (2) apportionment of the costs among agencies using the central panel, and (3) hourly billing for hearing services.

Considerations for implementing a central panel

Three points should be considered when contemplating the successful implementation of a central panel. First, many central panels were not implemented all at once. For example, the administrator from the Wisconsin Division of Hearings and Appeals described his state's implementation of a central panel as a process. The division was originally centralized in the early 1990s with a few hearing types. It now conducts hearings for 16 agencies.

Second, proponents of the central panel argue that the panel is a more efficient use of resources because fewer employees are required to serve as hearing officers. In Idaho, agencies used contracted hearing officers or agency heads to conduct hearings for most agency actions. Employees conducted the highest number of hearings, but these hearings were for a few actions.

Because agency heads and contracted hearing officers were appointed in a broad range of actions and the number of hearings conducted by employees was for a small number of actions, Idaho would not likely see any cost savings by moving to a central panel.

Third, agencies in other states have expressed a degree of trepidation over the proposal to move toward a central panel. If Idaho were to move toward a centralized system, the highest level of success would come from working with agencies to achieve the best solution for each action.

Recommendation 2

The Legislature should consider whether a central panel is necessary to mitigate the risk of bias within evidentiary hearings.

Resource for statute change

Should policymakers wish to make changes to statute or rule, the Uniform Law Commission's Revised Model State Administrative Procedure Act of 2010 is available as a resource. The model act represents best practices from states and offers statutory language for states using either a central or decentralized system to conduct hearings.

The commission, established in 1892, provides states with nonpartisan legislation with the goal to bring clarity and stability to critical areas of state statutory law. Members come from all 50 states and serve in a variety of capacities including lawyers, judges, legislators and legislative staff, and law professors.

We developed a checklist of questions that would be helpful in planning a central panel should the Legislature decide to pursue that option. This checklist is shown in exhibit 12.

Exhibit 12

Questions to consider when implementing a central panel

Structure

- Should a new agency be created to house a central panel of hearing officers?
- Is there an existing, neutral agency with the capacity to accommodate a panel of hearing officers?

Requirements

- Which agency actions should require the option for an evidentiary hearing?
- Which agency actions should be required to use a central panel hearing officer?
- Which agency actions should be exempted from using the central panel?
- Are changes needed in statute or rule to more clearly identify the agency actions that require the option for an evidentiary hearing?

Roles and responsibilities

- Which roles and responsibilities will be assigned to agencies and to the central panel?
- Will agency heads always retain final order authority?
- What quality control measures will be used to hold the central panel accountable?

Funding

- What funding method, or combination of methods, should be used to fund the central panel?
- What start-up costs will be incurred?
- Will employee hearing officer positions, along with associated positions for support personnel and operating appropriations, be transferred to the central panel?

Useful strategies for change

7

Moving from a decentralized to a centralized system is just one strategy for implementing change. We identified three additional strategies that could prove useful should the Legislature determine other changes to the current system are needed.

Developing communication materials will help increase transparency and public trust.

Conducting evidentiary hearings can be a time consuming and lengthy process. Hearing proceedings vary from agency to agency. Additionally, proceedings may vary within a single agency based on the action that requires an evidentiary hearing. Given these nuances, some perceptions of bias risk could be caused by a lack of understanding of agency procedures and the safeguards in place to ensure a fair decision.

Recommendation 3

Agencies should consider drafting and publishing comprehensive information about their evidentiary hearing processes to help mitigate the perception of bias. Communication should not only address the need to know procedures, such as how to file an appeal or initiate a hearing, but also speak to the importance of a fair hearing and the steps agencies have taken to ensure a fair outcome.

An interagency agreement may inform the feasibility of transitioning to a central panel.

In August 2015 the Office of the Attorney General began conducting Medicaid fair hearings for the Department of Health and Welfare. These hearings were previously conducted by a contracted law firm. The change was initiated by a 2014 communication from the Centers for Medicare and Medicaid Services (CMS) which informed the department that it was out of compliance with federal rules. According to CMS, the department's use of contractors to conduct fair hearings did not adhere to rules which stipulate that fair hearings must be conducted by an employee of a government agency with merit-based standards.

As a result, the department formed an agreement with the Office of the Attorney General. The Attorney General's Office created a fair hearings unit and hired two full-time hearing officers to preside over approximately 400 annual Medicaid hearings.

Recommendation 4

The Joint Legislative Oversight Committee should consider inviting representatives from the Department of Health and Welfare and the Office of the Attorney General to present a status report during the 2017 legislative session with relevant ideas or strategies that could be generalized to other agencies.

An interim committee could coordinate future efforts to improve evidentiary hearing procedures.

State policy on evidentiary hearings has far-reaching effects—this evaluation looked at 213 actions across 75 agencies. Any changes will affect multiple agencies each with unique actions, resources, and needs. Experiences from other states demonstrated that customizing agency procedures is necessary to protect public rights and optimize available resources.

Any efforts to implement change could benefit from the establishment of an interim committee. The committee could be a useful mechanism to coordinate changes to statute and rule and ensure agency perspectives are well represented.

Recommendation 5

The Legislature should consider establishing an interim committee to coordinate any future changes.

Study request

Sen. Grant Burgoyne

Rep. Lynn Luker

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House of Representatives
State of Idaho

Date: March 12, 2015
To: JLOC
From: Representative Lynn Luker & Senator Grant Burgoyne
Re: OPE Evaluation Request
Subject: Administrative Hearing Officers

Background: Administrative hearing officers are used by many state agencies to resolve conflicts and hear appeals in the areas that they regulate. Currently, Idaho's agencies control their own selection and contracting process with regard to hearing officers. A conflict arises when the agency is also a party in the contested case, which in many agencies is frequent. Additionally, appeals in such cases may be decided by the director of the agency.

One example is that the federal Center for Medicaid recently threatened to withhold federal funds from Idaho's Division of Medicaid because their hearing officers are employed and contracted by the Department of Health and Welfare, creating a clear conflict of interest. To respond to the federal government's concerns, the hearing officers responsible for Medicaid are becoming part of the Office of the Attorney General. Similar conflicts exist in other state agencies that perform dispute resolution related to matters that they regulate.

For citizens and businesses working with, or receiving services from, state agencies, it is imperative that administrative hearings are fair and unbiased. We wish to know the extent to which agency contested case hearing processes create potential conflicts of interests and what possible alternatives exist. This evaluation will help us establish guidelines for the provision of administrative hearing officers, establish fair and consistent appeals processes, and ensure that it is cost-effective, impartial, and transparent.

