

**MINUTES**  
**Approved by the Committee**  
**Administrative Hearing Officer Committee**  
**Tuesday, October 25, 2016**  
**9:00 A.M.**  
**EW 42**  
**Boise, Idaho**

Co-chair Representative Gary Collins called the meeting to order at 9:01 a.m.; a silent roll call was taken. Committee members in attendance: Co-chair Senator Steve Vick and Co-chair Representative Gary Collins; Senators Bart Davis, Kelly Anthon, and Mary Souza; Representatives Lynn Luker, Stephen Hartgen, Lance Clow, and John Gannon. Absent and excused: Senator Grant Burgoyne. Legislative Services Office staff present were: Katharine Gerrity, Keith Bybee, and Ana Lara.

Other attendees: Amy Hohnstein and Josh McKenna, Idaho Dept. of Labor; Mollie McCarty, Ramon Hobdey-Sanchez, Erick Larson, and Alan Frew, Idaho Dept. of Transportation; Scott Keim, Nicole McKay, and Charina Newell, Office of the Attorney General; Heidi Graham and Paul Spannkebel, Dept. of Health and Welfare; Tana Cory, Occupational Licenses; Kim Toryanski, Division of Human Resources; Russell Westerberg; and Maurine Ellsworth.

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

Department of Labor - Ms. Amy Hohnstein

Co-chair Collins called up Ms. Amy Hohnstein, Appeals Bureau Chief for the Idaho Dept. of Labor (DOL), to begin her presentation. Mr. Hohnstein began her presentation by explaining the unemployment process:

- When a claimant files for unemployment benefits, they receive an initial determination from the Benefits Bureau of the DOL that indicates whether they are eligible for benefits or not;
- If a party disagrees with that initial determination, he may file an appeal;
- Once an appeal is received by the Appeals Bureau, they schedule a hearing;
- All interested parties receive a notice of telephone hearing;
- The parties who choose to participate call into the hearing;
- All parties who give testimony are sworn in;
- The hearing officer explains procedures, and describes the documents contained in the appeal packet that was mailed to all parties;
- The hearing officer then questions the parties. All parties are entitled to cross-examination, and they may also question any witnesses that any party has provided; and
- All parties are mailed a written decision that can then be appealed to the Industrial Commission.

Process for hiring and training hearing officers:

- Hearing officer positions are usually listed as open/competitive.
- They seek applicants that have prior experience as a hearing officer, and/or legal background, and/or knowledge of the unemployment system.
- DOL currently has six hearing officers (three of which are or have been attorneys).
- All 6 hearing officers perform quality hearings, and receive high grades in the quarterly federal reviews.
- Hearing officers have received training at the National Judicial College. Some of the courses offered include: administrative law fair hearing, evidence challenges for administrative law judges, and ethics for administrative law judges.

- DOL's hearing officers are members of the National Association of Hearing Officials, and adhere to their code of ethics.
- The training for unemployment hearing officers is based on the federal criteria that they are graded on every quarter.

#### Highlights and additional information from the presentation:

- DOL issues 45,000 to 90,000 initial determinations a year.
- DOL conducts 10,000 hearings a year (60% of the total hearings studied by the Office of Performance Evaluations).
- The Office of Performance Evaluations (OPE) found DOL's hearings to be low-risk for bias.
- Factors for being categorized as low-risk for bias include:
  - Ex parte communications policy in place;
  - Separated physically and organizationally from the rest of the department; and
  - Subject to quarterly federal review;
- Decisions are appealed to the Industrial Commission for the purpose of a de novo review.
- Appeal hearings must be simple, speedy, and inexpensive. Simplicity in hearings assure that parties know and understand their rights.
- The hearings are geared toward pro se parties. Only 5% of claimants hire attorneys to represent them in hearings.
- Unemployment appeals hearings are unique. They are not subject to the Idaho Administrative Procedure Act or the Idaho Attorney General's Procedure Rules, but rather to procedure rules promulgated by DOL.
- New hearing officers spend a great deal of time learning the applicable laws and rules, and observing seasoned hearing officers.
- Federal guidelines set out by the United States Dept. of Labor steer the Idaho DOL in both quality and timeliness. They are required to schedule, conduct, and issue a written decision within 30 days of the date of appeal, including a mandatory notification time of at least 7 days.
- Ms. Hohnstein reminded the committee that Professor Seamon stated in the previous meeting that there are no real problems with 60% of hearings, and believed a central panel would be beneficial for other hearings outside of DOL.
- The hearing officer's decisions are not overridden by an administrator or a director.
- Conducting hearings in the Appeals Bureau in the IDOL is different from conducting hearings in other agencies. DOL has their own rules that govern their process, as well as strict federal guidelines and quarterly federal reviews.

