

MINUTES
Administrative Hearing Officer Committee
Monday, November 21, 2016
9:00 A.M.
Room EW 42
Boise, Idaho

Co-chair Senator Steve Vick called the meeting to order at 9:03 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, Mary Souza, and Grant Burgoyne; Representatives Lynn Luker, Stephen Hartgen, Lance Clow, and John Gannon. Absent and excused: Senator Kelly Anthon. Legislative Services Office (LSO) staff present were: Katharine Gerrity, Keith Bybee, and Ana Lara.

Other attendees: Amy Hohnstein, Idaho Dept. of Labor.

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

Co-chair Steve Vick began the meeting by thanking LSO staff for their work on the committee. He reminded the committee members of their charge to:

- Report findings;
- Make recommendations; and
- Possibly develop proposed draft language for the Legislature.

Co-chair Vick invited Senator Davis and Ms. Gerrity to discuss the draft (DRKAG021) proposal. Senator Davis explained that this draft legislation is not intended to be exhaustive, and it may not reflect fully the opinions of the entire committee. Senator Davis reminded the committee that Professor Seamon had recommended that they review the Model Act by the Uniform Law Commission. He used the Model Act as a standard for this draft legislation, and forwarded it to Professor Seamon for him to review, and provide any additional recommendations. Senator Davis stated that Professor Seamon's recommendations have been incorporated into the draft. Senator Davis explained that he had reviewed Chapter 52, Title 67, Idaho Code, and compared it to the draft. There are three things that Senator Davis would like the committee to keep in mind:

1. The draft begins with changes in Section 67-5241, Idaho Code, and explained that this draft does not contain any modifications to rule promulgation found in Sections 67-5201 through 67-5232, Idaho Code.
2. The draft has the principles and concepts of the Uniform Model Act, but has been customized to fit the practices of the State of Idaho.
3. The creation of the Office of Administrative Hearings is described on page 19, line 32 of the draft.

He opined that the committee should make modifications to the definitions in Section 67-5201, Idaho Code .

Senator Davis listed additional changes:

- Page 1 - The repealed sections regarding hearing procedures, agency head orders, etc. were revised and included elsewhere in the draft legislation;
- Page 2 - The presiding officer may continue to be an agency head, a multi-member body of individuals, or an individual designated by the agency head. This section would also allow for the presiding officer to be an administrative law judge (ALJ);

- Page 3 - The new section details the contested case procedure. Senator Davis opined that this section is not in conflict with the current Administrative Procedures Act, but it does provide a more exhaustive explanation of the process;
- Page 4 - Section 7 describes the evidentiary standards. The section describes the hearsay standard (whether a decision can be based on hearsay or whether hearsay becomes primarily corroborating evidence);
- Page 5 - Section 8 describes the process for notices in contested cases;
- Page 6 - Section 10 describes an emergency adjudication procedure. Senator Davis explained that Idaho currently grants to its departments and agencies the ability to make an emergency adjudicatory determination based on the phrase 'immediate danger.' On page 6, line 34, of the draft calls for an 'imminent peril' standard instead;
- Page 7 - Section 67-5247(7) of the draft states that an emergency determination has a limited lifespan. The current statute does not currently have a limited lifespan;
- Page 8 - Section 11 describes the ex parte communication standard. He explained that while the state currently has a modest ex parte standard, the ex parte standard in this draft has been augmented, and provides better clarity;
- Page 8 - Section 12 provides for a party, who may not be a party to the action, the right to intervene. This section statutorily provides some discretion to the presiding officer to grant a request to intervene, especially if it involves claims or defenses that are based on the same transaction or occurrence as the case before it;
- Page 9 - Section 13 describes the beginning of the discovery process;
- Page 9 - Section 67-5251 of the draft describes the discovery standards;
- Page 10 - Section 67-5252 of the draft describes the default section that states that if a party without good cause fails to participate, then the hearing officer may issue a default order;
- Page 11 - Section 67-5253(6) of the draft states that hearsay evidence may be used to supplement or explain other evidence, but on timely objection, is not sufficient by itself to support a finding of fact, unless it would be admissible over objection in a civil action;
- Page 15 - Section 67-5259 of the draft preserves the standard for licenses; and
- Page 17 - Section 67-5265 of the draft describes the exhaustion of administrative remedies, and does not provide for a de novo review on appeal.

Senator Burgoyne thanked Senator Davis and Ms. Gerrity for their work on the draft legislation, and particularly liked the hearsay rule. He voiced his concern regarding the appeal language which he found a little ambiguous. He believes a couple of minor modifications in the language would make clear that, in the case of appeals, they are not altering the burden of proof if it is allocated by law. Senator Burgoyne stated that his principle concern continues to be the agency head provision. The draft allows for the agency head to act upon a hearing officer's recommended decision within 120 days of when the hearing recommendation was made. He explained that he is uncomfortable with hearing officers issuing recommended decisions.

