

MINUTES
Approved by the Committee
Administrative Hearing Officer Committee
Monday, November 13, 2017
9:00 A.M.
EW 41
Boise, Idaho

Co-chair Steve Vick called the meeting to order at 9:04 a.m.; a silent roll call was taken. Committee members in attendance: Co-chair Senator Steve Vick and Co-chair Representative Gary Collins; Senators Jim Rice, 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: Darrell Early, Office of the Attorney General; Michell Bird - Idaho Real Estate Commission; Jane McClaran and Joan Cloonan - Idaho Bureau of Occupational Licenses; Keith Simila - Idaho Board of Professional Engineers & Professional Land Surveyors; Shasta Kilminster-Hadley - Idaho Board of Medicine; and Bill von Tagen and Jonathan Sater.

Co-chair Vick called for the approval of the October 2, 2017 minutes. **Senator Burgoyne made a motion to approve the October 2, 2017 minutes. Representative Clow seconded the motion. The motion passed unanimously by voice vote.**

Summary Relating to Draft Legislation (KAG 020) - Subcommittee Members

Co-chair Vick invited Representative Luker to provide summary remarks regarding the subcommittee's work on [draft legislation KAG020](#). Representative Luker explained that, at the last committee meeting, the committee tasked a subcommittee to meet and review comments and to also take the committee's recommendation to create an Office of Administrative Hearings (OAH). He further explained that the committee met a couple of times and incorporated many of the comments received into the new draft and had also included a section providing for an OAH.

Representative Luker stated that the subcommittee had taken into account some of the concerns and differences of view regarding what a preliminary review was in terms of reviewing a license or permit application. He explained that the subcommittee made an effort to clarify that agencies that received applications for licenses or permits, and performed ministerial review to gather information with respect to those applications, would not rise to the level of a contested case. He further explained that, once a decision was made on the application and if it negatively affected an applicant's rights, it would allow for a notification of the right to file a contested case. Representative Luker stated that the clarification could be found in the new definition of "order"; and a new section was added to address "preliminary review." He summarized the following changes:

- Some sections were removed regarding interventions;
- In light of a more independent fact-finding process, the subcommittee reverted to the original language in the judicial review section with a few minor changes;
- The OAH would allow for the appointment of a Chief Administrative Hearing Officer (CAHO) to hire and assign hearing officers;
- The CAHO would be appointed for 6 years - subject to confirmation by the Senate; and
- The creation of an advisory committee.

Co-chair Vick invited Senator Burgoyne to provide summary remarks regarding the draft legislation. Senator Burgoyne began by thanking the agencies and public for their respective comments; he said the subcommittee took the comments very seriously and made many accommodations with respect to the concerns. Senator Burgoyne explained that, with respect to the issue of contested cases, the subcommittee discovered that the conceptual problems in the current APA had made their way

into one of the committee's drafts and the subcommittee would not have learned about it had it not been for the public comments received.

Senator Burgoyne highlighted the following items in the draft:

- The standard of review was restored and the amendments previously suggested in the prior draft legislation (KAG003) were removed;
- Administrative hearing officer provisions may need to be altered to address the language itself and minor conceptual issues; and
- He opined that, at least in the beginning, an advisory council would be beneficial for the CAHO.

Senator Rice noted that it would be more appropriate to potentially house the OAH within the executive branch.

Representative Luker referred to Deputy Director Thomas Donovan's comments with respect to the savings clause for agencies that are exempt, and suggested the subcommittee should revisit Section 67-5240, Idaho Code, that specifically exempted certain entities (e.g., Public Utilities Commission and the Industrial Commission). Representative Luker relayed Deputy Director Donovan's comments that suggested removing the portion from the contested case definition and creating a new separate section for it. He emphasized that there were adjustments that needed to be made (e.g., updates to cross-references). He encouraged the public to submit comments with respect to draft legislation KAG020. He welcomed any questions or dialogue from the committee members with respect to the new draft legislation.