#### Discussion:

Senator Davis asked if Ms. Hohnstein is also a hearing officer. Ms. Hohnstein responded that she also conducts hearings in addition to her work as the Appeals Bureau Chief, and could be counted as a seventh hearing officer. Senator Davis asked if the first evidentiary hearing in the appeal level is handled by the Unemployment Appeals Bureau. Ms. Hohnstein answered in the affirmative. Senator Davis referenced Professor Seamon's comment that having a robust understanding of general administrative law is a valuable policy for the state of Idaho to consider, and asked Ms. Hohnstein for her thoughts regarding the matter. Ms. Hohnstein opined that Professor Seamon was referencing the minority of hearings conducted outside of the DOL.

Senator Davis inquired about who carries the burden of proof in a de novo review in an appeals hearing. Ms. Hohnstein explained that the employer would have the burden of proof in a discharge. In a situation in which an employee quit, the employee would have the burden of proof. Senator Davis asked if the Idaho DOL has data regarding the frequency in which its hearing officers rule to the advantage of the employee or to the advantage of the employer. He asked if the trend is consistent with our region and/or nationally. Ms. Hohnstein responded that she had no knowledge regarding the trends in other states.

Senator Davis asked if the factors that the Idaho DOL is judged on are based on the process of the analysis or the merits of the analysis. Ms. Hohnstein responded that the Idaho DOL is judged on both. She explained that the federal quarterly reviews that are conducted in Washington D.C. look at the fair hearing criteria, but they do not look at how many claimants were paid.

Senator Davis stated that the presumption of reasonable conduct [for employees] almost appears as though it is a concept that the Appeals Bureau does not recognize. He added that employers are not happy with the process, and do not trust the system. Senator Davis opined that appealing to the Industrial Commission, and then to the [Idaho] Supreme Court, is not a meaningful process. He emphasized that his comments are a reflection of the feedback from his clients that include both employers and employees. He suggested that the Idaho DOL should not be exempt from having its process altered. Ms. Hohnstein emphasized that the Appeals Bureau receives a small amount of funding and conducts 10,000 hearings a year. She opined that attempting to create a central panel from a small amount of federal funding would be a difficult task.

Representative Hartgen referred to Director Kenneth Edmund's [letter](#) to the committee, and asked how the evaluation of timeliness, efficiency and quality is reported from the federal government to the Idaho DOL. Ms. Hohnstein responded that the Idaho DOL receives evaluation reports on specific hearings. They also receive a letter indicating whether there are areas that need to be addressed. Representative Hartgen followed up by asking if Idaho had received a letter identifying points of concern in the last several years. Ms. Hohnstein responded that, regardless of whether the U.S. government has or does not have areas of concern for a state, every state receives a letter detailing their [evaluation] results. Representative Hartgen commented that he could not recall a proposed rule change or revisions for the DOL relating to this area in the last several years. He questioned whether their process had indeed been operating well. Ms. Hohnstein responded that in general yes, and elaborated that the rule changes that have been made were regarding technology and how appeals are processed. She explained that addressing an area of concern would not necessarily call for a rule change.

Representative Luker asked if specific statutory references exist that allow for the Appeals Bureau to conduct a de novo hearing. Ms. Hohnstein responded that she would have to look for the references, but the Appeals Bureau does in fact conduct de novo hearings. Representative Luker referred to Section 72-1361, Idaho Code, and voiced his concern about the "clear and convincing evidence" standard compared to a de novo review standard (preponderance of evidence). He asked how the "clear and convincing evidence" standard applies to the DOL's de novo reviews. Ms. Hohnstein explained that their de novo reviews are based on a preponderance of evidence rather than clear and convincing evidence. Representative Luker asked if Ms. Hohnstein could explain at what point in the process the "clear and convincing evidence" standard is applied as required by Section 72-1361, Idaho Code. Ms. Hohnstein answered that at this time she could not provide a response, but would provide one to the committee at a later date.