Senator Burgoyne explained that the principle injustice he sees with respect to administrative procedures, is that people feel that they cannot afford to hire counsel early in the administrative process. This process allows for the creation of a record that is averse to them due to findings of fact that are made on some level early in the process, and with their record potentially not containing all of their evidence. He opined that the more complex the administrative procedure is, the more likely individuals will be denied justice due to the inability to afford counsel.

Senator Burgoyne opined that the 120-day time period allowed for an agency head to make a decision is, in most cases, too lengthy. He also takes issue with the multiplication of process

before arriving at a decision that is not a recommended decision, and would like to examine this process further.

Representative Luker stated that he is supportive of a potential central panel, although he would like to have further discussion regarding the aspect of financing a central panel.

Co-chair Vick invited Ms. Gerrity to present additional facts regarding the draft legislation. Ms. Gerrity explained that the only modifications made in the draft legislation were in regard to contested cases provisions; no modifications were made in regard to rules. She explained that many of the statutory replacements are simply Model Act provisions that one might categorize as modernized and more detailed. She added that this draft could become significantly lengthier since it will need to include other sections of code that cite to the existing law.

Representative Gannon inquired whether the draft intended to include the Dept. of Labor, the Idaho Transportation Department, etc. in the new process. Senator Davis responded that at this time, the draft legislation does not add or diminish the scope currently in place.

Representative Hartgen referred to Section 67-5272(b) of the draft where it makes reference to Section 67-5271(7), and stated that he could not find this reference in the draft legislation. Ms. Gerrity explained that there were three places in the draft where, once changes were made in regard to Professor Seamon's comments, it changed the numbering in the draft. She further explained that the correct reference should be to Section 67-5273(7), and that this correction needs to be applied to page 20, lines 14 and 31, and page 2, line 5. Representative Hartgen inquired about what the standard of ethical conduct would be for hearing officers. Senator Davis commented that the committee does still need to decide where a potential ALJ should be housed, and opined that the ALJs should be housed in the executive branch. He referred to Section 67-5273 in the draft, and explained that one of the duties of the chief administrative law judge would be to adopt a code of conduct for administrative law judges.

Co-chair Vick asked if the process for adopting the code of conduct would be subject to legislative review, or perhaps some other type of review. Senator Davis responded that at this time, the draft does not call for a review for the adoption of a code of conduct.

Representative Luker observed that the draft is comprised of two major components, and inquired if it would lend itself to being divided into two separate bills. He suggested that the draft could be divided so that one bill would consist of administrative procedure changes to the Administrative Procedure Act (sections 1-31), and the creation of a central panel in a separate bill (section 32 through the end). He opined that it might be easier to take on the bill if it were divided into two bills. Senator Davis explained that in the case that one of the two bills was not to pass, the issue would be that there is language in the first bill that requires the language of the second bill.

Representative Clow commented that as a committee they should decide whether it would be best to proceed to a central panel. If so, he said, they could address additional issues such as how the central panel should be financed, and what agencies, if any, should be exempt from the process. He referred to the part in the draft where it references the state merit system, and asked if a state merit system currently exists. Ms. Gerrity answered that classified employees currently fall into the merit system. Senator Burgoyne opined that the state merit system has been weakened in the last decade, and expressed concern regarding whether the state merit system would adequately protect the hearing officers or ALJs that are referenced in the draft legislation. Senator Davis explained that "state merit system" is a bracketed phrase borrowed from the Uniform Model Act, and should be changed to reflect the language that is used in the State of Idaho.

Representative Gannon opined that the draft language may be too complicated for a pro se litigant to understand in order to properly participate in the hearing procedure. He suggested that the draft could include a jurisdictional limit so that counsel would not potentially be needed for every hearing. Senator Souza asked whether there is information regarding what the fiscal impact would be if the

Legislature was to pass this bill. Mr. Bybee responded that the cost would depend significantly on currently undetermined information, such as which agencies would be subject to the central panel, and how large that central panel would be. He explained that in the last meeting, he had identified a five-year rolling average cost of \$1.4 million, but this excluded some entities, such as the Dept. of Labor. If the Dept. of Labor was to be included under the purview of the central panel, it would increase the cost due to the amount of hearings they conduct.

Senator Davis explained that while the draft proposes to house the central panel in the Dept. of Administration, he suggested that it could also potentially be housed in the Dept. of Self-Governing Agencies. He also suggested that the committee should consult with the Governor, and request his input on this matter. He stated that the committee could divide the draft in the manner that had been proposed earlier in the meeting, remove the language regarding ALJs, and address each bill separately. Senator Davis explained that this would allow for the Legislature to research the topic of a central panel further, and work out the details.