Representative Luker addressed Representative Clow's question with respect to whether there was an actual problem that needed resolve. He referred to Office of Performance Evaluations' (OPE) [study report](#) that indicated that the risk of bias was moderate to high in just under 50% of agency actions. He stated that the risk of bias was an issue that needed to be addressed and the draft did so in two ways:

1. Refined the provisions of the APA to provide safeguards; and
2. The addition of an independent hearing office that would potentially save agencies funds in terms of the cost of administrative hearings and would provide greater consistency in hearings and impartiality - regardless of whether it was actual or perceived bias.

Co-chair Vick reminded the public that there was still time to provide commentary with respect the draft. He explained that, if the draft moved forward, there would be full hearings in both the House of Representatives and the Senate.

Senator Burgoyne stated that written comments that specify problematic issues within sections of the draft were helpful; it allowed the committee to focus on what changes in the language to make, etc. He asked Mr. Darrell Early, who was attending on behalf of the Office of the Attorney General (OAG), to relay any problematic information or suggestions to the committee. He also suggested that the committee could authorize the subcommittee to continue its work, create a final draft, and provide the committee with the final draft of the bill for their comments.

Representative Clow questioned whether the issue of bias could be resolved without making substantial changes (e.g., creating an OAH). He expressed the complexity of the issue and relayed his difficulty supporting legislation that may not be needed or was not easily understood.

Senator Rice suggested that it might be useful for the committee to discuss each portion of the draft so that the committee understood the purpose behind the modifications. He emphasized the need for enough time to create an OAH, hire staff, provide training, etc. He stated that perceived bias was almost to the level of concern as actual bias and suggested that both actual and perceived bias concerns, with respect to hearing officers, would be addressed by moving the hearing officers to a new structure independent of the agencies.

Senator Burgoyne explained that the subcommittee attempted to discourage an entity performing administrative hearings from essentially hiring the judge, jury, and executioner due to the perception of bias, and agreed with Senator Rice's comments that perception of bias is as much of a problem as actual bias. However, he said, the ripple effects, in terms of the statutes involved, increases and it does become difficult to remember all the code sections affected.

Co-chair Vick concurred with Senator Rice's suggestion to review the draft section by section and invited Representative Luker to begin his summarization of the draft changes.

Representative Luker informed the committee that many of the provisions had been renumbered and were not new, but had been designated as new sections within the draft; he suggested the committee refer to the [summary relating to draft legislation KAG020](#) that Ms. Gerrity created for the committee, which specified any actual changes to the existing Administrative Procedures Act (APA). He summarized the following changes:

- Addition of the definition "agency decision" to create a distinction from an agency action and to exclude rulemaking; and
- "Contested case" definition is meant to provide a definition for when due process requires a hearing to protect rights.

He referred to Deputy Director Donovan's comments that suggested removing the language on page 3, lines 15-18, and reinserting the language in a separate section that specified which entities were exempt.

- "Contested case order" was the step after the contested case; it was the order that would become final and appealable;
- "Final order" was defined to provide clarity for at what point an order was final and ready for judicial review;
- "Hearing officer" terminology replaced "presiding officer" from the prior draft (KAG003);
- Definition of "order" on page 3, line 45 clarified the difference between granting applications for licenses and orders; and
- "Preliminary review" definition provided for the receipt, collection, processing, and analyzing of information, or other activity of an agency preparatory to the making of an agency decision.

Senator Souza inquired whether the preliminary review was already part of the current process. Representative Luker responded that the current statute wasn't clear about whether it was part of the process or not. He explained that there were some differences of view among agencies on this topic. He referred to the exclusion provided in Section 67-5242 of the draft that allowed agencies to use their own discretion.

Representative Clow referred to page 2, lines 1-6 and questioned whether including the words "agency action" in the definition of "agency decision" was at odds with the actual definition of "agency action." Representative Luker explained that the APA was very broad and dealt with, not only agency decisions with respect to hearings, but also rulemaking; the definitions provided for a distinction between the two. Senator Burgoyne added that the committee did not want to be overinclusive and remove decision-making from agencies that were not part of the independent decision-making process; the definitions attempted to define the scope for what was independent and should be left to a hearing officer and what was not independent and should be an agency decision to make in the manner it deemed appropriate.