Our questions are, specifically:

1) What are the various models of hearing officer use in Idaho's agencies? How many cases and appeals are decided by an officer paid by the agency or the director of that agency?
2) Do Idaho's administrative hearing processes comply with state and federal requirements (both of the Administrative Procedure Act and of any particular granting agency)?
3) What safeguards exist to avoid and mitigate the effects of conflicts of interest, both real and perceived?
4) How do other states maintain transparency and integrity in their administrative hearing process? How does Idaho's process compare?
5) What are various alternatives to our current process? Are the alternatives viable in Idaho, and if so, what would they cost?

Yours truly,

Rep. Lynn M. Luker

Study scope

Because no statewide entity oversees evidentiary hearings, we initially looked to Idaho's Administrative Procedure Act to guide our understanding of the hearing process. The act sets forth procedures agencies must follow when promulgating rules and hearing contested cases.

As we gained familiarity with the subject and learned that almost half of administrative agencies have opted out of all or some of the act's procedures specific to contested cases, we realized the study scope published in July placed undue emphasis on hearing proceedings under the act rather than a more balanced focus that would represent all agencies.

To adequately address the questions raised by the requesters, we studied and gathered information about agencies not subject to the hearing proceedings outlined in the act. We also worked with agencies that, for all intents and purposes, conducted evidentiary hearings but used a variety of terms to describe those hearings.

Although the following scope framed the issue as one within the Administrative Procedure Act, the comprehensive description and analysis presented in this report was an inclusive overview of all evidentiary hearing proceedings among agencies.

Evaluation approach and objectives

Because the state has no central repository for contested case information, we will be contacting each agency to determine how many contested case hearings have been held by the agency and what records are available for review. After we have conducted this initial screening, we will review formal contested case hearing appeals to district courts and the Idaho Supreme Court, review statute and administrative rule, review literature and

other states' practices, and gather additional information from agencies to achieve the following objectives:

1. Describe the various models of formal contested case hearings in Idaho.
2. Define the intended goals of the Idaho Administrative Procedure Act.
3. Describe professional standards and common practices.
4. Determine whether Idaho's formal contested case hearing models align with the intended goals stated in statute and rule.
5. Identify possible policy alternatives and incorporate cost information, when available.

Risk rank of agency actions

Agency	Agency action	Hearing officer model	Risk rank	Total hearings FYs 2011–2015
Accountancy, Idaho Board of	Disciplinary formal complaints	Contractor	Moderate	3
	Licensing applications	Agency head	High	3
Agriculture, Department of	Warehouse control program	Contract	Low	1
Athletic Commission, Idaho	Licensing and regulation	Contractor	Low	2
Barber Examiners, Board of	Licensing and regulation	Contractor	Low	1
Blind and Visually Impaired, Commission for the	Business enterprise program	Contractor	Low	1
Building Safety, Division of	Electrical Board, civil penalties appeal	Agency head	High	14
	HVAC, civil penalties appeal	Agency head	High	17
	Plumbing Board, civil penalties appeal	Agency head	High	4
	Public works contractors	Agency head	High	1
Chiropractic Physicians, Board of	Licensing and regulation	Contractor	Low	1
Contractors Board, Idaho State	Licensing and regulation	Contractor	Low	3
Cosmetology, Idaho Board of	Licensing and regulation	Contractor	Low	3
Dentistry, Board of	Application decision	Agency head	High	10
	Contested case	Contractor	Moderate	2

Table continued on next page.

Agency	Agency action	Hearing officer model	Risk rank	Total hearings FYs 2011—2015
Education, State Department of	Application denial	Hearing panel	Low	2
	Denial of charter petition (charter schools)	Agency not a party	Moderate	3
	Due process hearing (special education)	Agency not a party	Low	9
	Probable cause findings on ethics issues	Hearing panel	Low	5
Environmental Quality, Department of	Air permit	Contractor	Low	1
	Other action or inaction	Contractor	Low	4
Finance, Department of	Fairness hearing	Contractor	Moderate	1
	License or registration, denial or revocation	Contractor	Moderate	3
Fish and Game, Department of	Commercial licenses and permits	Contractor	Moderate	1
	Commercial permit or lease, outfitter	Contractor	Moderate	1
	Depredation claims	Contractor	Low	1
Health and Welfare, Department of	Advanced payment of premium tax credit	Contractor	Low	77
	Aid to aged, blind, and disabled	Contractor	Low	196
	Behavioral health, adult mental health services	Contractor	Moderate	1
	Child and family services	Contractor	Low	309
	Child care licensing	Contractor	Low	36
	Child support	Contractor	Low	450
	Criminal history and background checks	Contractor	Low	3

Agency	Agency action	Hearing officer model	Risk rank	Total hearings FYs 2011—2015
Health and Welfare (con't.)	Emergency medical services	Contractor	Low	3
	Food stamps	Contractor	Low	1,069
	Food stamps, intentional program violation	Contractor	Low	1,156
	Fraud investigation and enforcement of fraud, abuse, and misconduct	Contractor	Low	32
	Idaho child care program, provider and recipient	Contractor	Moderate	61
	Idaho child care program, fraud	Contractor	Moderate	35
	Licensing and certification, certified family homes	Contractor	Low	10
	Low income home energy assistance program	Contractor	Low	1
	Medicaid, basic plan benefits	Contractor	Low	499
	Medicaid eligibility for health care assistance for families and children	Contractor	Low	385
	Medicaid, enhanced plan benefits	Contractor	Low	906
	Public health	Contractor	Moderate	3
	Temporary assistance for families in Idaho	Contractor	Low	35
Health District 1 (Panhandle)	Onsite sewage disposal permitting	Contractor	Moderate	1
Insurance, Department of	Enforcement actions (penalties, suspensions, revocations, denials, temporary licensing, license limitations, multistate regulatory settlement agreements, unlicensed activity)	Contractor	Moderate	33

Table continued on next page.

Agency	Agency action	Hearing officer model	Risk rank	Total hearings FYs 2011—2015
Labor, Department of	Eligibility determination	Employee	Low	31,423
	Wage and hour determination	Agency not a party	Low	479
Lands, Department of	Encroachment permit, enforcement or cancellation	Employee	Moderate	1
	Encroachment permit, approval or denial	Employee	Moderate	20
	Integration	Contractor	Low	4
	Reclamation plan or closure plan, approval or denial	Employee	Moderate	1
	Riverbed mineral lease, approval or denial	Employee	Moderate	2
	Well spacing	Contractor	Moderate	3
Lottery Commission, Idaho State	Charitable gaming license revocation	Contractor	Moderate	2
Medicine, Board of	Disciplinary actions against licensee	Contractor	Moderate	16
	License denials	Contractor	Moderate	1
Midwifery, Idaho Board of	Licensing and regulation	Contractor	Low	2
Morticians, State Board of	Licensing and regulation	Contractor	Low	2
Nursing, Board of	Disciplinary actions	Agency head	High	4
Outfitters and Guides Licensing Board, Idaho	Disciplinary action decisions	Agency head	High	65
	Licensing decisions	Agency head	High	77