Representative Hartgen stated his concern regarding where the central panel should be housed. He explained that if it was to be placed within the executive branch, he believed that it would be seen as an additional extension of the executive branch, and not provide the perception of neutrality and fairness that it would deserve. He concurred with Representative Luker's suggestion to divide the draft, and address the matter of a potential central panel at a later date.

Senator Burgoyne concurred with Representative Hartgen regarding dividing the draft into two bills, and addressing the bill relating to a central panel at a later date. He commented that there are different panel models that the Legislature could consider. He added that they will need more cost information to determine which model would be best. He suggested that the committee could potentially vote on the following:

- Whether to ask the Legislature to reconstitute this committee next year;
- Whether the committee would prefer to divide the draft according to its topics (e.g., administrative procedure changes and creation of a central panel); and
- Whether the committee favors or does not favor a central panel of some kind.

Representative Clow, in an effort to illustrate to the committee that bias does exist in the current model, informed the committee about two examples of bias that had been made known to him. He also favored dividing the draft as well.

Senator Burgoyne stated that the issue of qualifications for hearing officers is another important issue to him. He elaborated that while most hearing officers are attorneys, there is no requirement for them to be attorneys. He opined that enhancing the hearing officer position is part of gaining independence, and providing the public some degree of assurance. He stated that the magistrate judge qualifications is a good standard that he tends to favor. Senator Burgoyne wondered if, in the case that the Legislature elected to adopt a central panel, they would be open to the idea of allowing initially exempted agencies to later voluntarily participate in the central panel model.

Senator Souza asked Senator Burgoyne if requiring magistrate judge qualifications for hearing officers would call for a higher level of pay. Senator Burgoyne opined that the work hearing officers do is significantly different from the work the magistrates do. He stated that while administrative law is complex, he does not believe that it warrants the same level of pay, even if the qualifications for magistrate judges and hearing officers were to become the same.

Co-chair Vick called for the approval of the minutes from October 25, 2016. Co-chair Collins made a motion to approve minutes. Representative Clow seconded the motion. The motion passed unanimously.

Mr. Bybee followed up on Senator Burgoyne's point regarding the level of pay for hearing officers. He explained that there are several examples of individuals in positions similar to those of hearing

officers, who may have the same qualifications as magistrates, but are paid according to the level of work they perform.

The committee adjourned for a break at 10:30 a.m.

The committee reconvened from break at 10:48 a.m.

Co-chair Vick called the meeting back to order and explained that the committee would discuss their findings, make recommendations, and then take any motions. **Representative Luker moved that one of the committee's findings be that Idaho's Administrative Procedures Act, with regard to contested cases, is in need of updating by the use of the Model State Administrative Procedures Act as the base; to include provisions of the Model Act relating to subpoenas and discovery, as well as a more clearly defined judicial review process. Senator Burgoyne seconded the motion.** Senator Burgoyne clarified that he takes the motion to mean that the APA model is to be used as the base, but they are free to adapt it to Idaho's particular circumstances. **The motion passed unanimously.**

Representative Luker moved that the committee make a second finding stating that based upon the evidence presented to the committee, there is most likely a benefit to implementing a central panel of administrative law judges, the final form of which would need to be defined by a reconstituted interim committee. Senator Burgoyne seconded the motion.

Senator Davis was hesitant to make a finding that would include a recommendation for the adoption of a central panel due to the risk of dividing the committee on this matter. He explained that while he would like to see the State of Idaho transition toward implementing a central panel, he would prefer to make a finding that real, perceived, or implied bias exists under the current model, and that the State of Idaho should look at other models in an effort to mitigate bias. Representative Luker concurred with Senator Davis' revised finding, and seconded the motion.

Representative Hartgen opined that the committee should avoid language that implies that the committee has determined that bias exists. He explained that the committee had heard from parties who believe bias exists, and that there is evidence that suggests bias exists, but the committee did not conduct testimonial hearings to determine that bias actually exists. Representative Hartgen suggested that the committee could find that there is merit in implementing a central panel, and that the role of a reconstituted committee would be to address where the central panel should be housed. Senator Burgoyne suggested that the finding could include language that the current process invites bias.

Senator Davis stated that the committee did have parties who expressed their belief that bias existed in their case. He explained that if the committee did not wish to make a finding that bias exists because they do not find it necessary in order to obtain their goal or to make their point, then he takes no issue. However, Senator Davis believes that the current statutory framework creates an implied risk of bias, and the public may have the perception that bias exists. He explained that the Office of Performance Evaluations (OPE) report listed a series of safeguards in place for mitigating the risk of bias. Senator Davis made a substitute motion that the current process in place does create for many the perception of bias, and that as a state they find that it would be valuable to implement safeguards to mitigate the risk of perceived bias. Senator Souza seconded the motion.

