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CONTACT US

Section Chair
Polly McNeill
pollym@summitlaw.com

Newsletter Submissions
Eileen M. Keiffer
emkeiffer@gmail.com

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Differences Between Administrative Hearings and Court Trials: Practical Pointers for Trying Child Support Hearings at the Office of Administrative Hearings

By Robert Murphy

The Legislature created the Washington State Office of Administrative Hearings (OAH) in 1981, upon a recommendation by the WSBA's Administrative Law task force (a precursor to the current Administrative Law section) to "improve the appearance of fairness" in the administrative hearing process. The Legislature also intended administrative hearings to be easily accessible for the public, mandating that: "(h)earings shall be conducted with the greatest degree of informality consistent with fairness and the nature of the proceeding."[1]

OAH has more than 100 administrative law judges (ALJs). ALJs are attorneys who have been licensed for more than five years (although not necessarily in Washington state). OAH hears over 40,000 cases annually, more than 37 percent of which involve the Department of Social and Health Services (DSHS). The greatest number of cases is in the employment benefits area. However, those cases will not be discussed in this article. This article will discuss the differences in administrative hearings and court trials, primarily focusing on child support cases. Child support cases are by far the largest part of the DSHS docket.

ALJs conduct hearings which are very similar to court trials. However, one major difference is that almost all ALJ hearings are done telephonically. If a party can demonstrate a compelling reason, an "in-person hearing" can be held; however, this is a rarity. Generally, in-person hearings are held in cases involving alleged child abuse/neglect or abuse of vulnerable adults.[2]

It is important to understand some of the nomenclature. In child support cases, the parties are referred as the Noncustodial Parent (NCP) or Custodial Parent (CP). In superior court, these parties would be referred to as the Responsible Party and the Custodian. The easiest way to distinguish the parties is that the NCP is the party that pays child support and the CP is the party that receives same. The DSHS Division of Child Support (DCS) is also a party. DCS is represented by an attorney at all hearings; this attorney is known as a "Claims Officer" (CLO).

For OAH hearings, the substantive and procedural law is contained almost entirely in the Washington Administrative Code (WAC), unlike superior court that would use the federal and state constitutions and RCW as primary sources. ALJs by law, not choice, look first to the WAC.[3] The ALJ shall first apply the DSHS rules adopted in the Washington Administrative Code (WAC). If no DSHS rule applies, the ALJ shall decide the issue according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, regulations, and court decisions.[4]

An ALJ may not decide that a rule is invalid or unenforceable; only a court may do that.[5] To be clear, an

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Send submissions to: Eileen M. Keiffer (emkeiffer@gmail.com).

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Differences Between Administrative Hearings and Court Trials
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ALJ cannot apply case law that is inconsistent with a WAC. For example, DSHS rules contain the following: "…the *Arvey* decision cannot be used by an ALJ. (a) DCS orders cannot set off the support obligation of one parent against the other. (b) Therefore, the method set forth in *Marriage of Arvey*, 77 Wn. App 817, 894 P.2d 1346 (1995), must not be applied when DCS determines a support obligation. (7) The limitations in this section apply to DCS staff and to administrative law judges (ALJs) who are setting child support obligations."[6]

If practitioners focus as they are taught in law school to start with the federal and state constitution, then statutes, case law and finally regulations they will be going backwards. Practitioners should find the DSHS rules easy to read.

Phone Hearings v Court Trials

While there are many differences, this article will highlight the major distinctions between hearings and trials. The procedure to begin an OAH hearing is that the CLO will contact the CP and NCP and their representative by telephone. This may include an attorney, although in administrative hearings any person including non-lawyers may represent a party. Any party can request that the hearing be in-person although this is rarely done.[7] Hearings usually start on the hour or are scheduled to start on the hour but may not begin until sometime later. The reason behind this is that ideally, the CLO is conducting a prehearing with the parties, including settlement discussions.[8]

Hearings are scheduled for one hour but sometimes run longer. The better prepared practitioners and their client(s) are, the more smoothly it will run. Some CLOs are very prepared and others not so much. The parties may be anywhere in the state. Oftentimes the CLO will be in Everett, the ALJ in Spokane Valley (perhaps teleworking), and the CP in Yakima with the NCP in Seattle. It is important to have a good phone connection and be in a quiet location. If you are in your office with a client on the speaker phone, the phone may need to be muted or there could be an echo. Also, only one person can speak at a time. The ALJ will record the hearing. There is no court reporter unless a party or their representative has arranged for same. Even then the official record is the recording.