Representative Gannon asked if there are provisions in the Code of Federal Regulations that dictate how the unemployment process should proceed which might not guide hearing officers in other agencies. Ms. Hohnstein responded that the federal government issues a [handbook](#) that all states use to model their appeal hearings for unemployment benefits. Representative Gannon asked if the handbook is based on any federal regulation or rule that the state is required to follow. Ms. Hohnstein responded in the affirmative. Representative Gannon followed up by asking in the event all the DOL's hearing officers were to be placed in a general group of hearing officers, would they all have to follow the hearing procedures that are in place now [for the DOL]. Ms. Hohnstein answered in the affirmative. Representative Gannon asked if there would be a need to provide specified training to all hearing officers if the process was to change so that hearing officers were selected randomly from a group. Ms. Hohnstein responded that new hearing officers would have to be trained in all those procedures and guidelines. Representative Clow referenced the 5% of [parties]

who hire attorneys, and asked if that percentage consisted of mostly employers or employees. Ms. Hohnstein responded that the percentage is evenly split between claimants and employers.

Senator Davis requested the list of the 31 standards [that the DOL is required to adhere to in their hearings]. He asked if Ms. Hohnstein, as the Bureau Chief, ever audits the decisions of her hearing officers to determine if they are in need of further education and training. Ms. Hohnstein responded that she takes part in the federal review. She explained that she listens to hearings on a quarterly basis, and provides training/feedback to the hearing officers when necessary.

Ms. S. Kay Christensen, Office of the Attorney General

Co-chair Collins called upon Ms. S. Kay Christensen to present next. She introduced herself, and began her [presentation](#) by providing a brief historical overview:

- In May of 2014, Centers for Medicare and Medicaid Services (CMS) denied DHW's proposal for how to resolve appeals. The concern had to do with compliance with federal law requirements - specifically the nature of the relationship between the DHW and the hearing officers.
- In October of 2014, DHW and CMS agreed in principle to a proposal that would transfer all Medicaid and APTC appeals to the Attorney General's Office (AGO). The idea was for the AGO to act as an independent source for hearing officers in those cases.
- In November of 2014, DHW's budget requests included a transfer of three full time equivalent units to the AGO. The AGO's budget included a request to create a Fair Hearing Unit (FHU) with costs and expenses for necessary remodel, equipment, and salaries. Both budget requests were approved in the 2015 legislative session.
- During the spring and through July of 2015, the creation and implementation process began. During the beginning of the implementation process, the AGO had discussions with DHW staff, the Racine Law Office, and administrative law experts. They also acquired the equipment needed, and the remodel continued. The selection process was also completed in the month of July.
- In August of 2015, hearings officers began their work with the arrival of their first DHW case. They also had completed the National Judicial College Fair Hearing Officer training which was funded by the DHW.
- In September of 2015, the FHU conducted their first hearing.
- In October of 2015, the Racine Law Office completed the transfer of the remaining cases to the FHU.
- Reasons for the transition to a Fair Hearing Unit:
  - Consistent hiring and training standards;
  - As lawyers they would be subject to conflict of interest and ethics rules;
  - Insulated from the pressure of the executive branch;
  - Eliminates the potential appearance of bias; and
  - Allows for the development of recommendations for best practices.
- Selection process:
  - They determined minimum job criteria (e.g., licensed attorneys, years of experience, administrative law background, working knowledge of state government, and a familiarity with Medicaid); and
  - Advertised, reviewed resumes, and interviewed a select list of applicants.
- Staff hired included:
  - A paralegal who had previously worked in the AGO Medicaid Fraud Criminal Unit; and
  - Two Lawyers (Idaho licensed with 7-8 years of practice experience);
- Training in 2015 included:
  - Exhaustive study of relevant law, rules and regulations;
  - Attending DHW briefings on the Medicaid program operation. They also participated in DHW contractor-run telephonic hearings;
  - Identifying potential legal problem areas and discussing possible resolutions;

- Drafting FHU internal procedures (no indefinite stays); and
- Attending National Judicial College Hearing Officer training.
- Training in 2016 was focused on continuing education focused on administrative law judges/fair hearing officers.
- Since the beginning of the FHU, there have been 469 cases and 445 closed cases; the average turn around time is 4.95 days post-hearing.
- There is now a dedicated unit that is devoted to the employment of fair hearing principles, assuring due process and adherence to the practices of the National Judicial College's Administrative Law Procedures for fair hearings consistent with the requirements of the Idaho Administrative Procedures Act.
- The FHU has created a source of agency independent hearing officers within state government.
- Initial investment and ongoing expenses are listed on slides 12 and 13.
- There was an approximate first year savings of \$100,000.