Agency	Agency action	Hearing officer model	Risk rank	Total hearings FYs 2011—2015
Personnel Commission, Idaho (Division of Human Resources)	Appeals of state classified employees for disciplinary dismissals, demotions, suspensions or involuntary transfers or of the failure of an appointing authority to provide a right or benefit to which employee is entitled to by law	Agency not a party	Low	25
Pharmacy, Board of	Action against licenses and registrations and restrictions or denials of license or registration applications	Agency head	High	41
Police, Idaho State	Alcohol beverage control, administrative sanctions against ABC administrative rules	Contractor	Moderate	19
	Idaho Peace Officers Standards and Training Council, peace officer decertification	Contractor	Moderate	6
	Idaho State Racing Commission, licensee discipline	Contractor	Moderate	6
Professional Counselors and Marriage and Family Therapists, Idaho Licensing Board of	Licensing and regulation	Contractor	Low	4
Professional Engineers and Professional Land Surveyors, Board of Licensure of	Discipline	Agency head	High	2
Public Employee Retirement System of Idaho	Member disagreement with agency action or statute interpretation	Contractor	Low	14
Real Estate Appraiser Board	Licensing and regulation	Contractor	Low	2
Real Estate Commission, Idaho	Discipline for license law violations	Contractor	Moderate	7

Table continued on next page.

Agency	Agency action	Hearing officer model	Risk rank	Total hearings FYs 2011—2015
Residential Care Facility Administrators, Board of Examiners	Licensing and regulation	Contractor	Low	1
Social Work Examiners, State Board of	Licensing and regulation	Contractor	Low	8
Speech and Hearing Services Licensure Board	Licensing and regulation	Contractor	Low	1
Tax Appeals, Board of	County Board of Equalization	Employee	Low	562
	Idaho Tax Commission	Agency not a party	Low	80
Tax Commission, Idaho State	Appeal of public utilities assessment	Agency head	High	11
	Redetermination of assessed tax (all tax types except property)	Employee	Low	750
Transportation Department, Idaho	Admin license suspension	Agency not a party	Moderate	13,360
	Contract bids	Contractor	Moderate	1
	Highway access	Contractor	Moderate	5
	Vehicle or motor carrier services (motor vehicle titles, registrations, dealer licenses, commercial vehicle registrations, over legal permits, etc.)	Contractor	Moderate	15
Veterinary Medicine, Board of	Denial of licensure or certification	Agency head	High	1
	Disciplinary action (veterinarians, certified veterinary technicians, certified euthanasia technicians)	Agency head	High	2

Agency	Agency action	Hearing officer model	Risk rank	Total hearings FYs 2011–2015
Vocational Rehabilitation, Idaho Division of	Customer service provisions	Contractor	Low	8
Water Resources, Department of	All other agency action (water district changes, ownership changes, stream channel permits, dam safety certificates, well drilling permits, injection wells, etc.)	Employee	Moderate	9
	Application for permit, appr/den	Employee	Moderate	27
	Application for transfer, appr/den	Employee	Moderate	13
	Issuance of water right license	Employee	Moderate	2
	Water delivery calls or orders	Agency head	Moderate	6
GRAND TOTAL: 42 agencies	93 agency actions			52,488 hearings

D Methodology

Idaho has a decentralized structure for administrative hearings. No central agency oversees, collects data, evaluates, or reports on the procedures governing evidentiary hearings. As such, much of our fieldwork was focused on identifying which agencies had actions with the potential for an evidentiary hearing. One of the significant deliverables of our report is a list of agency actions for which an evidentiary hearing has been held within the past five fiscal years.

To deconstruct the requirements of an evidentiary hearing, determine what factors contribute to the risk of bias, identify safeguards that can mitigate the risk of bias, and assess the level of risk present within actions, we used the following methods.

Document review

A great deal has been written about hearing officer bias. Building upon the ideas and findings of experts in administrative law as far back as 1968, we conducted an extensive literature review of scholarly articles from peer-reviewed journals. See appendix E for a selected bibliography of works referenced in our report.

Similarly, the courts have ruled in cases where parties made claims of hearing officer bias. We analyzed 23 key US Supreme Court and Idaho Supreme Court cases (see appendix F for a list) and searched for Idaho Supreme Court opinions issued in January 2010–June 2015 involving appeals of evidentiary hearings. Our review of these cases determined how often bias was raised as an issue in appealed cases, how often bias was confirmed, and the frequency of other cited reasons for appeal.

Because many evidentiary hearings procedures followed by agencies were codified in statute or rule, we reviewed the Idaho Administrative Procedure Act, the *Idaho Rules of Administrative Procedure of the Attorney General*, and agency-specific statute and rules.

Interviews

We interviewed representatives from 13 state agencies:

Attorney General, Office of the
Education, Department of
Environmental Quality, Department of
Health and Welfare, Department of
Insurance, Department of
Industrial Commission
Labor, Department of
Lands, Department of
Occupational Licenses, Bureau of
Personnel Commission, Idaho
Tax Commission, Idaho State
Transportation Department, Idaho
Water Resources, Department of

Hearings from these agencies represented 98 percent of the total reported hearings in fiscal years 2011–2015. The information we gathered from these discussions were useful in determining the scope of our evaluation, understanding conceptual issues of bias, identifying existing procedural safeguards agencies had in place to mitigate bias risk, and developing relevant text in a questionnaire.

We also interviewed three groups of current employee hearing officers, seven contracted hearing officers, and two employees formerly involved in hearings. Collectively, these hearing officers had worked for 21 agencies. The interviews allowed us to observe a range of perspectives concerning the potential and real pressures that hearing officers experienced from the appointing agency.

Finally, we interviewed Professor Richard Seamon, Associate Dean for Faculty Affairs and Professor of Law with the University of Idaho, and the Honorable Justice Roger S. Burdick of the Idaho Supreme Court.

We analyzed 23 US Supreme Court and Idaho Supreme Court cases.

13 agencies interviewed represented 98% of hearings.

Review of evidentiary hearing procedures and policies

We developed a method to describe specific aspects of evidentiary hearings including:

1. Number of agencies that had conducted evidentiary hearings
2. Number of actions with the potential to require an evidentiary hearing
3. Methods by which hearing officers were appointed and compensated
4. Number of hearings conducted in fiscal years 2011–2015
5. Number of appeals of evidentiary hearings to district court appeals filed in fiscal years 2011–2015
6. Role agencies played in evidentiary hearings
7. Existing statutes, rules, policies, or procedures in place that established safeguards to protect the independence of hearing officers

Agencies excluded from the scope

We conducted a preliminary screening of agencies. We worked with the Office of the Attorney General and contacted representatives from agencies to learn which agencies had the potential to require an evidentiary hearing. From that initial screening, we narrowed our scope to 75 agencies.

