State Administrative Hearings: Views from the Bench

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Washington State Department of Social & Health Services

Disclaimer

- Any opinions expressed are my own, and not necessarily those of the Department of Social and Health Services

WAC 388-02-0375
What happens at your hearing?

- At your hearing: The ALJ:
- (a) Explains your rights;
- (b) Marks and admits or rejects exhibits;
- (c) Ensures that a record is made;
- (d) Explains that a decision is mailed after the hearing;

What happens at your hearing? (cont.)

- At your hearing: The ALJ:
- (e) Notifies the parties of appeal rights;
- (f) May keep the record open for a time after the hearing if needed to receive more evidence or argument; and
- (g) May take actions as authorized according to WAC 388-02-0215.

Know what findings of fact and conclusions of law you wish the ALJ and the Review Judge to adopt

- You don't know if you've proven your case, if you don't know what facts support the conclusions you seek, and what conclusions support the order you seek.
- Before the hearing, look at the notice and the applicable rules. Make a list of all of the facts that you have to prove in order to satisfy the requirements of the rules. Identify a piece of evidence (testimony or document) that will prove each fact.
- Include these in any written submissions you provide.

Submit evidence to prove each and every fact

- Before the hearing, look at the notice and the applicable rules.
- Make a list of all of the facts that you have to prove in order to satisfy the requirements of the rules.
- Identify a piece of evidence (testimony or document) that will prove each fact.

This process will ensure that you submit evidence to prove each of the necessary facts in the case.

- It is particularly important to submit information about each necessary fact during the hearing because you will not have another opportunity to develop a factual record.
- In most cases, you cannot submit any additional evidence on review.

WAC 388-02-0480
What does burden of proof mean?

- (1) Burden of proof is a party's responsibility to:
- (a) Provide evidence regarding disputed facts; and
- (b) Persuade the ALJ that a position is correct.
- (2) To persuade the ALJ, the party who has the burden of proof must provide the amount of evidence required by WAC 388-02-0485.
- The Appellant usually has the burden of proof in an application for benefits or a license.
- The Department usually has the burden of proof in a disciplinary case.

WAC 388-02-0485
What is the standard of proof?

- Standard of proof refers to the amount of evidence needed to prove a party's position.
- Unless the rules or law states otherwise, i.e. in a foster care case, the standard of proof in a hearing is a preponderance of the evidence. This standard means that it is more likely than not that something happened or exists.

WAC 388-02-0390 What is evidence?

- (1) Evidence includes documents, objects, and testimony of witnesses that parties give during the hearing to help prove their positions.
- (2) Evidence may be all or parts of original documents or copies of the originals.
- (3) Parties may offer statements signed by a witness under oath or affirmation as evidence, if the witness cannot appear.
- (4) Testimony given with the opportunity for cross-examination by the other parties may be given more weight by the ALJ.

RCW 34.05.452
Rules of evidence — cross-examination

- (1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is **the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs**. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

RCW 34.05.452 Rules of evidence — cross-examination (cont.)

- (2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington **Rules of Evidence** as guidelines for evidentiary rulings.
- (3) All testimony of parties and witnesses shall be made under oath or affirmation.
- (4) Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

RCW 34.05.452 Rules of evidence — cross-examination (cont.)

- (5) Official notice may be taken of (a) any judicially cognizable facts, (b) technical or scientific facts within the agency's specialized knowledge, and (c) codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed and the sources thereof, including any staff memoranda and data, and they shall be afforded an opportunity to contest the facts and material so noticed. A party proposing that official notice be taken may be required to produce a copy of the material to be noticed.

Determine whether the evidence would be admissible in a civil trial. RCW 34.05.461(4) states:

- Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on **such inadmissible evidence** unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

HEARSAY EVIDENCE

- Is the following statement:
- (a) admissible hearsay
- (b) inadmissible hearsay
- (c) admissible non-hearsay
- (d) inadmissible non-hearsay
- Which is it??

RULE ER 801 Hearsay DEFINITIONS

- The following definitions apply under this article:
- (a) Statement. A "statement" is
- (1) an oral or written assertion or
- (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which **Are Not Hearsay**. A statement is not hearsay if--

- (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is
- (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
- (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
- (iii) one of identification of a person made after perceiving the person; or

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

- (2) Admission by Party-Opponent. The statement is offered against a party and is (i**) the party's own statement**, in either an individual or a representative capacity or
- (ii) a statement of which the party has manifested an adoption or belief in its truth, or
- (iii) a statement by a person authorized by the party to make a statement concerning the subject, or
- (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

HEARSAY EVIDENCE

- According to these two provisions, the prohibition on basing a finding of fact on hearsay is not absolute.
- A finding of fact may be based on hearsay if the hearsay would be admissible in a civil trial.
- A finding of fact may be based on hearsay if the parties had an opportunity to question or contradict the hearsay.
- A finding of fact may be based in part on hearsay if the hearsay is corroborated by other non-hearsay evidence.

WAC 388-02-0440
What is judicial notice?