Discussion:

Representative Luker inquired about what rule procedures the FHU uses. Ms. Christensen replied that the Administrative Procedure Act (APA) works as the backbone for their procedures. However, the DHW has their own rules and regulations with respect to the hearings; the FHU itself has established some internal procedures (e.g., use of pre-hearing conferences). Representative Luker asked what standard of review the hearing officers use. Ms. Christensen replied that the standard of review is a preponderance of evidence. Representative Luker inquired if there are other hearings in other divisions of the DHW that the FHU would be interested in taking on. Ms. Christensen responded that they would be amenable to that.

Senator Davis inquired whether the state of Idaho would be better served by having a separate hearing unit agency that is not part of the AGO. Ms. Christensen replied that she has not had much time to contemplate a separate agency, and is uncertain where the agency should be placed. She explained that keeping it within the AGO does provide an ability to isolate the unit from internal and external pressures. Senator Davis also asked if, other than providing the funding, the Legislature had made a statutory policy shift to create the Fair Hearing Unit, and specifically tasked the AGO to create it. Ms. Christensen answered in the negative.

Representative Hartgen referred to the second slide of the presentation, and asked if [the FHU] had been approved entirely through the budget process or if it had been discussed in committee. Ms. Christensen explained that it had been managed in the budget process because the FTEs had to be transferred from the DHW to the AGO in order to fund the FHU. She stated that there had been discussions in the budget hearing, but she had not been privy to any additional conversations outside of the budget hearings. Representative Gannon inquired whether Ms. Christensen had found instances where this process could not be lawfully applied to other agencies due to federal regulations or case law. She answered that the process could work for licensing boards, for example. She stated her belief that an independent hearing officer unit would be able to address specific agency needs. Senator Vick asked if there is a potential for the FHU to hire contract hearing officers versus hiring full-time employees. Ms. Christensen opined that contract hearing officers and for-pay hearing officers have different motivations, and it would not be a good mix. She added that having an in-house unit is best for achieving consistency.

Representative Luker inquired about how cases are assigned, and how this process would change if the FHU was to expand. Ms. Christensen answered that the cases from DHW are assigned on a rotating basis between the two hearing officers. If the FHU was to expand to serve a group of agencies, she said, they would probably continue assigning cases on a rotating basis. Representative Luker asked if the FHU is keeping track of the decisions that they make. Ms. Christensen answered that the FHU is keeping track of their decisions internally.

Dept. of Health and Welfare - Ms. Heidi Graham, Mr. Paul Spannknebel, and Ms. Nicole McKay

Co-chair Collins called upon Deputy Attorney General Nicole McKay, to present next. Ms. McKay began her presentation by introducing Mr. Paul Spannkebel, Division Administrator, and Ms. Heidi Graham, HR Program Manager for the Dept. of Health and Welfare.

Ms. Graham began her part of the presentation by describing her supervisory responsibilities over the administrative support function for the hearing activity that is associated with the Racine Law Office contract.

Ms. Graham provided a general overview of the fair hearing process (performed by Racine Law Office on behalf of the DHW):

1. Divisions issue notice letters pertaining to decisions;
2. An individual who disagrees with the notice may file an appeal;
3. If appropriate, an informal review is conducted;
4. If it cannot be resolved informally, then the appeal is assigned to the AGO or Racine Law Firm;
5. A hearing is scheduled and conducted;
6. A decision is rendered;
7. A party may request for the review to be performed by either the Board of Health and Welfare or the Director;
8. A decision is rendered; and
9. The decision may be appealed to the district court.

Highlights and additional information from the presentation:

- Some divisions offer pre-hearing conferences when appropriate.
- Attorneys may be present for hearings.
- Appeals can be withdrawn during the fair hearing process.
- Documents pertaining to the hearing are disbursed to all parties.
- There are no ex parte conversations, and most hearings are conducted telephonically and recorded.
- The party who has the burden of proof varies based on the situation.
- If new documents are presented during the hearing process with good cause, the hearing officer can remand the matter back to the DHW for consideration.
- The hearing officer may affirm, reverse, or modify the DHW's decision, or remand it back to the DHW.
- Hearings are conducted utilizing the rules or regulations (federal or state) that apply to the different programs that the DHW has.
- The bid process for the hearing officer contract followed the state's purchasing administrative rules.
- The contractor is responsible for selecting and training the hearing officers that they have.

