



Welcome to the Administrative Law Section's E-Newsletter!

We hope you enjoy our electronic format, and encourage your feedback. Please also feel free to forward our newsletter to your colleagues (but encourage them to join the Administrative Law Section if they find the newsletter informative!). We also welcome suggestions for topics for future newsletters.

Contact Us

John M. Gray, Chair
john.m.gray@comcast.net

Newsletter Submissions
Merrilee Harrell
mharrell@rtwgcg.com

Inside This Issue

Spring CLE and Wine Social .	1
Homan Award – Call for Nominations.....	1
Legislative Roundup	2
Diversity Conference	3
Administrative Law Section Board of Trustees Business	3
Administrative Law Section Awards \$5,000 to Access to Justice.....	3
Case Law Summary	3
Administrative Law Research Resources, Part II.....	4
Join the Administrative Law Section!	4

Spring CLE and Wine Social – FREE to Admin Law Section Members!

The Administrative Law Section is pleased to announce its spring mini-CLE, "Administrative Law Cases from the U.S. Supreme Court and How They Relate to Washington State Practice," featuring University of Washington School of Law Professors William Andersen and Kathryn Watts.

The program will review recent and upcoming administrative law cases from the U.S. Supreme Court and discuss how those decisions relate to administrative law practice in Washington state. The cases will include *Coeur Alaska v. SE Alaska Cons. Council*, involving jurisdiction to issue a permit under the Clean Water Act; *FCC v. Fox*, involving agency regulation of speech (expletives at the Billboard Music Awards); and *Free Enterprise Fund v. Public Co. Acc'g Oversight Board*, involving separation of powers.

Professor Andersen, who joined the Law School faculty in 1964, was instrumental in the drafting and enactment of the Washington state APA and has taught administrative law, constitutional law, urban government and antitrust. He has published in all

of these fields and is the co-author of a casebook on Antitrust.

Professor Watts, who clerked for U.S. Supreme Court Justice John Paul Stevens, teaches administrative law, constitutional law, and Supreme Court decision-making. She has published a chapter on judicial review in the ABA's last two annual Developments in Administrative Law and Regulatory Practice books.

The CLE will be held at the University of Washington School of Law, William H. Gates Hall, Room 138, on June 17th from 3:30 – 5:00 (1.5 CLE credits). A social hour with wine and light snacks will follow the program. Click [here](#) for directions, nearby parking, and public transportation.

The program is approved for 1.5 general CLE credits, and is FREE to current members of WSBA's Administrative Law Section. (Section membership is \$20. Click [here](#) to join the Administrative Law Section.) Tuition for the program is \$25 for non-Administrative Law Section members, and \$12 for currently enrolled law students.

Click [here](#) to register.

Homan Award – Call for Nominations

The Board of Trustees is seeking nominations for the 2010 Frank Homan Award. This is an award that honors individuals who have demonstrated contribution to the improvement or application of ad-

ministrative law. Please send your nomination to any board member or officer of the section. You can find a list of board members and officers on page 2, and by clicking [here](#).

Legislative Roundup

The Regular Session of the 61st Legislature adjourned on March 11th. Two bills that may be of interest to administrative law practitioners were passed into law, and are summarized below.



SHB 2555

Authorizes the director of the Department of Labor & Industries (L&I) to issue subpoenas to enforce production of information necessary to enforce chapter 19.28 RCW (pertaining to electricians, electrical contractors and electrical and telecommunications installations) if the director has reason to believe there has been a violation of that chapter. The superior court is authorized to enforce the subpoena.

L&I is responsible for licensing electrical contractors and certifying electricians. They have authority to inspect job sites to verify compliance with state laws, and may audit a contractor's records to verify the hours of experience submitted by an electrical trainee. However, L&I does not have authority to issue subpoenas related to its enforcement activities.

During public testimony it was argued that it is necessary to catch unlicensed contractors in the act in order to identify and penalize those who operate outside of the law in direct competition with legitimate contractors. The enforcement tool would also help protect consumers against unqualified operators. It was noted that the subpoena authority would be similar to that of the plumbing board.

Before a subpoena can be issued, there must first be a request for information, and a failure to respond. Proponents argued that subpoena authority would encourage timely response to requests for information, promoting cooperation and efficiency. Additional requirements that the subpoena and request for information describe the possible violation, cite to relevant law, and explain how the information being requested is reasonably related to the possible violation was added to the final bill.

The bill was supported by the International Brotherhood of Electrical Workers, the National Electrical Contractors Association, and the Certified Electrical Workers of Washington. It takes effect June 10, 2010.

Merrilee Harrell – Russell, Wagg, Gabbert & Budzinski

2SHB 2603

This bill amends the Administrative Procedure Act, as amended by the Paperwork Violation Act in 2009, to enhance first-time violation waiver provisions (RCW 34.05.110).