We excluded proceedings conducted by the Industrial Commission and the Public Utilities Commission because these two agencies had statutory exemption from the contested case proceedings under the Administrative Procedure Act. The exemption was part of a 1993 revision of the act. Per statute, any orders produced by the Industrial Commission or the Public Utilities Commission would be appealed to the Supreme Court.

Agency hearing model questionnaire

We developed and sent an agency hearing model questionnaire to the agencies we identified with the ability to conduct evidentiary hearings. Exhibit 13 lists our questions.

In addition to the answers, we asked agencies to submit four pieces of information:

1. Sample contract (if applicable)
2. Job description for positions that served as a hearing officer (if applicable)
3. List of district court case numbers for any hearings that were appealed in fiscal years 2011–2015
4. List of individuals who acted as a hearing officer in fiscal years 2011–2015

We assisted agencies in completing the questionnaire through in-person interviews, phone calls, and emails and gathered information from all 75 agencies.

Exhibit 13

Administrative hearing officer questionnaire

General information

1. List the type of appealable agency action.

2. List the IDAPA rule governing the appeal process for this agency action.

3. What is the position title or board name of the agency head with the statutory authority to make the final order for this agency action?

4. Is the hearing process for this agency action subject to federal rules and regulation?

5. How many appealable decisions are made for this type of agency action each fiscal year (2011—2015)?

6. Number of administrative hearings held per fiscal year (2011—2015).

Hearing officers

1. For the majority of contested case hearings, who serves as the hearing officer?

2. What type of order does your hearing officer have the authority to issue (recommended, preliminary, final)?

3. When you contract for hearing officers, do you:
   - ❑ Contract annually
   - ❑ Contract per hearing
   - ❑ We do not contract for hearing officers
   - ❑ Other

4. When you contract for hearing officers, do the individuals or law firms:
   - ❑ Exclusively act as a hearing officer
   - ❑ Provide other services in addition to those related to hearing officer
   - ❑ We do not contract hearing officers
   - ❑ Other

5. When employees serve as a hearing officer, in what ways are they separated from other agency employees?

6. Whether you contract or use employees, what qualifications do you require from someone who serves as a hearing officer?

7. Do you have a code of ethics or statement of professional standards that you expect your hearing officers to adhere to?

8. Do you have provide training to hearing officers?

9. Within rule or statute, do your hearing officers have any restrictions on their authority to
   - ❑ Schedule cases, including prehearing conferences
   - ❑ Schedule and compel discovery and to require advance filing of expert testimony
   - ❑ Preside at and conduct hearings, accept evidence, rule upon objections, and otherwise oversee hearing
   - ❑ Issue a written decision, including a narrative of proceedings, findings of fact, conclusions of law, and recommended or preliminary orders
10. What safeguards do you have in place to protect the independence of your hearing officers?

Administrative hearing process

1. What is the role of your agency in a contested case within each type of appealable agency action?
2. Do you have a system or procedure in place to verify that hearing officers do not have a conflict of interest before being assigned to a contested case?
3. How frequently do parties have legal representation through the contested case process?
4. If a party requests a new hearing officer with cause (as per IDAPA 04.11.412 Disqualification of officers hearing contested cases), who makes the determination on the petition?
5. Does your agency have specific rules limiting *ex parte* communications with the hearing officer?
6. How frequently does your agency head review preliminary orders?
7. How frequently does the agency head change a recommended or preliminary order?
8. Do you provide any information to assist parties who are representing themselves in a contested case?
9. Does your agency have the ability to recover legal fees?
10. Do other parties in a contested case have the ability to recover legal fees?
11. Are contested case orders available online for public review?
12. If you could change one thing about the current formal contested case process, what would it be?
13. Additional notes about your agency's administrative hearing process.

Frequency of district court appeals

We compared the number of reported evidentiary hearings in fiscal years 2011–2015 with the total reported number of appeals to district court (excluded from this comparison were hearings conducted by the Department of Labor because the majority of its hearings were appealed to the Industrial Commission).

Risk analysis

Using information collected from agencies, we identified and categorized agency actions into one of four hearing officer models:

1. Agency head
2. Contractor
3. Employee
4. Agency not a party

The Department of Education conducts hearings for two separate actions related to application denials and probable cause findings for certified teachers. A specially selected hearing panel conducts hearings for these actions. The actions did not clearly fall into one of the four hearing officer models. We include the numbers for these hearings when we report grand totals, but these actions are not included in the numbers specific to the hearing officer models.

Agencies with no reported hearings in fiscal years 2011–2015

Of the 213 agency actions reported, 120 (56 percent) had no hearings in past five fiscal years. We did not assess risk for these 120 agency actions.

Risk category ranking

The data in our analysis is qualitative. We did not want to give the false impression of precision by reporting a numeric risk score. We developed an algorithm that took into account the hearing officer model, the presence of a risk factor, and the absence of a safeguard. When a risk factor was present or when a safeguard was absent, one point was allocated. A total risk score was calculated for each agency action.

We calculated the maximum possible points for each hearing officer model, which was not the same for each model. The four models each had unique concerns depending on the role of the agency in the proceedings and the relationship of the hearing officer to the agency.

Although the maximum possible points was not the same for each model, the percentage of maximum possible points that was assigned to the rank of low, moderate, or high was consistent across the hearing officer models. Table A illustrates the percentages assigned to each rank. We divided the risk score by the maximum possible points and used table A to determine the rank.

Table A

Low				Moderate			High		
10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

Analyzing factors that contributed to the perception of bias

We identified arguments for and against a decentralized hearing system. We translated these arguments into two factors that could increase the perception of bias: (1) the role of the agency in the hearing process and (2) the relationship of the hearing officer to the agency. We analyzed each agency action using the answers provided by agencies in the questionnaire. When agency responses met one or all of the following criteria, the risk level was increased:

Role of the agency in the hearing process

The agency reported that it fulfilled more than one role in a hearing process for an action, and one of those roles was to initiate, advocate, or prosecute.

Relationship of the hearing officer to the agency

For all actions in which the agency fulfilled more than one role, including to initiate, advocate, or prosecute:

For the majority of evidentiary hearings, the agency head (board or individual) served as the hearing officer.

For the majority of evidentiary hearings, the agency appointed a contracted hearing officer. An exception was the Department of Health and Welfare, which contracted with the Office of the Attorney General. These hearings were conducted by employees of a separate state agency, and these employees had merit protections.

For the majority of evidentiary hearings, an employee was appointed who did not have employment protections (i.e., classified employee).

Analyzing the presence of safeguards

We identified seven safeguards that can mitigate the risk of bias. We analyzed each agency action using the answers provided by agencies in the questionnaire. When agency responses met one or more of the following criteria, the risk level was increased:

Conflict of interest policy: For all hearing officer models except agency head, the agency did not have a system to check for a conflict of interest before assigning a hearing

officer to a case and did not require hearing officers to be attorneys.