The bid process for the DHW's hearing contract (general overview):

- The contract unit puts the RFP (request for proposal) out for bid;
- The evaluation team performs the evaluations which can take several weeks;
- Once the evaluations are completed, the costs are calculated;
- The contract unit sends award notifications, and must allow 5 business days for vendors to appeal;
- Appeals are processed by the Division of Purchasing;
- Once any appeals are taken care of, the contract is awarded.

Discussion:

Representative Luker inquired about the length of contracts. Ms. Graham responded that contracts are a year in length when first issued, and can be amended depending on the type of contract. She added that the Racine Law Office contract does have a termination clause. Representative

Luker followed up by asking how many divisions the contract covers. Ms. Graham answered that there are a variety of divisions that are still covered by Racine Law Office. Representative Luker asked what portion of hearings the FHU performs. Ms. Graham responded that from August 3, 2015 through September 30, 2016, the FHU has taken 449 hearings and Racine has taken 491 hearings. Representative Luker referenced Ms. Christensen's comments about the cost-savings that the FHU provides, and asked if the DHW had started looking into using the FHU in terms of potential cost-savings. Ms. Graham stated that she has not, but she recently calculated the total cost for cases and found that using the FHU would provide cost-savings.

Ms. Nicole McKay continued the presentation, and explained that the DHW is organized into eight divisions. Within these divisions, there are over 40 different programs that utilize this process. Each one of these programs have very specific processes that the cases must follow in the administrative arena. Generally speaking:

- Medicaid cases are heard by the FHU, may be appealed to the director, and then appealed to the state court system;
- Audit investigation cases are split between the FHU and the contractor depending on the program;
- Welfare cases are heard by the contracted hearing officers;
- Licensing and certification cases are split by program, and range from federal review, internal department review, to the contracted hearing officers, to the Board of Health and Welfare, and then to the state district court system;
- Most public health cases are heard by the contract hearing officers;
- The family and children services cases are split; and
- Some administrative reviews start with an internal department review, others follow the route from the contracted hearing officers, but all may be appealed to the director, and then to the state system.

Overall, each of these programs require specialized knowledge of governing, substantive and procedural federal and state laws, regulations, and rules. The FHU engaged in extensive study and training prior to being used for Medicaid cases. If the state were to move to a centralized hearing system for all state agencies, the hearing officers dedicated to the DHW's work would need to be trained specifically in the substantive and procedural laws and rules for each of the programs. The FHU has developed a successful model and is working very well with the Medicaid cases. The highest volume of cases from the DHW come from the Medicaid and Welfare divisions.

Discussion:

Representative Luker requested that the number of hearing cases be incorporated into the spreadsheet. Ms. McKay stated that she would incorporate the number of cases, and send the revised spreadsheet to Ms. Gerrity in LSO.

Budget Perspective for Contested Case Proceedings - Mr. Keith Bybee

Co-chair Collins called upon Mr. Keith Bybee, Principal Budget Analyst for LSO, to present next. Mr. Bybee began his [presentation](#) by explaining his use of expenditure data that cover the cases defined in the OPE study. Agencies excluded from this study were the Department of Water Resources, Department of Labor, Industrial Commission, and the Public Utilities Commission per the committee's request.

Highlights and additional information from the presentation:

- Only one agency reported expenditures for capital outlay [for hearings] for fiscal years 2011 through 2015.
- Operating expenditures (which includes cost for contracted hearing officers) accounted for the largest spending.
- The Tax Commission does not view contested cases with the same definition that OPE used for this study. They took the amount of hearings officers and spread them by function. They had a flat average of \$141,600 in personnel costs per year.

- The Board of Tax Appeals does hear some appeals from the Tax Commission, and allocates personnel costs accordingly.
- The national average was a \$9.8 million annual budget. The cost per hearings was about \$2,500 nationally for the 27 states defined.
- With the \$1.4 million budget, the state could do a combination of hiring an administrative law judges manager, administrative law judges (ALJ), and contract hearing officers.
- The annual amount line listed on slide 5 was determined by taking the rate and multiplying it by 1,918 hours (standard contractor hours), plus the \$5,000 for training. A full-time employee with the state of Idaho would have 2,080 hours in comparison.
- The salary for the ALJ officers and ALJ managers were benchmarked against an entry-level deputy attorney general's pay and a mid-level management deputy attorney general.
- The annual amount for ALJ officers and the ALJ manager include benefits.
- In terms of a centralized system, there would need to be a plan in place that would allocate costs fairly between the general fund, dedicated funds, and any federal funds.
- A cost recovery method would have an initial investment, but it would wash out in the future.
- A fee for service method would require some manner to contract for services, and the state may or may not be in a position to recuperate all the costs from the general fund in the first year.