Procedurally, the hearing is similar to a trial. The ALJ will set the stage, identify the case with the docket number, administer the oath to all parties including the CLO, identify the exhibits (these are consecutively numbered with something similar to a "Bates stamp"), entertain objections, and rule on admissibility. Generally, the CLO testifies first in the narrative, explaining DCS' position. The CLO is then subject to cross examination, and then the CLO may call the CP or NCP as a witness or will defer to the attorney representing same. Some ALJs initially question the witnesses while others prefer to let the parties have their say before questioning, especially if the parties are represented by counsel. Parties are allowed closing arguments and then the record closes. The ALJ, unlike a trial judge, will not pronounce the decision at the hearing but will take the matter under advisement.

Since the issue is child support, the evidence is limited to this subject. Practitioners should avoid presenting any evidence relating to custody or visitation. (If the parties are in superior court on a parenting plan and are willing to have the court set child support as well, practitioners should make sure that the "start date" is the same or an unnecessary administrative hearing to set a few weeks of past child support will need to be held). The ALJ will prepare a worksheet based on the evidence. OAH uses proprietary software (Family Soft SupportCalc). This software is somewhat different than the software used by DCS, in that OAH software takes into account the tax exemption for the CP, whereas the DCS program does not.

At the conclusion of the hearing, the ALJ will close the record and advise the parties that a decision will not be made on the record but will be made in writing. The parties will receive this decision within 21 days according to OAH policy. The ALJ then issues a final order. If either party disagrees with the decision, they have the right to request the decision be reconsidered within 10 days or they can directly appeal to superior court within 30 days. The only exception is that DCS by its own rules can only request reconsideration.

Practical pointers

Do attempt to discuss the case if possible with the CLO. The CLO should initiate contact to the parties but does not always do so. If there is any chance to work out or clarify any issues, this is a good time to do it before the hearing. Also, make sure you have a good quality sound system as echoes are distracting.

Parties can "affidavit" an ALJ by filing a motion of prejudice that includes an affidavit or statement that a party does not believe that the ALJ can hear the case fairly. The first request for a different ALJ is automatically granted. The chief ALJ grants or denies any later requests.[9]

If English is not a party's first language, OAH will pay for an interpreter, if requested.[10]

1 RCW 34.12.010.
2 WAC 388-02-02360.
3 WAC 388-02-0220.
4 WAC 388-02-0220(2).
5 WAC 388-02-0225(1).
6 WAC 388-14A-3200.
7 WAC 388-02-0360.
8 WAC 388-02-0180 (1)(k).
9 WACs 388-02-0230 through 0245.
10 WAC 388-02-0120 through 0150.

Rulemaking Alert: Office of Administrative Hearings Issues Rules Relating to Accommodation

On August 16, 2017, the Office of Administrative Hearings (OAH) adopted new Washington Administrative Code (WAC) section 10-24-10, Accommodation.[1] The rules will take effect as of January 1, 2018.

The goals of the rulemaking were: to establish a process within OAH for the referral of a self-represented (pro se) party having disabilities to the OAH Americans with Disabilities Act (ADA) coordinator, to establish a network to assist such pro se parties in accessing OAH's proceedings, and to establish a training program to enable such assistance.

The rule provides, among other things:

- If the OAH administrative law judge or any party has a reasonable belief that a pro se party may not be able to meaningfully participate in an OAH adjudicative proceeding due to a disability, with the party's consent, the ALJ must refer the party to the OAH ADA coordinator and delay the proceeding until the coordinator addresses the accommodation request;
- That an appropriate response to such a request may be the appointment of a suitable representative for the pro se party with a disability;
- Criteria as to what it means for a pro se party with a disability to not be able to meaningfully participate in an adjudicative proceeding;
- Parameters for the interactive process for the ADA coordinator to determine the type of accommodation for persons unable to meaningfully participate in an adjudicative proceeding, including whether the appointment of a suitable representative is the appropriate accommodation;
- Criteria for a suitable representative;
- That OAH will establish a network of individuals who may serve as suitable representatives; and
- That OAH staff will receive training in accommodating people with disabilities throughout an adjudicative proceeding.

1 The text of the new rule may be found online: http://apps.leg.wa.gov/wac/default.aspx?cite=10-24-010.

Meet our Winner! The 2017 Law Student Diversity Grant

By Susan Pierini

Each year, members of the Administrative Law Section donate resources to a law student enrolled in a Washington state law school. The grant is targeted to support a student working in an unpaid public law or non-profit position for the summer. The work must promote diversity and inclusion. The Administrative Law Section is pleased to announce that Sabiha Ahmad is the 2017 Grant Recipient.

