

March 1, 2018

Honorable Lynn M. Luker, Chair
House Committee on Judiciary, Rules & Administration
Idaho State Capitol
Boise, ID 83702

Re: House Bill 623, Administrative Procedures Act
(referred to committee 2/23/2018)

Dear Committee Members:

I would like to submit the attached written testimony supporting House Bill 623. Although I work for the University of Idaho, I do not submit this testimony on behalf of the University of Idaho. I submit it in my personal capacity. I hope the Committee will find it useful.

Thank you for your consideration.

Sincerely,

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**TESTIMONY SUPPORTING House Bill 623, ADMINISTRATIVE PROCEDURES ACT,
AS REFERRED TO THE HOUSE COMMITTEE ON JUDICIARY, RULES & ADMINISTRATION,
2/23/2018**

By Richard H. Seamon, Professor, University of Idaho College of Law

Introduction

Chairman Luker and Honorable Members of the Committee:

My name is Richard Seamon, and I am a professor at the University of Idaho College of Law. I say that for identification purposes, though my testimony today is not presented on behalf of the University of Idaho. I am here today solely in my personal capacity.

I would like first to say just a few words about my experience with administrative law and procedure, since that is the subject of House Bill 623. I hope this will give the Committee useful context for my testimony.

My experience with administrative law and procedure goes back more than 30 years, to 1986, when, for my first job after graduating from law school, I clerked for a judge on a court that has a steady diet of administrative law cases. That was the United States Court of Appeals for the District of Columbia Circuit, where I clerked for a year. After the clerkship, I spent 9-10 years in the full-time practice of law, devoting much of it to administrative litigation and court litigation brought against, or on behalf of, federal agencies. For six of those years, I was at the U.S. Department of Justice.

I've now been a full-time law professor for 21 years, and I've taught administrative law in every one of those years. During that time, I've devoted significant attention to state agencies and state administrative law, including -- since 2004 -- Idaho agencies and Idaho administrative law. I became specifically familiar with House Bill 623 when it was before the Administrative Hearing Officer Interim Committee. If the Committee wishes more information on my background, it can be found on the UI website.

With that background out of the way, I'd like to offer two kinds of comments on House Bill 623: general and specific. I'll pause after my general comments, and before getting into my specific comments, to ask whether the Committee wishes for me to give oral testimony of the specific. All of my comments are in my written testimony, and the specific ones get quite deep into the weeds. I don't want to wear out my welcome.

General Comments

My general comments concern the aspect of House Bill 623 that, in my opinion, is the most significant and beneficial one: the creation of an office of administrative hearings within the department of self governing agencies. This new office will hire full-time, professional hearing officers to conduct contested-case hearings for essentially all Idaho agencies except the public utilities commission, the industrial commission, the department of water resources, and the water resources board. This new office's hearing officers will take on a job that is now being done in many agencies by contract hearing officers. If House Bill 623 is adopted, Idaho will join about half of the States that currently put all their hearing officers in a single, separate agency. These are known as "central panel States." They include our neighbors Washington State, Oregon, Nevada, and Wyoming. They do not include Montana or Utah.

I support House Bill 623 and, in particular, its creation of this new office of administrative hearings. I believe the office will produce three public benefits. First, it will enhance the overall fairness of contested case hearings. Second, it will enhance public perception of, and confidence in, the fairness of contested-case hearings. Third, it will enhance public access to administrative justice. I will briefly elaborate on these benefits and then discuss possible objections to putting all the contested-case hearing officers into one office of administrative hearings.

1. Overall Fairness of Contested Case Hearings

As to the overall fairness of contested case hearings, in my view, it boils down to one main fact: It is hard for a hearing officer to be impartial in a dispute between a member of the public and an agency, when the hearing officer works for that agency. In our jobs, we like to feel like we're part of a team. Hearing officers are no different. As a result, when a hearing officer rules against the agency that the hearing officer works for, the hearing officer can feel like he or she has done something that hurts his or her own team.

This feeling can arise even when the hearing officer works for the agency on a contract basis. In that arrangement, moreover, the hearing officer may have an additional pressure to rule in favor of the agency. The hearing officer may fear that, by ruling against the agency, the hearing officer reduces the chance that the agency will continue contracting with him or her to hold hearings.

The law has long recognized that it is hard to judge your own team. In 1610, the famous English Judge Sir Edward Coke said no person can be a judge in his own cause. In the United States, James Madison articulated the maxim in the Federalist Papers, No. 10. And in a 2009 decision the U.S. Supreme Court extended the principle in a way that's relevant to House Bill 623. The Court said, "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when —without the consent of the other parties— a man chooses the judge in his own cause." *Capterton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009). But that is essentially what happens when agencies employ the hearing officers who hold the hearings.

I don't mean to impugn the objectivity of hearing officers under the current system. I am simply saying that House Bill 623 would relieve the inherent pressure to rule in favor of the agencies for whom the current hearing officers work.