Representative Hartgen voiced his concern about the language regarding the risk of bias. He opined that the committee had not found that bias exists through either the OPE report or the testimony provided to the committee; he added that an implied potential for bias exists. Representative Hartgen made an amended substitute motion that the committee finds that the administrative hearing review process currently in place is in need of modernization, and that a centralized entity should be examined carefully as to how future hearings should be conducted to eliminate problems regarding conflicts of interest, rights for review, subpoenas and discovery. Representative Clow seconded the motion.

Senator Davis opined that a perception of bias exists, which is consistent with testimony provided to the committee, and his own experience. However, he is not attached to the use of the phrase 'perception of bias.' He expressed concern regarding the amended substitute motion including language that would state that the definitive solution is a centralized panel. Senator Gannon voiced his preference for a finding to include the endorsement of a central panel. Co-chair Vick questioned whether the committee would be making a strong enough finding if they do not use the phrase 'perceived bias,' and voiced his concern that others will not find significant motivation to address the issue.

Senator Burgoyne proposed a potential amended substitute motion that the committee finds that the existing framework for contested cases omits sufficient safeguards against bias, and thereby creates a potential for bias, and a perception of bias.

After some discussion, the committee members withdrew their respective motions. Representative Hartgen made a motion that the committee finds that the administrative hearing review process in place is in need of modernization, and that a centralized hearing panel of hearing officers be carefully examined as an option to eliminate potential problems, such as conflicts of interests, rights of review, discovery, and perceived bias. Representative Clow seconded the motion.

After some additional discussion, **Senator Davis made a substitute motion that the current administrative review process fails to provide sufficient safeguards to all parties and interests, which invites the potential for bias. Improved safeguards should include discovery alternatives, a code of ethics, improved clarity regarding judicial review, and training. The motion passed unanimously.**

Senator Davis inquired whether the committee should make a finding that the Fair Hearing Unit should be statutorily authorized, other than through the budget funding measure. Senator Davis made a motion that the Legislature should make a separate statutory policy decision as to where the Fair Hearing Unit should be housed. Co-chair Collins seconded the motion. Senator Burgoyne wondered whether the motion is within the scope of the concurrent resolution, and questioned how it advances the charge of the committee. Representative Luker suggested expanding the motion to acknowledge the Fair Hearing Unit as a model for a potential central panel, and to suggest that legislative authority should be given in regard to where it is housed. Senator Davis offered that Representative Luker's suggestion could be included as a recommendation in the final report. **The motion passed unanimously.**

Representative Luker made a recommendation that they propose legislation that addresses the adoption of the Model State Administrative Procedures Act as discussed during the meeting, sections 1 through 31 of draft DRKAG021, with a few details still to be determined. A subcommittee consisting of Senator Davis, Senator Burgoyne, Representative Luker, and Representative Gannon should be formed to work out the details of the legislation. Senator Davis seconded the motion. Senator Burgoyne explained that while he supports this motion, he wishes to be clear that he takes issue with hearing officers making recommended decisions to agency heads, and that this substantive policy question is one he will want to address. **The motion passed unanimously.**

Senator Burgoyne made a motion that the committee recommends that the 1st Regular Session of the 64th Idaho Legislature approve a reconstituted Administrative Hearing Officer Interim Committee to examine and make recommendations regarding contested case reforms, including but not limited to:

- 1. The potential of creating a central panel of hearing officers or administrative hearing or administrative law judges;**
- 2. The determination of where such a central panel would be located; and**
- 3. The determination of the types of agency contested cases that should be exempted from such a panel.**

Senator Davis seconded the motion. Co-chair Vick asked whether it would be possible to have an estimate of fiscal costs for a potential centralized panel before the Legislature was to potentially vote on this recommendation. Mr. Bybee explained that the difficulty lies in that the size and scope of a potential central panel would need to be determined in order to determine costs. He suggested that the joint committee could ultimately make the final decisions for the Legislature once a policy was in place. He stated that a potential range of budget information could be made available on the fiscal note. He explained that the Budget and Policy Division could delve into the history of administrative hearing expenditures, and use the information as a guide for the Legislature in their decision-making. **The motion passed unanimously.**

Ms. Gerrity asked if the final report could be approved by the committee members by buck-slip via email. The committee approved this request.

Representative Luker asked if the proposed subcommittee would be authorized to meet beyond November 30. Senator Davis explained that this would be an informal group that would examine the last details, draw consensus among the group members, and provide the details to the committee members.

The committee adjourned at 12:14 p.m.