Sabiha is a second-year student at the University of Washington School of Law. She received her undergraduate degree from the University of Washington as well, majoring in philosophy. At law school, Sabiha is active in the South Asian Law Student's Association and has received merit and fellowship awards for her distinguished work. She is proficient in Urdu and is learning Hindi script.

Sabiha spent the summer putting her language and growing legal skills to work at the Unemployment Law Project (ULP) in Seattle. Sabiha worked on translating ULP's informational brochures into Urdu. She also conducted client interviews and provided pro bono representation in administrative hearings. She writes to us of her experiences: "(i)t was surprising to me that my immediate recognition of our client's gaps in understanding the employer's policies was not as apparent to the judge. Luckily our team at ULP brought these matters to the fore and obtained an order for a new hearing with appropriate interpretation services provided. I am proud to join ULP's efforts to articulate the language of the law on behalf of vulnerable workers." Congratulations Sabiha, we are proud of you too!

If you are interested in an Administrative Law Section grant, or know a law student who may interested, applications will be available at participating law schools in May of 2018. If you have any questions, please contact Administrative Section Trustee Susan Pierini at susanpierini@gmail.com.

Caselaw Updates

***Washington Restaurant Association, et al v. Washington State Liquor Control Board, et al*, 401 P. 3d 428 (2017).**

By Scott Hilgenberg

This appeal addressed the legality of rules promulgated by the Washington State Liquor and Cannabis Board (Board) that implemented Initiative Measure No. 1183. The Initiative (codified at RCW Title 66) privatized the distribution and sale of liquor and established fees on private distributors and distillers who sell and distribute spirits. The Washington Restaurant Association, Northwest Grocery Association, and Costco (Association) brought a petition for judicial review of the rules under the Washington Administrative Procedure Act (APA). The Association of Washington Spirits and Wine Distributors (Distributors) intervened to defend the rules. At issue were rules creating an additional license fee on private distributors, rules requiring sale and delivery of spirits from licensed premises, and rules creating daily limits on sale of spirits. The superior court granted in part the Association's petition, ruling that the additional license fee rules and sell-and-deliver rules were valid but the daily limit rules were invalid because they exceeded the Board's rulemaking authority. The Court of Appeals reversed in part, finding the additional license fee rules invalid because they exceeded rulemaking authority, and otherwise affirmed the superior court's order.

Under the APA, a rule may be invalidated if it violates constitutional provisions, exceeds the agency's rulemaking authority, is arbitrary and capricious, or its adoption did not comply with rulemaking procedures.[1] In reviewing APA claims, the court's primary goal is to determine the collective intent of the people who enacted the initiative measure.

The court determined that the rules creating an additional 10 percent fee on distillers' sale revenue exceeded the Board's authority. RCW Title 66 provided the Board with the power to make rules prescribing fees for permits and licenses for which no fees are prescribed in Title 66. Under Title 66, licensed in-state distillers are permitted to blend, rectify, and bottle spirits if they pay an annual licensing fee of $2000. Title 66 also provides that a licensed distiller may act as retailer or distributor. The court determined that because Title 66 allows a licensed distiller to distribute and sell when it pays its $2000 annual fee, an administrative rule could not require any additional licensing fee to distribute or sell spirits. Because the rules placed an additional license fee on distillers where the statute already addressed fees, the court determined that the Board exceeded its statutory rulemaking authority.

The Association also argued the sell-and-deliver rules were arbitrary and capricious, asserting that the Board failed to provide justification for rules requiring spirit distributors to sell and deliver their products from their licensed premises. The court concluded the Association failed to carry its burden to demonstrate that the rules were arbitrary. The court noted Title 66 provides that one purpose of the rules is to promote the efficient collection of taxes. The rules effectively prohibited distributors from selling products without first storing their products in their licensed premises within the state. The court rejected the Association's argument that a rule is arbitrary if the agency does not provide an explanation for its rule. Rather, the court explained that an arbitrary rule would be one taken without regard to attending facts and circumstances. The court noted that the record provided the board's justification for the rules, which focused on the efficient collection of taxes and ability to regulate liquor sales. Accordingly, the court found that the Association failed to meet its burden.

On cross-appeal, Distributors asserted that the superior court erred in finding that the daily limit rule was invalid. The Association asserted that the Distributors were not an aggrieved party under Rule of Appellate Procedure (RAP) 3.1. because the agency did not defend its own rule. The court concluded that because Distributors as intervenors were a party to the underlying action (and had a risk of substantially affected proprietary or pecuniary rights) they are an aggrieved party under RAP 3.1. On the merits, the court concluded that the superior court did not err because Title 66 only limited a single sale to 24-liters and did not address the number of sales allowed within a day, but the rule created an additional restriction of one sale per day. The court determined it was unreasonable to read a daily limit into Title 66 where no such limit existed, and therefore the rule was inconsistent with state law and such rulemaking exceeded the Board's authority.