#### Discussion:

Representative Luker asked if agencies are using their operating fund to pay for hearing officers. Mr. Bybee responded that it is included in their existing budgets, and are considered actual expenditures. Representative Luker asked if the data for the agencies that are not included in this presentation (i.e., State Dept. of Education, Dept. of Agriculture, etc.) would fit in the annual average of \$1.4 million. Mr. Bybee responded that it would potentially fit into the average.

Representative Clow made a motion to approve the minutes for the meeting held on September 20. Representative Luker seconded the motion. The motion passed unanimously.

The committee adjourned for lunch at 11:35 p.m.

The committee reconvened at 1:32 p.m.

Bureau of Occupation Licenses' Contested Case Process - Ms. Tana Cory

Co-chair Vick called upon Ms. Tana Cory, Chief of the Bureau of Occupational Licenses (BOL) to present next. Ms. Cory began her presentation by introducing herself and providing some background regarding the Bureau of Occupational Licences.

#### Highlights and additional information from the presentation:

- The Bureau of Occupational Licenses is housed within the Dept. of Self Governing Agencies.
- The BOL serves 30 self-governing licensure boards, and is contracted by them for administrative, legal, and fiscal services.
- All boards have the charge to protect the public by ensuring that people are minimally qualified before issuing a license, and by responding to the complaints about licensees.
- Between fiscal years 2011 and 2015, the boards served by the BOL received 3,863 complaints, and 28 hearings were held.
- Hearing Officer Process:
  - The boards that BOL serve do not select hearing officers.
  - The Chief of the Bureau of Occupational Licenses does not have a role in the decision-making process or in the determination of filing a complaint.
  - If the licensee files an answer to the complaint, a hearing officer is appointed by the bureau.
  - Either party may disqualify one hearing officer without cause, and any hearing officer who may have bias can be disqualified.



- All hearing officers are attorneys, and function pursuant to the Administrative Procedure Act and the Idaho Rules of Administrative Procedure of the Attorney General.
- At the conclusion of the hearing, the hearing officer submits their findings of fact, conclusions of law, and recommended order to the board. The hearing officer also submits the entire record to the board.
- The board then makes a final decision and issues an order. At the time of reviewing the matter, they have an administrative attorney present to advise them on administrative law and procedure.
- The BOL believes in using hearing officers who have experience in administrative law. It is not cost-efficient for the boards that the BOL serve to contract with hearing officers who do not understand the administrative law process.
- The OPE report recommended that agencies publish comprehensive information about hearing processes. The BOL agrees with this recommendation, and will be reviewing the information they provide.

#### Discussion:

Representative Gannon inquired about the steps for further review once a hearing has been conducted. Ms. Cory explained that the board receives the record of the hearing, and it has 56 days to render a final order. The licensee has 28 days to file an appeal in district court. Representative Gannon followed up by asking if the board has to follow the hearing officer's decision, and what the legal standard of review is for a hearing officer's decision. Mr. Maurice Ellsworth, general counsel for the Bureau of Occupational Licenses, explained that the board has jurisdiction of the cases, and can reject the findings and conclusions of a hearing officer. However, he has never seen them reject a hearing officer's findings of fact; there is great deference given to a hearing officer's findings of facts. On conclusions of law, Mr. Ellsworth said, the board is the judge of their statutes.

#### Idaho Transportation Department's Contested Case Process - Mr. Alan Frew

Co-chair Vick called upon Mr. Alan Frew, Motor Vehicle Administrator for the Idaho Transportation Department (ITD), to present next. He began his [presentation](#) by explaining that there are two types of hearings: contested case hearings and administrative license suspension (ALS) hearings .