***De novo* review:** Action was not subject to a *de novo* review before a district court by statute.

***Ex parte* communications policy:** Action was not subject to the Administrative Procedure Act and the agency did not have specific rules limiting *ex parte* communications.

Federal review: Action was not subject to federal review.

Hearing officer training: For all hearing officer models except agency head, the agency did not provide training and did not require hearing officers to be attorneys.

Professional code of ethics: For all hearing officer models except agency head, the agency did not have a specific code of ethics applicable to hearing officers and did not require hearing officers to be attorneys.

Separation of hearing officers: For all actions in the employee hearing officer model, the agency did not have physical, organizational, or full functional separation of hearing officers.

We identified two additional safeguards that every action had (1) judicial review or appeal to a separate agency and (2) a hearing officer disqualification policy. Because no agency would have received a level of increased risk, we did not calculate these variables in the risk ranking.

E Selected bibliography

The following bibliography lists selected sources that exemplify the types of evidence available in literature and supports our report findings. This list is not a complete record of all of the information and sources we used or consulted while conducting this project.

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Responses to the evaluation

State of Idaho
DIVISION OF BUILDING SAFETY

Building a Safer Idaho

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Governor

C. Kelly Pearce
Administrator

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February 9, 2016

Rakesh Mohan, Director
Office of Performance Evaluations
954 W Jefferson Street
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Boise Idaho 83702

RE: Comments – Joint Legislative Oversight Committee – Administrative Hearings and Risk of Bias – Draft Report

Dear Director Mohan:

Thank you and your office for the effort extended to perform a comprehensive review of how administrative hearings are conducted across the broad spectrum of Idaho state government. It is a most comprehensive compilation.

I also express appreciation for the opportunity to provide response in behalf of the Division of Building Safety in advance of the release of the report to the Committee.

As such, I specifically appreciate the opportunity to provide a somewhat differing approach to the findings directly related to the Division's designation as being a 'high risk' structure.

As the report is currently drafted, I believe there may not be a clear definition of how the agency conducts administrative hearings, and as such the report leads to the conclusion that there exists a 'high risk' of bias.

As you are aware, the Division hosts seven (7) technical boards. The membership of these boards is appointed by the governor and serves at his pleasure. Further, the members are not selected from an 'association' or otherwise designated list – but, come from the 'ranks' of individuals properly licensed within their trades. Additionally, all but one of the seven (7) boards also has a sitting public representative as a board member.

Legislation is within the process this year to insure the seventh board will also have a designated public representative.

Further, as the Division Administrator, I hold no supervisory authority or defined influence over these board members. As such, within the Division, there exists a clear, well-defined separation between the role of board members and those employees of our agency.

This separation includes the respective roles in the issuance of civil and administrative penalties to include the appeal process.

The agency role in the civil penalty process is to define a violation of code, review the circumstances involved in an infraction and then make a determination as to an appropriate penalty based upon documented evidence, presented by inspectors and/or other parties initiating complaints. Wherein an agreement is not reached, incidents are directed to the appropriate board for hearing/resolution.

While the Division provides the administrative support services to sustain the various boards, the Division does not control the board's actions.

The electrical, plumbing and HVAC boards are charged with hearing such appeals of penalties assessed under the authority of the administrator. The board members regularly conduct appeals from such parties and are supported by counsel from a representative of the Office of the Attorney General. Parties are sworn, testimony taken and deliberation of the merits applied. The board issues the 'final order' reviewing the appeal. Again, the administrator has no role in the issuance of the order. This is the exclusive role of the board with counsel from the representative of the Attorney General's office – who, when necessary or at the direction of the boards, will also prepare a written order. Findings and rulings are recorded in the minutes of the board meetings.

I believe this separation of responsibility sufficiently assures individuals the access to fair and unbiased hearings, and that such hearings occur before boards composed of individuals having technical competence in the respective trade issues.

Contrasting this system with one driven by an 'independent' hearing officer holding no background or foundation in the technical aspects of the various trades represented within the Division and its boards would seem to be regressive. It is apparent that costs would 'soar' when it became necessary to subpoena technical witnesses now readily available as members of the board.

Hopefully, this response has been stated in a manner which gives more clarity to the assurance of non-high risk actions by our administrative boards. Should you need any clarification, please do not hesitate to contact my office.

Sincerely,

C. KELLY PEARCE
Administrator

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December 29, 2015

Ms. Hannah Crumrine
Senior Performance Evaluator
Office of Performance Evaluation
954 W. Jefferson Street
Boise, ID 83702

Re: Response to OPE Hearing Officer Evaluation
MKA File No. 1287.00

Dear Ms. Crumrine:

I am the attorney for the Idaho State Board of Dentistry (Board). I have been asked to provide comments to the draft Model of Administrative Evidentiary Hearing Risk Assessment (Model) and the proposed risk categories assigned to the Board hearing processes. For the record, I have been Board counsel for approximately ten (10) years and am intimately familiar with the practices employed by the Board and staff as to applications for licensure and disciplinary matters. I have also served as a hearing officer for several state agencies and boards over a period of fifteen (15) years.

As to the Model itself, it appears that the fact that an agency or board may be assigned multiple roles as a matter of state law assumes a potential for bias. I find this curious as I know of no licensing board in this state, or any other state, that is not expected to investigate and discipline licensee misconduct while at the same time provide the licensee with a full and fair hearing under the state and federal constitutions. A vast body of law has arisen over the past decades designed to lessen the potential for bias during the hearing process. The law is explicit that the investigative role is to be separated from the quasi-judicial role. In every licensing board I am familiar with, it is an absolute given that the hearing process is not tainted by ex-parte information, from any source. While some might argue that the administrative processes that exist in this state are flawed, absent a complete revision of the law, administrative agencies will continue to be assigned multiple roles. Therefore, it seems unusual that that which is a given in administrative law is considered a biasing factor. In any event, using this as a factor makes it appear as if the Model begins with a potential strike against the agency or board.