Representative Hartgen inquired whether the process outlined in the draft applied to the Idaho Transportation Department (ITD) license revocation proceedings. Representative Luker explained that the license revocation process was exempt because the ITD had a separate statutory procedure. He referred to the exemption under the savings clause found on page 3, lines 17-18 of the draft.

Representative Hartgen inquired about the reference to "third-party" within the definition of "order" on page 3, lines 45-47. Representative Luker explained that the definition was designed to clarify an agency's ability to know that an appealable order did not exist when issuing a license that was unrestricted, not contested, and did not affect the rights of a third-party, which may have a right to commence a contested case. Representative Luker went on to note:

- Section 67-5241, Idaho Code, with respect to informal dispositions, was simplified to make it more cohesive with the modified process;
- Section 67-5242, a new section, states that the provisions of the act do not apply to an agency preliminary review until an order is issued, not issued within the time required by law, or the agency fails to perform a duty required by law. Section 67-5242(2) allows an agency to use, and adopt by rule, provisions of the act for use in preliminary reviews consistent with requirements of due process;
- In response to one comment, the timeframes had been changed to multiples of seven to facilitate calculating time periods;
- The intervention section was removed due to concerns expressed;
- Changes were made to the emergency adjudication process on page 9 to address concerns brought forward by some agencies; and
- Section 67-5267 found on page 19, lines 4-12 was the same as the current standard of review. However, the remaining lines within this section were somewhat altered.

Representative Hartgen inquired whether the hearing officers residing in the OAG would be absorbed into the OAH. Senator Rice responded that, while their functions would be absorbed by the OAH, the hearing officers would need to apply for employment and the CAHO would have the ability to hire them - if he chose to do so. Representative Hartgen inquired whether hearing officers would be state employees or contracted independently. Representative Luker explained that, while the draft allowed for the CAHO to retain independent contractor hearing officers (it would be the exception and not the rule), the hearing officers would be state employees.

Senator Souza inquired whether the draft provided more efficiency or whether it expanded government at an increased cost to the taxpayers. Senator Burgoyne stated that the committee should aim for the consolidated, independent function to cost no more than what was being spent on hearings presently. However, he said, the population in the state was growing and the state had taken over primacy on certain water issues at the Department of Environmental Quality (DEQ). He suspected that if a review was done in five years, it would show that the state had spent more funds than it did before, but the issue would be discerning whether this was due to consolidation or because the functions grew naturally.

Senator Burgoyne stated that, with respect to Representative Hartgen's question regarding the ability to hire hearing officers from the OAG, page 21, lines 45-46 stated that a hearing officer should not have served in the executive branch for a period of two continuous years preceding appointment. He added that this language could be altered to allow for an exception for the hearing officers within the OAG since they operated independently from the OAG and opined that they should be grandfathered in.

The committee adjourned for a break at 10:27 a.m.

The committee reconvened at 10:40 a.m.

Co-chair Vick invited Senator Burgoyne to continue the draft summary explanation. Senator Burgoyne summarized the following:

- Section 32, on page 20, line 3, allowed for the creation of an OAH and an advisory council. Senator Burgoyne stated that Section 67-5270(b) allowed the OAH to conduct hearings, mediations and arbitrations not provided for by this chapter if requested by agencies; and

- Section 67-5271 provided for the appointment of the CAHO and delineated the qualifications, powers and duties, and removal of the CAHO. The duties and responsibilities included the protecting and ensuring the decisional independence and monitoring hearing officer compliance with a code of conduct, etc.

Senator Rice opined that the requirement for hearing officers to have not served in the executive branch for a period of two continuous years prior to employment with the OAH should be removed and instead be made a requirement for the CAHO. This would allow for hearing officers with experience to apply and retain continuous employment with the state as administrative hearing officers for the OAH.

Co-chair Vick reminded the committee that Mr. Early was present on behalf of the OAG to answer any questions. He also stated that, after the draft summary discussion, Mr. Bybee would discuss the draft's potential fiscal impact.

Senator Burgoyne stated that Section 67-5271(k) allowed the CAHO to retain independent contractor hearing officers. He explained that this accomplished two things:

1. Provided flexibility for workflow management in the event that the caseloads increased for state employee hearing officers; and
2. Provided the ability to retain a contracted hearing officer with a significant specialization for a particular hearing.