#### Highlights and additional information from the presentation:

- Between 2011 and 2015, ITD had 21 contested case hearings that primarily consisted of motor vehicle/special permits.
- In the last 5 years, ITD has had 40,798 administrative license suspensions, and there were 13,096 hearings held. 90% of the hearings held were sustained, and 149 of those sustained hearings were appealed.
- Administrative appeals for administrative license suspensions go directly to district court.
- Contested case hearings:
  - Based on action by ITD;
  - Decisions were made by ITD on subjects administered by ITD;
  - There may be an appeal by an affected party;
  - Administrative Procedure Act applies to every case; and
  - The agency director makes the final decision.
- Contested Case Hearing Officers:
  - Retired district judges or attorneys are usually appointed; and
  - They are external third parties independent of ITD that uphold the code of ethics of their legal profession.
- For ALS hearings, legislative requirements are outlined in Section 18-8002, Idaho Code.
- ITD must uphold the suspension unless one of the five items listed on slide 8 is found, as defined by legislation.
- There are 4 certified ALS hearing officers who were trained and certified by the National Judicial College and by the National Association of Hearing Officers.

- All ALS hearings are conducted by phone.

Discussion:

Senator Souza referred to the budget information presented by Mr. Bybee earlier in the meeting, and asked if the average cost per case of approximately \$12,500 is accurate. Mr. Frew responded that the amount is probably accurate. He explained that there were only 21 contested cases, and the legal load was significant to successfully defend their actions. Senator Souza followed up by asking if the cost would vary per case if a centralized panel were created. Mr. Frew agreed that the cost might vary significantly due to ITD contracting independent hearing officers for their contested cases.

Co-chair Vick asked if all the ALS hearing officers are contracted. Mr. Frew answered that they all work for ITD. Co-chair Vick followed up by asking if all the hearing officers are also attorneys. Mr. Frew responded in the negative, but explained that they are trained and certified by the National Association of Hearing Officers as well as by the National Judicial College.

Central Panels - The Honorable Justice W. Michael Gillette

Co-chair Vick called upon the Honorable Justice W. Michael Gillette to present next via conference-phone. Justice Gillette began his presentation by introducing himself, and providing some background history as a solicitor general and judge. He explained that he has been teaching at the National Judicial College for the last 35 years, and his classes have been primarily for administrative law judges aka hearing officers.

Justice Gillette explained to the committee that it is difficult for individuals to believe in the absolute, objective fairness in an arrangement where a state agency who creates the rules, interprets the rules, applies the rules, and imposes a penalty for violating rules after an employee of the state agency decides that an individual is guilty of a violation. He added that lawyers have a tendency to tell their clients that they will lose due to all the executive, legislative, judicial power being concentrated in one place of the process - the agency. Individuals who are represented by counsel are encouraged to doubt the efficacy of the process or to have questions about it.

Justice Gillette stated that the OPE study is consistent with his own experiences and observations. He added that it is still possible for central panel judges to be downgraded by lawyers who are representing litigants because the judges are still being paid by the agencies.

Justice Gillette stated that the closer a decision appears to be connected with the agency head, the more suspicious the outcome is for the individual. As the OPE's study suggests, the cases with the greatest danger of having built-in bias, as well as perceived bias, are those cases where ultimately the decision is made by the agency head. Justice Gillette recommended that matters be taken out of the hands of agency heads when possible.

Justice Gillette explained that the three models that are offered for funding a central panel are important. If the Legislature designates the money to fund the panel, then the agencies do not take as much issue with the decisions rendered. If the agencies are paying for the panel directly, there can be pressure placed on the administrative law judges. So long as an agency head grades an administrative law judge based on how they rule, then they've missed the point, and should be discouraged from doing so, he said.

Justice Gillette referred to the OPE study that found that only 25% of the agencies involved have had ongoing or periodic education for their administrative law judges. He opined that this low percentage is detrimental, and urged the committee to encourage legal education for hearing officers. The National Judicial College is available in Reno, NV and there are three national organizations that provide continuing education and training to hearing officers.

Representative Luker asked if there were any agency carve outs in fashioning the central panel in Oregon. Justice Gillette explained that the Public Utilities Commission was excluded due to the peculiar public interest vested in their decisions and the range of impact their decisions have, as

well as Worker's Compensation, and prison discipline matters. Other agencies were given the authority to opt out of certain provisions, but by and large they have tended not to. He emphasized the importance of including as many agencies as possible in order to create uniformity in law enforcement and the manner in which hearings are conducted. He opined that it is also important to cross-train administrative law judges so that they may become generalists, although it is expensive to do so.