As to the proposed risk categories assigned to the Board of Dentistry there are two (2) points to be made. The first is that the Model seems to presume that whenever the agency head is called upon to fulfill a quasi-judicial role a high risk for bias exists. Hence, the Board hearing an application matter is deemed to be at high risk. In my experience at the Board of Dentistry, the

level of risk for bias in application matters is quite low. First, the vast majority of license applications are handled at the staff level and the Board will have little occasion to bring the matter to hearing as the granting of licenses is nearly universal, assuming all qualifying factors of the applicant are met. The only time the Board is called upon to review an application is when one or more of the statutory grounds for potential denial of a license apply. These grounds generally fall into one of four categories: addiction issues; past criminal misbehavior; past discipline by a state board; or failure to disclose these matters in the application. In such cases, the Board is charged, as a matter of state law, with reviewing whether or not to issue a license. Almost invariably, the applicant is from out-of-state, or is a new graduate. As such, they are total strangers to the Board. In addition, the applicant rarely will seek a contested hearing, in that the information is irrefutable, and fully and freely admitted to by the applicant. The question before the Board is whether to grant a license despite the prior misbehavior. This is a discretionary call based upon the Board's determination as to whether or not the applicant presents a risk to the public. Usually, the applicant provides information demonstrating that they are not a risk. Under these conditions, it seems the potential for bias is relatively low. Indeed, these hearings are not "contested" but are an informal discussion about what to do with an applicant who admits past misconduct, and who assures the Board that such misconduct is unlikely to reoccur.

The second point pertains to the designation of hiring an outside hearing officer as having a moderate risk of the potential for bias. While I assume some have argued that the hearing officer is theoretically beholden to the agency which pays him or her, there are several factors which can be used to protect the parties from bias. First, there is the ability to disqualify a hearing officer without cause, in accordance with Administrative Rule 412. Next, the same rule allows a party to bring a challenge against a hearing officer for actual cause, in accordance with state court rules. Next, the hearing officer only provides a recommended or preliminary order, which must be reviewed by the Board, and can be modified or rejected at the urging of either party. Next, the hearing officer's decision is appealable to the district court and ultimately the appellate courts. I should also point out that most hearing officers in this state are practicing attorneys, who are subject to their own canons of professional responsibility. Given these conditions, it would seem the potential for bias would be low.

I hope you find this information helpful. Please feel free to contact me if you need clarification as to anything in this letter.

Yours very truly,

Michael Kane

MICHAEL J. KANE

MJK:tlp
cc: Ms. Susan Miller, Executive Director, Idaho Board of Dentistry

IDAHO
DEPARTMENT OF LABOR
C.L. "BUTCH" OTTER, GOVERNOR
KENNETH D. EDMUNDS, DIRECTOR

February 11, 2016

Rakesh Mohan
Director, Office of Performance Evaluations
954 W. Jefferson St.
P.O. Box 83720
Boise, Idaho 83720-0055

Dear Director Mohan:

Thank you for affording the Idaho Department of Labor (the "Department") an opportunity to submit a formal response to your report on administrative hearings and risk of bias. In this response, we hope to explain the unique characteristics of the Department's hearing officer system, which functions at a very high level, is subject to stringent federal oversight and has a very low risk of bias. In light of these unique characteristics, the Department believes there is no reason for discontinuing the Department's current hearing officer system and moving it to a central panel.

The greatest number of appeals heard by the Department relate to unemployment insurance ("UI") benefit determinations. The first level appeals of determinations are heard by the Appeals Bureau, an independent division within the Department. For the period 2011 through 2015, the number of first level UI appeals ranged from 5,000 to nearly 8,000 annually. At the height of the recent recession, appeals exceeded 10,000 in one year.

Idaho's UI system is administered by the Department with ongoing oversight by the federal government. This oversight is a product of federal "conformity" requirements and federal funding of state administrative costs. Nearly all of the Department's costs related to its UI program are directly funded by annual federal grants through a complex formula that includes, among other measures, an evaluation of the timeliness, efficiency and quality of decisions of the Appeals Bureau.

If Idaho were to fail to meet federal "conformity" requirements, there could be drastic consequences. Idaho's covered employers could lose their existing federal FUTA tax credit against state unemployment taxes (SUTA), resulting in much greater taxes, and the Department could lose federal funding of its UI program.

Nearly all of the factors described in this report that would contribute to bias are not found in UI appeals, and most of the protective factors exist in UI appeals. These include:

- **The Director of the Department has no role in the appeals process.**

- **Department hearing officers are independent**. They are all full-time, classified state employees, and physically and organizationally separated from the rest of the Department. They are not involved in the Department's underlying investigations and determinations of eligibility.

- **Department hearing officers are experienced**. Of the Appeals Bureau's seven current full-time hearing officers, four have 13 or more years experience in the UI field. The average of our hearing officers' UI appeals experience is more than 11 years.

- **Department hearing officers are subject matter experts in the UI benefits field.** The UI field requires an understanding of unique procedural rules and substantive law and the more than 60 different legal issues that may arise. The Department's appeals hearings are not subject to the Idaho Administrative Procedure Act or the Idaho Attorney General's Procedure Rules, but rather to procedural rules promulgated by the Department.

- ***Ex parte* communications are prohibited**. Applicable IDAPA rules prohibit *ex parte* communication with hearing officers, the Chief of the Appeals Bureau (who directly supervises the hearing officers), and their clerical personnel. The rules expressly state the Department staff shall not attempt to influence the disposition of an appeal by the Appeals Bureau.

- **First level appeals to the Appeals Bureau and second level appeals by the Idaho Industrial Commission are conducted on a *de novo* basis**. There is no presumption of correctness of the fact finding and legal conclusions of both the initial eligibility determination and the first level appeal. The Industrial Commission, which conducts the second level *de novo* review, is completely independent of the Department.

- **The Department does not have a vested interest in the outcome of UI appeals**. Unemployment benefit claims are paid from a federally managed trust fund and have no effect on the operating budget of the Department. The real parties in interest in these appeals are employers and claimants.

- **The Department's UI hearings are systematically monitored by the federal government for due process, timeliness and the quality of their decisions**. The United States Department of Labor ("USDOL") conducts quarterly reviews of randomly selected hearings and scores them for timeliness and quality. The expected timeliness measure requires written decisions in first level appeals within 10 days of the hearing date and no later than 30 days from the date of filing of the appeal. USDOL reviews the quality of UI hearings and decisions based on 38 criteria, including due process, bias and prejudice, testimony and cross-examination, quality of the record, and clarity of written decisions. The Appeals Bureau's performance is consistently ranked by USDOL among the top 5 of all states.

- **Competing federal requirements assure fair decisions**. The federal government requires the Department to promptly make determinations of eligibility. It also requires the Department to protect against and collect overpayments and to afford claimants due process. These competing policies result in fairer decisions because the Department could not favor claimants over employers, or vice-versa, without negatively impacting federal performance measures.

- **UI hearings will become fully integrated with the Department's internet unemployment system ("iUS")**. The Department's iUS system recently received a national award for technological advancement. The Department intends to integrate UI appeals within this system to improve efficiency and have real-time tracking of performance metrics, which exist now for its initial determinations. The iUS system is required to meet USDOL and Social Security Act data security requirements; system information cannot be shared or transmitted over networks of other state agencies. These heightened data security requirements apply to activities relating to both initial determinations and subsequent appeals.