Senator Burgoyne referred to page 21, line 16 that allowed for the CAHO to assign an employee hearing officer to fill in for him on a temporary basis - not to exceed 28 continuous days. He questioned whether this provision was necessary and pointed out that many agency directors often took vacation or sick time and may have a different practice in place. Senator Burgoyne referred to Section 67-5271(4) and stated that, to ensure independence, the CAHO may be removed from office upon impeachment by the House of Representatives and conviction by the Senate.

Representative Clow inquired whether the state presently had full-time state employee hearing officers within the executive branch. Senator Burgoyne responded that there were some administrative hearing officers within the OAG; the Department of Labor (DOL) employed, as classified full-time employees, appeal examiners (hearing officers). He explained that, while the DOL was exempt from the APA, this provision would affect the appeal examiners and preclude them from potential employment with the Office of Administrative Hearings for two years. He reminded the committee that Senator Rice's earlier suggestion to modify this provision so that it would only apply to the CAHO would solve this issue. He went on to note:

- Section 67-5271(3) stated that the compensation for the CAHO would not change during his term of office;
- Section 67-5272 provided for additional requirements for the CAHO and all hearing officers;
- Page 22, lines 10-15 delineated the hearing officers' powers; and
- Section 67-5273 provided information regarding the compensation for administrative hearing officers.

Senator Burgoyne noted that there was a process for determining compensation for classified employees and that the provision would need to be modified to reflect the process. He stated that a requirement should be inserted to state that hearing officers were full-time employees and would not perform any other work, except as volunteers, in order to minimize any potential conflicts of interest.

Representative Hartgen questioned whether it was customary for the salary of employees to be approved by an advisory council, as stated on page 22, lines 24-27. Senator Burgoyne responded that it was not customary and opined that the language should be removed from the draft.

- Section 67-5274 provided for disqualifications for administrative hearing officers;

Senator Souza inquired whether it would be reasonable to allow the CAHO to determine disqualifications for hearing officers rather than leave the determination to the individual hearing officer. Senator Burgoyne explained that the provision was worded this way because it was the standard procedure for court. He added that the provision could be modified to allow for the CAHO to make that determination. Representative Luker reminded the committee that, if the

provision was changed, the committee would need to consider how disqualifications for a CAHO would be determined.

- Section 67-5275 provided an outline for the advisory council to the OAH;
- Page 24, lines 10-33 delineated the advisory council's duties; and
- Section 67-5276 was part of the model act and was included in the draft with some minor modifications.

Representative Luker referred to page 24, lines 7-9 and inquired whether it was customary for an advisory council to have bylaws. Senator Burgoyne responded he was unsure and agreed that it was unnecessary. Representative Luker referred to Section 67-5275(8)(b) and questioned whether it was necessary to include, in statute, the language "once every four years."

Representative Clow questioned whether there was an existing council that could absorb the role of the advisory council to the OAH.

Representative Clow referred to page 23, line 29 and inquired about the prohibition of honorarium for the advisory council members. Senator Burgoyne responded that it was his understanding that the Legislature was moving away from providing PERSI benefits and honorarium for councils. Ms. Gerrity responded that it was her understanding that the compensation, if any, for councils and boards varied; she offered to look into the matter further. Representative Luker explained that statute allowed for two different types of honorarium; one was traditionally included in PERSI and the other was similar to a per diem. He noted that all but two of the advisory council members would be members of state government and paid for their time; a provision could be added for the two non-state employees. Senator Burgoyne suggested that it might be useful for staff to review some analogies in advisory boards with respect to compensation.

Representative Hartgen inquired whether the council meetings would be subject to open meeting laws. Senator Burgoyne responded in the affirmative. Representative Luker stated that, with respect to whether contested case hearings were open to the public, the procedure was outlined in Section 67-5244. He said that contested case hearings were generally open to the public.