2. Public Perception of, and Confidence in, the Fairness of Contested Case Hearings

My second general remark relates to public perception of, and confidence in, the fairness of contested-case hearing and is as simple -- I hope not simplistic -- as my first comment.

Federal law requires a judge to recuse him or herself "in any proceeding in which his [or her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The American Bar Association's Code of Conduct for judges says that a judge must "avoid impropriety and the appearance of impropriety." Canon 1. These provisions reflect that appearances matter. I think the average member of the public who was a dispute with an agency would find it hard to believe that he or she could get a fair hearing from an employee of the agency. The person is much more likely to believe in the fairness of a system in which the hearing is held by someone who is not being directly paid by the agency.

For that reason, the public will benefit from House Bill 623's creation of a single new office for contested-case hearing officers.

3. Public Access to Administrative Justice

Although I do not have statistics on this matter, I suspect that in many contested case hearings in Idaho, members of the public will be either entirely unrepresented by an attorney or they will be represented by an attorney who has limited experience with that specific agency's hearing procedures. These circumstances make it really hard for members of the public to make their case effectively.

Those circumstances might well be mitigated by having an office of administrative hearings. For one thing, the office could effectively and efficiently train its hearing officers on how to deal with unrepresented parties and inexperienced attorneys. For another thing, the office develop more uniform hearing procedures, which would benefit general-practice attorneys who pick up occasional cases involving different agencies, and those attorneys' clients. Thirdly, the office of administrative hearings might well be able to develop a user-friendly set of forms for people who want to represent themselves, like the Idaho courts have done. All these measures would better assure access to administrative justice.

4. Potential Objections to Creation of an Office of Administrative Hearings

I can envision three objections to the creation of an office of administrative hearings. I will describe them and explain why, in my opinion, they do not carry the day.

First, agencies develop expertise in the areas for which they are responsible, and the hearing officer should be equipped with that expertise to ensure the completeness of the hearing record and the accuracy of factual and legal determinations. This expertise argument might justify the creation of specialized subject-matter divisions within the office of administrative hearings. House Bill 623 authorizes the chief administrative hearing officer to do that. (Proposed 67-5271(2)(j), p. 23, lines 1 and 2.) In addition or alternatively, hearing officers could do rotations that would give them time to develop expertise in specific subject matters. Even so, there are some benefits of having hearing officers handle cases involving a variety of subject matter. That variety should make the job more attractive to well-qualified applicants. Furthermore, frankly, requiring the agency to present its case to an at least somewhat-generalist hearing officer helps keep the agency honest by forcing it to articulate and defend rationales, policies, and factual matters that would otherwise be unstated if the hearing officer were an "agency insider."

A second objection is that creating an office of administrative hearings increases the bureaucracy. House Bill 623, however, does not, by its terms, increase the number of contested case hearings; it just addresses who presides over those hearings. As the Fiscal Note to House Bill 623 observes, House Bill 623 could end up saving the State money by reducing or eliminating the use of contract hearing officers. It is true, however, that House Bill 623 might increase the number of requests for contested case hearings, especially if it changes public perception about the likelihood of these hearings being objective. That would not be a bad thing, especially since hearing officers -- like judges -- have means of quickly and efficiently resolving matters that are frivolous.

A third possible objection is that creating the office of administrative hearings will unduly burden agencies. On this view, agency heads will often be forced to review the decisions

of hearing officers to ensure consistency and accuracy in agency decision making, especially with regard to cases that implicate the exercise of agency discretion and important agency policies or important issues of statutory interpretation. This argument about an increased need to agency-head review rests on the premise that hearing officers are less likely to be "on the same page" as the agency if they work in a different office from the agency. Indeed, there may be a tradeoff between the potential benefits of separating hearing officers from the agencies for which they hold hearings -- namely, increase in real and perceived fairness -- and the potential downside -- namely, less familiarity with agency policies and positions. But because House Bill 623 does authorize all agency heads to review all hearing officer decisions, it enables the agency to be the final administrative decision maker on all significant matters. Any additional burden associated with exercising this review is speculative.

Specific Comments

1. p. 4, line 9, 67-5201(8) (definition of "Contested order") - I suggest consideration of revising the definition along the following lines to clarify that this term does not include interlocutory rulings by a hearing officer -- e.g., rulings on discovery disputes, admissibility of evidence, etc.:

"'Contested case order' means an order issued by a hearing officer resolving ~~issues in~~ a contested case..."
2. p. 4, after line 14, 67-5201 (Definitions) - I suggest consideration of adding a definition of "emergency adjudication," which is the subject of 67-5247, p. 11. Without a definition, it is unclear that 67-5247 applies only to contested cases. One possible definition comes from the 2010 Model State APA, § 102(10): "'Emergency adjudication' means an adjudication in a contested case when the public health, safety, or welfare requires immediate action."
3. p. 5, line 23, 67-5201(25)(b)(ii) - The reference to "67-5232" should be changed to "67-5268."
4. p. 6, line 8, 67-5241 (DISPOSITION BY AGREEMENT) - I suggest consideration of prefacing this section by the phrase "Unless prohibited by other provisions of law." I suggest this change because, for example, some other provisions might bar the use of a settlement agreement, in lieu of a consent order. In addition, subsection (4), line 46, contemplates that the right to judicial review can be expressly waived. I could envision situation in which such a waiver might be contrary to law. For example, an agency official might have authority to settle a matter but lack authority to waive judicial review.
5. p. 9, lines 8-10, 67-5244(1) - This provision appears to allow the hearing officer to refer a case to mediation or other alternative dispute resolution only with the consent of the parties. In contrast, 67-5272(5), p. 24 line 10, empowers the hearing officer, seemingly without the parties' consent, to "*order* ... the use of alternative dispute resolution when appropriate ..." These two provisions seem to conflict.
6. p. 12, line 22, 67-5248(1) - This provision refers to a "pending" contested case, and specifies when the contested case begins, but not when it ends. One possibility is to refer back to 67-5201(11)(a), p. 4, lines 16-17, where a "final order" is defined to include "A contested case order that is final as provided in sections 67-5253 and 67-5254."

7. p. 15, lines 32-33, 67-5254(2) - I suggest consideration of adding commas to clarify, as follows:

If the request is declined, the contested case order shall be final from the date of the notice of, or last day for declining, the review or twenty-eight (28) days after filing of the contested case order, whichever is later.

8. p. 16, lines 1-2, 67-5254(4) - I suggest consideration of specifying what "relevant time periods" are tolled under this sentence. The only time period I could think of is the one a few lines down the page, p. 16, lines 7-10, in 67-5254(6).
9. p. 16, lines 11-21, 67-5254(7). I suggest consideration of addressing, either in this subsection or in the following section -- 67-5256, p. 16, lines 25-42, whether not only the hearing officer, but also the agency head, can reconsider a decision. Although reconsideration is addressed in 67-5256, that provision currently appears to contemplate only reconsideration by the hearing officer, not by the agency head. For what it is worth, in my experience most agency heads can reconsider their final orders in contested cases. Compare 2010 Model State APA § 416, which authorizes reconsideration of any "final order," whether it's issued by a hearing officer or the agency head, and uses the term "decision maker" to refer to them both.
10. p. 16, lines 31-33, 67-5256(2) - This provides for tolling of "the time for filing a request for a judicial review" while a request for reconsideration is pending before a hearing officer. But this ignores that judicial review of the hearing officer's order will be premature if the agency head reviews the hearing officer's decision on reconsideration. It also raises the question: Must a party dissatisfied with the hearing officer's decision seek agency head review as a prerequisite to seeking judicial review? I had this same question after reading the exhaustion provision, 67-5265, on pp. 19-20. I have not completely researched existing law on this issue. My preliminary research, though, suggests that Idaho courts generally require exhaustion of all available administrative remedies, even administrative remedies that are not expressly required by statute. *E.g., Regan v. Kootenai County*, 140 Idaho 721 (2004). If my preliminary research is accurate, then a party dissatisfied with a hearing officer's decision would have to seek agency head review before seeking judicial review. In that event, the tolling provision in 67-5256(2) would not apply.
11. p. 18, lines 42-47, 67-5262(2) - I would like to offer three comments about this provision. First, as discussed above, House Bill 623 appears not to authorize, expressly, reconsideration by the agency head, and a hearing officer's decision on reconsideration probably is probably not subject to immediate judicial review (before disposition of a request for agency-head review). Second, I suggest consideration of requiring that a request for reconsideration will toll the time period for seeking judicial review only if the reconsideration request is filed timely and in accordance with all procedural requirements. Third, this provision says that the 28-day period for judicial review starts on the date of service of the decision on reconsideration. It does not address a situation in which reconsideration is deemed denied by the lapse of time, pursuant to 67-5256(3),

on p. 16, lines 39-41. The second and third comments could be addressed by amending the provision along these lines:

(2) A petition for judicial review of a final order must be filed within twenty-eight (28) days of the service date of the final order, or, if reconsideration is sought in a timely request filed in accordance with all applicable procedural requirements, within twenty-eight (28) days after the service date of the decision thereon or after the date on which the request is deemed denied by lapse of time under 67-5256(3)...

12. pp. 20-21, 67-5267 (STANDARD OF REVIEW) - This provision address the standard for judicial review of an agency order, but not an agency rule. The existing Idaho law prescribing the standard for judicial review of an agency rule is Idaho Code 67-5279(2). But all of Idaho Code 67-5279(2) is proposed for repeal by House Bill 623 Section 7, on p. 7, lines 5-6. I suggest consideration of reinstating 67-5279(2).
13. p. 21, line 13, 67-5268(1) - I suggest consideration of revising the current wording to read, "Any person may request that an agency issue ..."
14. p. 24, lines 10-11, 67-5272(5) - As discussed above in specific comment 5, this provision appears to conflict with 67-5244(1), on p. 9, lines 8-10, because it apparently authorizes a hearing officer to order the parties to attempt alternative dispute resolution without their consent.

Summary

I thank the Committee for its consideration of these comments.