(continued on next page)

WSBA Administrative Law Section Executive Committee Officers & Board of Trustees 2009-2010

Officers

Chair

John M. Gray

john.m.gray@comcast.net

Secretary/Treasurer

Anthony Broadman

anthonybroadman@gmail.com

Chair-elect

Kristal Wiitala

wiiitakk@dshs.wa.gov

Immediate Past Chair

Cindy C. Gideon

cindyg@atg.wa.gov

Trustees

Terms expiring in 2010

Merrilee S. Harrell

mharrell@rtwgc.com

Lisa Malpass Childress

lisa.malpass@hotmail.com

Don Wittenberger

dww546@aol.com

Terms expiring in 2012

Art Butler

aab@aterwynne.com

Melanie deLeon

melcdeleon@yahoo.com

Suzanne Mager

suzannam@dor.wa.gov

Terms expiring in 2011

Rebecca Glasgow

rebeccag@atg.wa.gov

Marc Lampson

marc@ulproject.org

Jeffrey B. Litwak

litwak@gorgecommission.org

Committee Chairs

CLE

Richard Potter

richard.potter@verizon.com

Publications

Cindy Gideon

cindyg@atg.wa.gov

Diversity and Outreach

Melanie deLeon

melcdeleon@yahoo.com

Public Service

Don Wittenberger

dww546@aol.com

Legislative

Richard Potter

richard.potter@verizon.com

Leadership

Larry Berg

larry.berg@comcast.net

Newsletter

Merrilee Harrell

mharrell@rtwgc.com

The Administrative Law Section also welcomes other articles and items of interest for publication. The editors and Board of Trustees reserve discretion whether to publish submissions.

Send submissions to: Merrilee Harrell (mharrell@rtwgc.com).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association nor its officers or agents.

Desktop Publisher • Ken Yu/Quicksilver • k.yu@earthlink.net

Legislative Roundup *continued*

It adds a new section requiring agencies to provide small businesses with a copy of the state law or agency rule that the business is violating, and give the violating business at least two days to correct the violation before imposing a fine, civil penalty, or administrative sanction. The bill amended one of the exceptions (RCW 34.05.110(4)(b)) to allow agencies to impose a fine, penalty, or sanction if the business acted knowingly or willfully. The text relating to conduct that may result in a felony conviction was removed. The bill clarified that the Paperwork Violation Act applies only to state agencies other than the Attorney General's Office; it does not affect the authority of the Attorney General to impose fines, civil penalties or other administrative sanctions or to enforce the Consumer Protection Act. Finally, the bill also amended the definition of "small business" to mean a business with 250 or fewer employees or gross revenue of less than \$7 million.

There was little testimony on the bill. It takes effect on June 10, 2010.

Jeffrey B. Litwak – Columbia River Gorge Commission

Diversity Conference

The Washington Minority Bar Associations' Collaboration Project will be holding their fifth annual Statewide Diversity Conference on June 25, 2010, at Seattle University School of Law. The Administrative Law Section has supported this conference in the past, and as part of our ongoing commitment and support to this important program, we are offering scholarships for up to ten current members of the Administrative Law Section to attend the conference at no charge.

If you would like to be considered for one of the scholarships, contact John Gray at john.m.gray@comcast.net.

Administrative Law Section Board of Trustees Business

The Board welcomes two new trustees and wishes to express its gratitude to departing trustee Judy Page and secretary/treasurer Karen Caille for their years of service and involvement with the Administrative Law Section. Anthony Broadman, a current trustee, has agreed to vacate that position to take on Karen's duties as secretary/treasurer. The Board has unanimously approved Rebecca Glasgow and Jeffrey B. Litwak to fill the positions vacated by Judy and Anthony. Rebecca, a former Supreme Court clerk, is an AAG with Washington's Department of Revenue. Jeff is with the Columbia River Gorge Commission, and has been an active member of the Section's CLE committee. Welcome, Rebecca and Jeff!

Administrative Law Section Awards \$5,000 to Access to Justice

In 2009, the Administrative Law Section approved a plan, recommended by its Public Service Committee, to contribute \$5,000 to the Access to Justice Impediments Committee for the adaptation of the guide *Washington Courts on Ensuring Equal Access for People with Disabilities*, and, to the extent any funds were left over, to support the publication and distribution of the adapted guide to Washington state administrative law judges. ATJ used the funds to contract with Jeff Manson to undertake the adaptation.

The Administrative Law Section's Public Service Committee has previously sponsored the production of a DVD, produced by Kitsap County Legal Services, titled *Everyday People Solving Problems: How to Represent Yourself at a DSHS Fair Hearing*; and has also contributed copies of the Administrative Law Practice Manual and the Public Records Act Deskbook to the county law libraries in Washington state.

Case Law Summary

By John Gray, ALJ pro tem, Office of Administrative Hearings

Hardee v. Department of Social and Health Services, 152 Wn. App. 48, 215 P.3d 214 (2009).