Because of these differences and protective features, the risk of bias in the Department's appeals hearings is very low. That fact, combined with the unique area of law involved in these appeals and UI hearings officers' top federal scoring, are strong reasons for maintaining the Department's existing hearing officer system.

Sincerely,

Ken Edmunds

Kenneth D. Edmunds
Director

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IDAHO DEPARTMENT OF LANDS

TOM SCHULTZ, DIRECTOR
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February 12, 2016

Amanda Bartlett
Office of Performance Evaluation
PO Box 83720
Boise, Idaho 83720-0055

via e-mail: ABartlett@ope.idaho.gov

Re: Formal Agency Comments on OPE Report

Dear Ms. Bartlett,

Thank you for helping the Idaho Department of Lands (IDL) through this evaluation. It was great to hear how different agencies handle hearing processes, and more collaboration between agencies could improve overall state government.

IDL is submitting this formal response to clarify workload issues associated with employee hearing officers. IDL does not employ any full time hearing officers. Any hearing officer responsibilities are secondary to the primary job duties assigned to IDL employees. Being a hearing officer is a small part of the overall work accomplished by them, and it results in other non-time critical work getting delayed or deferred. In the absence of being tasked as hearing officers, those employees would have more time for strategic planning and other non-time critical tasks that can greatly improve program performance and customer service.

Sincerely,

Eric Wilson
Resource Protection and Assistance Bureau Chief

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February 12, 2016

Rakesh Mohan
Director
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Idaho Legislature
P.O. Box 83720
Boise, ID 83720-0055

Re: Survey and Report on Administrative Hearing Officers

Dear Mr. Mohan:

I write on behalf of the Idaho Outfitters and Guides Licensing Board. The Board is in receipt of the spreadsheet portion of the administrative hearing officer report pertaining to the Outfitters and Guides Licensing Board. Apparently, you have given this agency a high rating regarding the potential risk of bias of the hearing officers utilized by the Board. However, I can advise you that such a risk analysis is simply inapplicable to this agency as it does not utilize hearing officers. Rather, the full Board is responsible to hear disciplinary matters regarding its licensees, or licensing matters concerning its applicants.

There are a number of reasons why this Board does not utilize hearing officers for its contested cases under the Administrative Procedures Act. Potential disciplinary matters are handled much more quickly, efficiently and at a significantly reduced cost when such matters are heard directly by the Board rather than by a hearing officer. Additionally, the members of the Board are able to watch the respondent and witnesses testify live, which is essential in assessing an individual's credibility. Most Board members are licensed as outfitters in this industry and, as such, are able to utilize their unique understanding and experience associated with the issues involved in this industry. Finally, I can tell you that the outfitters and guides who are licensed by the Board prefer that the Board members sit in judgment over their cases rather than a licensed lawyer with little experience or understanding of the issues associated with this industry. I can assure you, however, that the Board does utilize an attorney who acts as an administrator at the hearing for the Board, and who assists the Board in rulings on legal issues associated with the process or proceeding.

I hope the Board's response has been helpful in your understanding of this issue as it relates to the Idaho Outfitters and Guides Licensing Board. If I can answer any additional questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Roger J. Hales

RJH:dr
cc Client

7388 Mohan 01.wpd

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December 28, 2015

Ms. Amanda Bartlett
Principal Evaluator
Office of Performance Evaluation
954 W. Jefferson Street
Boise, ID 83702

Re: Response to OPE Hearing Officer Evaluation
MKA File No. 825.00

Dear Ms. Bartlett:

I am the attorney for the Idaho Board of Licensure of Professional Engineers and Professional Land Surveyors (Board). I have been asked to provide comments to the draft Model of Administrative Evidentiary Hearing Risk Assessment (Model) and the proposed risk category assigned to the Board hearing process. For the record, I have been Board counsel for approximately fifteen (15) years and am intimately familiar with the practices employed by the Board and staff as to disciplinary matters. I have also served as a hearing officer for several state agencies and boards over a period of fifteen (15) years.

As to the Model itself, it appears that the fact that an agency or board may be assigned multiple roles as a matter of state law assumes a potential for bias. I find this curious as I know of no licensing board in this state, or any other state, that is not expected to investigate and discipline licensee misconduct while at the same time provide the licensee with a full and fair hearing under the state and federal constitutions. A vast body of law has arisen over the past decades designed to lessen the potential for bias during the hearing process. The law is explicit that the investigative role is to be separated from the quasi-judicial role. In every licensing board I am familiar with, it is an absolute given that the hearing process is not tainted by ex parte information, from any source. The issue has been repeatedly raised in the courts, and the notion that bias exists as a matter of law has been rejected. One of the best explanations of the matter is from the United States Supreme Court. I take the liberty of quoting extensively from *Withrow v. Larkin,* 95 S.Ct. 1456 (1975):

> Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decision-maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' ... In

pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Very similar claims have been squarely rejected in prior decisions of this Court.

That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. ...

It is not surprising, therefore, to find that '(t)he case law, both federal and state, generally rejects the idea that the combination (of) judging (and) investigating functions is a denial of due process . . ..' Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition ... that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle. ...

It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law. We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around. ...

The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the

> adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. ..
>
> The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. ...

Withrow v. Larkin, 95 S.Ct. 1456, 1463-1470 (1975).

Therefore, it seems unusual that that which is a given in administrative law is considered a biasing factor. In any event, using this as a factor makes it appear as if the Model begins with a potential strike against the agency or board.

As to the high risk designation, this appears to result from the Model itself, which seems to assume that there is a risk of bias solely because the Board acts as a quasi-judicial body. For the record, a board hearing a contested case is an absolutely normal event, both in Idaho and nationwide. It is also explicitly contemplated in the administrative procedure statutes and rules. Moreover, it is mandatory that this Board hear discipline cases under Idaho Code § 54-1220. This has been the law since 1939. I know of no case anywhere in the country where it has been found that a board sitting in a quasi-judicial capacity indicates by that fact alone that it is biased, or where a court has inferred bias, or any other suggestion of impropriety found by a court under any state constitution, the federal constitution or any statutory scheme. And, as pointed out above, the courts reject such an idea. In short, while I understand the notion that an uninformed layman might think there is a potential for bias, I do not think there is a legal underpinning for a legislative body to find potential for bias as a matter of legislative policy. Obviously, as the cautionary note in the Model points out, there can be instances of bias on a case by case basis. But I do not think it is wise to assume as a given that when an agency head acts in a quasi-judicial capacity a high risk of bias exists. I fear this appears to be a second strike against the Board, and an unfair one.

I should also point out that it is the culture at the Board for members to recuse themselves at even the slightest hint of a potential accusation of conflict of interest. Of course, the Board members are subject to the Ethics in Government Act. As with every other administrative determination, a disciplinary decision is subject to review by the judiciary.