Fiscal Impact for Draft KAG020 - Deputy Division Manager Keith Bybee, Budget and Policy Analysis

Co-chair Vick invited Mr. Bybee to address the fiscal impact of the draft legislation. Mr. Bybee referred to his previous [presentation](#) and suggested that the committee could create a fiscal note that provided for a lump sum of \$1.5 million and one full-time person until the CAHO decided what employee structure would be best for the OAH, dependent on the outside expertise needed and what type of cases the agency would take on. He reminded the committee that the \$1.5 million figure was devised from the study last year that took into account the agencies' annual expenditures on administrative hearings with the exception of a few agencies (i.e., DOL, DOT, Idaho Water Resources Board, etc.). He added that, depending on the expenditures, the Legislature could adjust this figure as necessary.

Mr. Bybee stated that another issue to determine would be whether OAH would operate on direct billing for services or a cost-recovery methodology. He suggested that it might be beneficial to begin with a general fund appropriation and a cost-recovery methodology. He explained that a general fund appropriation would allow for the availability of appropriation funds and a determinate amount of spending authority to allow for operations to move forward; it would lend itself more towards a cost-recovery methodology. He added that a direct billing methodology would also not be out of the ordinary, but would require some additional general funds up-front to bankroll the agency. He explained that the first year would require the initial \$1.5 million general fund appropriation and would need to work on its direct billing to provide the cash-flow for the operations.

Discussion:

Senator Burgoyne inquired whether the \$1.5 million would be a new appropriation and questioned whether, in the case that there wasn't enough increased revenue in the general fund for this

appropriation, it would be necessary to take funds from elsewhere. Mr. Bybee responded in the affirmative. He added that, while the state was forecasted to have \$130 million of new funds for Fiscal Year 18 (FY18), much of the additional funding would be consumed by statutory growth in education, Medicaid, and corrections.

Senator Burgoyne inquired whether there was a sense for what budget requests would be made that could potentially deplete the State's revenue growth. Mr. Bybee explained that, with respect to the general fund, there was a 8.3% request increase for FY18. There was a \$100 million growth among public schools, Medicaid, and corrections in the maintenance portion of the budget alone. He added that there was an additional \$26 million request for replacement items.

Senator Burgoyne inquired whether the State was likely to see any offsetting cost-recovery in the first fiscal year of the \$1.5 million appropriation. Mr. Bybee explained that it would depend on the methodology. He explained that if the Legislature selected a cost-recovery methodology, it would receive a 90% cost-recovery in the third fiscal year. If the Legislature selected a direct billing methodology, there would be some offsets up-front, but it would also require some initial investments. One of the benefits of a direct billing methodology was that it allowed the agency to function more like a dedicated fund agency versus a general fund agency.

Senator Burgoyne inquired if there was a manner to determine the amount of funding spent on independent contractors that could potentially be transferred to the OAH. Mr. Bybee responded that it would be relatively easy to determine a one-to-one cost-savings in the professional services contract. Senator Burgoyne asked if the data was available at this time. Mr. Bybee responded that he did not have the information on hand.

Final Discussion:

Co-chair Vick stated that the co-chairs agreed that the subcommittee should be allowed to continue its work and the committee should meet early in the legislative session. He voiced his preference for a sunset clause on the legislation, and based on the committee's discussion, a different sunset clause for the advisory council. He reminded the committee that a sunset clause would provide a requirement to review the legislation and determine if the process was beneficial.

Representative Gannon stated his interest to see a compilation with respect the cost for contract hearing officer services and any other related costs.

Representative Luker agreed that there should be a sunset clause for the advisory council, but stated his concern that it would be difficult, and potentially detrimental, to insert a sunset clause on the legislation.

Representative Clow inquired whether the OAH would be placed in the Dept. of Administration (DOA) or the Dept. of Self-Governing Agencies. Mr. Bybee explained that if the OAH was placed in the Dept. of Self-Governing Agencies, the director would not have a reporting mechanism. However, he said, if it was placed under the DOA, there would be reporting authority to the director of DOA. The draft allowed for the agency head of the OAH to report to the advisory council rather than to an agency director.

Representative Luker made a motion that the full committee authorize the subcommittee to take the suggestions made at the meeting, and collect any further comments, for a reasonable period of time, and incorporate them in a subsequent draft for the full committee to consider at the beginning of the legislative session. Senator Rice seconded the motion. The motion passed unanimously.

The committee adjourned at 12:07 p.m.