In this significant case, the Court of Appeals upheld an administrative review decision in which the review judge heard and read the same evidence as did the ALJ, but came to opposite conclusions. The review judge then wrote her own findings of fact. This might surprise some practitioners, but the APA (RCW 34.05.464) provides the statutory authority of review judges to write their own findings of fact. See, *Tapper v. Employment Security Department*, 122 Wn.2d 397, 858 P.2d 494 (1993).

Kathleen Hardee provided child daycare services in her home pursuant to a home child-care license issued by the Department of Social and Health Services ("Department"). Hardee's troubled 19 year-old son, William, lived with Hardee in the same home out of which she operated the daycare. The Department was aware that William had been convicted of harassment, intimidation, and assault in 2001, but Hardee agreed in writing to keep him off the premises during the hours the daycare center was in operation. In 2004, Hardee asked the Department for a waiver of this restriction, which was granted, though Hardee signed a safety plan in which she agreed never to allow William to have unsupervised access to children.

In 2006, the Department learned that William had been charged with first degree child molestation in an incident that occurred elsewhere. Following an investigation that found, among other things, that Hardee had allowed William to have unsupervised access to children at the daycare, the Department revoked Hardee's license to operate the

(continued on next page)

Case Law Summary *continued*

daycare. After a hearing, the ALJ reversed the Department and reinstated Hardee's license. The Department sought review by the DSHS Board of Appeals.

The review judge concluded that the evidence supported the Department's revocation of Hardee's license, and reversed the ALJ's decision, writing her own findings of fact based on the record submitted on review – the same evidence heard by the ALJ. Hardee appealed.

On review, the Court distinguished between site licenses, professional licenses, and occupational licenses. While a clear and convincing evidence standard applies to review of a professional license revocation, a preponderance of the evidence standard applies to a site license revocation. The Court held the review judge correctly applied the latter standard in Hardee's case. The Court further held that the review judge acted within the authority granted by RCW 34.05.464(4) and WAC 170-03-0620(1), which give the review judge "all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing...." The Court would not disturb the review judge's credibility determination and findings about Hardee because they were supported by substantial evidence.

The case is significant for its discussion of different burdens of proof required to revoke a license, depending on the type of license. Revoking a professional license requires a higher level of proof because of the amount of time and money an individual has invested in satisfying the requirements to obtain the license.

Following *Hardee*, a bill was proposed in the 2010 legislative session that would have changed the burden of proof in all license revocation cases to "clear, cogent, and convincing," and would have inserted a declaration in the APA that "when the review concerns a license, the action necessarily concerns a life, liberty, and property interest of the petitioner for purposes of constitutional analysis." The bill, which also would have amended other parts of the APA, did not pass out of committee.

The Washington Supreme Court has granted Hardee's petition for review. The case will be set for hearing in the Fall/Winter 2010-2011 timeframe.

Administrative Law Research Resources, Part II

By John Gray and Merrilee Harrell

This is the second part of list of legal research resources we have compiled over the years. The first list, published in the [winter issue](#) of this newsletter, focused more on Washington resources. This issue's list includes federal resources, and commercial resources that are not necessarily state-specific.

We encourage you to let us know about your favorite resources so we can publish them in upcoming newsletters! If you have a Web site that you find useful that is not listed here, please send the link to: john.m.gray@comcast.net.

The following web sites are useful for research at the federal level or in states other than Washington:

Federal Government Sites

Data.gov: www.data.gov. Offers public access to wealth of datasets generated by the Executive Branch of the federal government.

GPO Access: www.gpoaccess.gov. A comprehensive site developed by the U.S. Government Printing Office offering forms, and links to federal resources from A-Z.

Library of Congress - "Thomas": thomas.loc.gov. Central source for legislative information from the Library of Congress. A primary stop for tracking federal legislation.

Office of Information and Regulatory Affairs: www.reginfo.gov/public/. Produced by the Office of Management and Budget (OMB), and the General Services Administration (GSA).

Regulations.gov: www.regulations.gov. "Your voice in federal decision-making." Developed and managed under the eRulemaking Program, with the assistance of 25 partnering federal agencies.

Educational Sites

Cornell University Legal Information Institute: www.law.cornell.edu. Access to the U.S. Code, the Code of Federal Regulations, Federal Rules, and more.

Commercial Sites

HG Worldwide Legal Directories: www.hg.org.

MegaLaw: www.megalaw.com. Free legal research and other investigative tools. Links to fee-based sites for some services.

Join the Administrative Law Section!

We encourage you to become an active member of the Administrative Law Section. Benefits include reduced tuition at Section-sponsored CLEs, a subscription to this newsletter, and networking opportunities in the field of administrative law. Click [here](#) to join!

The Section also has seven 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 2 of this newsletter, and on the Section's website.