Co-chair Vick asked if the panel in Oregon is part of the judiciary system, and whether it matters where the panel is housed. Justice Gillette opined that it does matter where the panel is housed. He stated that he was not aware of any place where the panel is part of the judiciary, and explained that ordinarily it is considered to be part of the administrative branch of government. Part of the reason for this, he explained, is that due process requires there be judicial review of contested case outcomes. He opined that it is perfectly acceptable to keep the panel in the executive branch until there is an appeal, and only then should the courts become involved. He stated that he would not recommend creating a whole new judiciary to do this work.

Representative Luker asked if there is a de novo review process in Oregon, and voiced his concern about the effect that can occur when there is no de novo review outside of the agency. Justice Gillette opined that it is a waste of time and not appropriate for a judge to reconsider the record, and worse yet for a judge to take additional evidence. Representative Luker followed up by asking if there is another standard he finds appropriate for evaluating fact-findings from agencies. Justice Gillette stated that a finding of fact should only be overturned if that finding is not supported by substantial evidence in the record when viewed as a whole.

#### Committee Discussion:

Co-chair Vick invited Senator Davis to explain the handout that he had provided to the committee. Senator Davis referenced Professor Seamon's recommendation to the committee to review the Uniform Law Commission's model code regarding the APA, and explained that Idaho had decided to keep its existing system in place rather than adopting the Uniform Law Commission's system. He explained that he had asked Ms. Gerrity to remove the sections of the model act that do not apply to Idaho's existing system, and incorporate the standards and principles of Idaho's APA. In addition, Senator Davis said he asked Ms. Gerrity to include some language regarding a central hearing officer panel system into the draft. Senator Davis stated that this was a first attempt at a first draft, and welcomed input from the committee.

Senator Souza asked the committee if they were moving toward the concept of a central panel, or making modifications to the current system. Senator Davis responded that as a whole the committee had not made a recommendation on how to proceed yet, and that he had requested this draft independently from the committee. Senator Clow asked if most of the language in the draft had been adopted from the uniform law on administrative procedures. Senator Davis responded in the affirmative.

Representative Gannon voiced his concern about potentially including ITD and the DOL due to the agency review sections on pages 11-13, and the tremendous amount of hearings those agencies conduct. He cautioned about allowing an agency head to review the decisions of the administrative law judges - primarily because of the potential burden it could be given the thousands of hearings performed by ITD and DOL.

Representative Luker explained that this draft addresses three of the issues he is concerned about: 1) discovery 2) subpoena feature 3) review standard. He agreed that the issue of agency head review would be a good topic for the committee to discuss. Representative Luker added that he would like to also discuss central panels, and whether it would be something that would remain in the AGO or be placed elsewhere. Representative Hartgen voiced his concern about creating a separate state entity with authority to review administrative procedures and decisions by various

agencies, as well as concern with potentially placing that entity within the AGO. He suggested creating a division within the judiciary that could conduct administrative hearings.

Co-chair Vick asked Mr. Bybee why the information for Oregon was not included in the list of centralized states, and if it would be difficult to obtain the information. Mr. Bybee explained that Oregon was included in attachment two, but in the PowerPoint presentation he listed states that had a similar budget to the state of Idaho for comparison; Oregon's budget was much greater than Idaho's budget.

Senator Davis voiced his inclination to remove some of the bias that may exist, even if it is nothing more than the appearance of bias, to create some form of a central panel (made up by contractors or otherwise) for the assignment of cases.

Representative Hartgen described the merits of placing the responsibility within the Judiciary:

- Ethical bar standards for avoidance of conflict of interest;
- Could be administered by an existing entity (Administrative Office of the Courts);
- Must be attorneys; and
- Level of experience can be set.

Representative Luker opined that addressing the central panel issue may take longer than the time the committee has left. He suggested a couple of options:

- Recommend continuing the interim committee; or
- Recommend the germane committees take this issue on.

He suggested the committee could also discuss potential recommendations for the model act.

Co-chair Vick asked the committee how they would like to proceed regarding potential legislation, goals, and recommendations.

Senator Davis stated his preference to increase transparency, to provide additional tools to litigants in the hearings, and to begin creating a central panel.

Representative Gannon suggested the committee review the draft, and discuss what proposal or parameters they would like to recommend.

The committee scheduled the next meeting for Monday, November 21. Co-chair Vick invited the committee members to provide recommendations to Ms. Gerrity so that she may provide those recommendations, if any, to the committee before the next meeting. Senator Davis requested that LSO review the minutes before the next meeting, gather recommendations and suggestions proposed by the presenters [and members], and send the list to the members as a reminder.

The committee adjourned at 3:45 p.m.