1 RCW 34.05.570 (2)(c).

***Foster, et al. v. Dep't of Ecology*, unpublished opinion, Ct. of Appeals Div. I, No. 75374-6-I (2017).**

By Robert Krabill

A group of youth plaintiffs (Youth) petitioned the Department of Ecology ("DOE") to adopt a greenhouse gas emission reduction rule. DOE declined in favor of its own approach to rulemaking. The Youth sued the DOE, alleging that it arbitrarily and capriciously denied their petition.

At the Governor's direction, the DOE started a rule making process to promulgate greenhouse gas emission rules. It published a draft rule in January 2016.[1] Because the DOE was actively engaged in rulemaking on the same topic, the superior court dismissed the plaintiffs' suit.

Then, the DOE withdrew the draft rules in response to public comments. The withdrawal prompted the Youth to file a superior court Civil Rule ("CR") 60(b) motion to

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Caselaw Update *continued from previous page*

reinstate. The superior court granted the motion and reinstated the case under CR 60(b)(11). The DOE appealed the reinstatement.

The Washington Court of Appeals, Division I found that the superior court had no authority to order rulemaking because the Youth did not show a violation of the Administrative Procedure Act. Because the Department was engaging in rulemaking about greenhouse gas emission standards, it did not reject the Youth's proposed rule on the same subject arbitrarily and capriciously. Therefore, it did not violate the APA.

When comments showed a need for significant revision, the next step was either to publish a supplemental rule making notice or to withdraw the draft rule and start a new rulemaking process. Merely withdrawing the draft rule in response to comments does not present extraordinary circumstances that would justify a CR 60(b) motion.

The Court of Appeals, Division I reversed the superior court's order reinstating the Youth's appeal.

1 WSR 16-02-101.

Columbia Riverkeeper; et al v. Port of Vancouver; et al, 188 Wn.2d 421, 395 P.3rd 1031 (2017).

By Eileen Keiffer

The Washington Open Public Meetings Act (OPMA) requires all public agency governing body meetings to be open to the public, subject to a few exceptions.[1] One of those exceptions allows governing bodies to enter executive sessions in order "(t)o consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price."[2] However, final action selling or leasing public property must be taken in a meeting open to the public.

In 2013, the Port of Vancouver (Port) entered into lease negotiations with two companies for a large rail terminal on public land. With respect to such negotiations, the Port often met in executive session in order to prevent rival ports from poaching tenants. The Port discussed virtually all topics relating to the real estate lease in executive sessions, including topics such as: the amount of property to be leased, market value of the site's features or amenities, lease term, any necessary improvements by the Port, etc.

In October of 2013, Columbia Riverkeeper and other environmental groups sued the Port and its commissioners, alleging among other things, that the Port commissioners violated the OPMA by discussing all of the myriad lease terms in executive session, as opposed to in a full public meeting.

The Washington Supreme Court interpreted the OPMA to hold that while a governmental entity may use executive session to discuss minimum acceptable price at which to sell or lease real property, such executive session may not be used to discuss all factors making up that price. It determined that a governing entity should generally discuss the contextual factors in open public meeting and then, to the extent those factors impact the lowest acceptable price, the governing body may only discuss that minimum price in executive session. Among the court's reasoning was the determination that a broad interpretation of the OPMA's minimum price exception would trample on the people's rights to determine "what is good for the people to know."[3]

1 RCW 42.30.030.

2 RCW 42.30.110(1)(c).

3 RCW 42.30.010.

Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Eileen M. Keiffer emkeiffer@gmail.com.

Administrative Law Section Homan Award

By Marjorie Gray

The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. Only Administrative Law Section members can nominate, but a nominee does not have to be an attorney or a section member. Nominations for 2017 closed on June 30, 2017.

It's not too early to nominate for 2018! Nominations can be made by sending an email to schaergirl@comcast.net.

Please include:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- Why you think this person should be recognized

The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University of Law in 1965, he began practicing in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974 and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent for the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings (RCW 34.12). Frank was generous with his time and expertise and is well-remembered for his sense of humor, his command of the English language, and his writing style — including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

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The Section also has six committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and much more. Feel free to contact the chair of any committee you have an interest in for more information. Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

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