I raise these concerns not in the spirit of dissent. Rather, I hope to demonstrate that there are reasons why the legislature should not remove the duty of acting in a quasi-judicial capacity from my client. In the case of engineering, the safety of the public is at risk when a licensee violates the rules. In the case of land surveying, a violation of the rules can lead to land ownership

disputes that can be raised decades after the violation. Violations of the standard of care in these professions can lead to litigation involving expert opinion based on highly complex principles of mathematics or scientific applications. Who better to review these matters than professional engineers or professional surveyors? To place disciplinary matters of this nature in the hands of a layman – no matter how well schooled in the law – is a recipe for highly expensive and protracted litigation, where the layman will have to be spoon fed that which is second nature to the professionals. The chances of error are increased significantly. A misunderstanding of the principles involved by a lay hearing officer can lead to decisions which will adversely affect not only the professional involved, but the public as a whole.

In short, I recognize that the issue of bias by administrative agencies is one that will be grappled with by the legislature. Every person in a judicial role brings their own views of life to the table. For example, most people are biased against child molestation, but juries are found and judges rule dispassionately on cases based upon the evidence. This same notion applies to administrative boards.

The idea that because a board performs multiple functions or hears cases a high degree of bias must be implied is simply unfounded. The idea that our system of administrative law must be revised because someone, somewhere might think a board could have a potential for bias is unreasonable.

Yours very truly,

MICHAEL J. KANE

MJK:tlp
cc: Mr. Keith Simila, P.E., Executive Director, IPELS

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February 11, 2016

Rakesh Mohan
Office of Performance Evaluations
Idaho Legislature
PO Box 83720
Boise, ID 83720-0055

Dear Mr. Mohan,

I am in receipt of the Formal Agency Response Report recently distributed for agency comment. You previously received a response to earlier inquiries from our counsel Mr. Mike Kane. In reviewing the report, I noticed some issues that our agency would like addressed either in the final report or as part of our testimony at hearing. The issues relate to:

1. The presumption in the model is that any agency head, or in our case the Board, is potentially highly biased because they are the agency head is not a correct assumption and we have a good track record of treating licensees fairly and impartially at hearing.
2. The report seems to point toward either a decentralized model for hearing officers or a centralized model. Our view is that there should be a model for agencies to choose which option they prefer. This implies a hybrid model that may contain both options within the state, and should depend on agency preference.
3. The follow-up steps after the February 22 hearing are not listed. It is advisable for such steps to be described and we suggest a task force be established to include members of the oversight committee and affected agencies to evaluate legislative options prior to the 2017 session.
4. Should such a task force be formed, our agency has directed our Board attorney Mr. Mike Kane to represent the Board.
5. Mr. Kane will also represent the Board at the February 22 hearing and future meetings.

Thank you for your consideration of our concerns.

FOR THE BOARD,

Keith Simila, P.E.
Executive Director

KS:ks /gov\PolMgmt\policies\administrative hearings Mohan.doc

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February 11, 2016

Amanda Bartlett
Hannah Crumrine
State of Idaho
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954 West Jefferson Street
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Dear Ms. Bartlett and Ms. Crumrine,

A great thanks to you for offering the opportunity to review the draft report on Administrative Hearings. We appreciate the broad scope of this project and the diverse nature of the agencies and hearings involved.

We also appreciate the nature of the recommendations and the influence that these recommendations could have to improve the confidence level of the state and respective agencies. We are comfortable with all of the recommendations and can embrace them in our process improvement if they are approved in their current form.

On the topic of the Risk of agency actions with evidentiary hearings, we would like to offer the following as our perspective. The Administrative License Suspension actions are by far the largest case load in terms of numbers of hearings at ITD. They present for us a unique role in holding a hearing for an action taken by a law enforcement officer in the field.

There are some specific characteristics associated with these hearings that we would like to highlight for your consideration:

- ITD staff members do not attend these hearings, and the outcome has no relation to work of ITD staff
- ITD has no interest in the outcome, nor is the decision a judgment on prior ITD action or work
- The hearing officers who conduct the Administrative License Suspension receive Administrative Law Judge training and understand the need for objectivity.
- The hearing officers regularly dismiss cases when the statutory Administrative License Suspension process has not been followed by law enforcement.
- The rulings of the hearing officers are subject to judicial review

- The appeal rate of the hearing officers' rulings is very low (In 2014 there were 31 appeals out of 2,442 hearing decisions)

- The number of Administrative License Suspension decisions overturned on appeal is very low (In 2014 2 cases out of the 2,442 hearing decisions were overturned by the judge)

Our perspective is that the Risk for these Administrative License Suspension Hearings would be more appropriately ranked as low risk rather than moderate.

As we offer our perspective and suggestion in this regard, we still recognize that the recommendations of the report offer insight as to things we might do to improve on our process.

Thank you for your work on this report and for offering us an opportunity to participate. Please continue to keep us informed as this project progresses.

L. Scott Stokes
Chief Deputy

Reports of the Office of Performance Evaluations, 2013–present

Publication numbers ending with "F" are follow-up reports from previous evaluations.

Pub. #	Report title	Date released
13-01	Workforce Issues Affecting Public School Teachers	January 2013
13-02	Strengthening Contract Management in Idaho	January 2013
13-03	State Employee Compensation and Turnover	January 2013
13-04	Policy Differences Between Charter and Traditional Schools	March 2013
13-05F	Coordination and Delivery of Senior Services in Idaho	March 2013
13-06	Guide to Comparing Business Tax Policies	June 2013
13-07F	Lottery Operations and Charitable Gaming	June 2013
13-08F	Governance of EMS Agencies in Idaho	June 2013
13-09F	Equity in Higher Education Funding	June 2013
13-10F	Reducing Barriers to Postsecondary Education	June 2013
13-11	Assessing the Need for Taxpayer Advocacy	December 2013
13-12	The Department of Health and Welfare's Management of Appropriated Funds	December 2013
14-01	Confinement of Juvenile Offenders	February 2014
14-02	Financial Costs of the Death Penalty	March 2014
14-03	Challenges and Approaches to Meeting Water Quality Standards	July 2014
14-04F	Strengthening Contract Management in Idaho	July 2014
15-01	Use of Salary Savings to Fund Employee Compensation	January 2015
15-02	The State's Use of Legal Services	February 2015
15-03	The K–12 Longitudinal Data System (ISEE)	February 2015
15-04	Idaho's Instructional Management System (Schoolnet) Offers Lessons for Future IT Projects	March 2015
15-05	Application of the Holiday Leave Policy	March 2015
15-06	Distribution of State General Fund Dollars to Public Health Districts	December 2015
15-07F	State Employee Compensation and Turnover	December 2015
16-01	Contracting for the Idaho Behavioral Health Plan	January 2016
16-02	Risk of Bias in Administrative Hearings	February 2016
16-03F	Confinement of Juvenile Offenders	February 2016

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