- (1) Judicial notice is evidence that includes facts or standards that are generally recognized and accepted by judges, government agencies, or national associations.
- (2) For example, an ALJ may take judicial notice of a calendar, a building code or a standard or practice.

WAC 388-02-0445
How does the ALJ respond to requests to take judicial notice?

- (1) The ALJ may consider and admit evidence by taking judicial notice.
- (2) If a party requests judicial notice, or if the ALJ intends to take judicial notice, the ALJ may ask the party to provide a copy of the document that contains the information.
- (3) If judicial notice has been requested, or if the ALJ intends to take judicial notice, the ALJ must tell the parties before or during the hearing.
- (4) The ALJ must give the parties time to object to judicial notice evidence.

Use witness testimony to prove contested factual issues

- If the hearing involves a contested factual issue, arrange to have the witness testify during the hearing.
- When the case turns on a factual dispute, you should not rely on documents alone. The live testimony will be much stronger evidence than the notes because the ALJ and the other party will have an opportunity to ask questions of the witness.

Engage and respond to the other party's arguments--clash

- The hearing is intended to be an interactive process. Do not just present your case and "tune out."
- After one party presents his/her case, you will be expected to respond to their testimony and arguments. You should engage their arguments and not just repeat your previous arguments.
- If one side raises an issue that was not addressed during the other side's case, you can ask to recall your witnesses to address the new issue.

Show your work

- If your case involves a calculation of some kind, show your work. Show all of the steps of the calculation.
- If the calculation involves more than one WAC, include a WAC reference for each step of the calculation.
- If you do not show all of the steps of your calculation, then you should not be surprised when the ALJ's calculation or review judge's calculation does not match the your calculation.

WAC 388-02-0395
When may the parties bring in evidence?

- (1) The parties may bring evidence to any prehearing meeting, prehearing conference, or hearing, or may send in evidence before these events.
- (2) The ALJ may set a deadline before the hearing for the parties to provide proposed exhibits and names of witnesses. If the parties miss the deadline, the ALJ may refuse to admit the evidence unless the parties show:
- (a) They have good cause for missing the deadline; or
- (b) That the other parties agree.
- (3) If the ALJ gives the parties more time to submit evidence, the parties may send it in after the hearing. The ALJ may allow more time for the other parties to respond to the new evidence.

WAC 388-02-0400 What evidence may the parties present during the hearing?

The parties may bring any documents and witnesses to the hearing to support their position. However, the following provisions apply:

- (1) The other parties may object to the evidence and question the witnesses;
- (2) The ALJ determines whether the evidence is admitted and what weight (importance) to give it;
- (3) If the ALJ does not admit the evidence the parties may make an **offer of proof** to show why the ALJ should admit it;
- (4) To make an offer of proof a party presents evidence and argument on the record to show why the ALJ should consider the evidence; and
- (5) The offer of proof preserves the argument for appeal.

WAC 388-02-0415
What are proposed exhibits?

- Proposed exhibits are documents or other objects that a party wants the ALJ to consider when reaching a decision. After the document or object is accepted by the ALJ, it is admitted and becomes an exhibit.

WAC 388-02-0425
Who decides whether to admit proposed exhibits into the record?

- (1) The ALJ decides whether or not to admit a proposed exhibit into the record and also determines the weight (importance) of the evidence.
- (2) The ALJ admits proposed exhibits into the record by marking, listing, identifying, and admitting the proposed exhibits.
- (3) The ALJ may also exclude proposed exhibits from the record.
- (4) The ALJ must make rulings on the record to admit or exclude exhibits.

WAC 388-02-0430
What may a party do if they disagree with an exhibit?

- (1) A party may object to the authenticity or admissibility of any exhibit, or offer argument about how much weight the ALJ should give the exhibit.
- (2) Even if a party agrees that a proposed exhibit is a true and authentic copy of a document, the agreement does not mean that a party agrees with:
- (a) Everything in the exhibit or agrees that it should apply to the hearing;
- (b) What the exhibit says; or
- (c) How the ALJ should use the exhibit to make a decision.

WAC 388-02-0500
What may an ALJ do before the record is closed?

- Before the record is closed, the ALJ may:
- (1) Set another hearing date;
- (2) Enter orders to address limited issues if needed before writing and mailing a hearing decision to resolve all issues in the proceeding; or
- (3) Give the parties more time to send in exhibits or written argument.

WAC 388-02-0260

May the department amend a notice?

- (1) The ALJ must allow the department to amend (change) the notice of a department action before or during the hearing to match the evidence and facts.
- (2) The department must put the change in writing and give a copy to the ALJ and all parties.
- (3) The ALJ must offer to continue (postpone) the hearing to give the parties more time to prepare or present evidence or argument if there is a significant change from the earlier department notice.
- (4) If the ALJ grants a continuance, the OAH must send, a new hearing notice at least fourteen calendar days before the hearing date. The OAH must provide notice of seven or more business days if the case is about child support . . .

WAC 388-02-0265
May you amend your hearing request?

- (1) The ALJ may allow you to amend your hearing request before or during the hearing.

WAC 388-02-0505 When is the record closed?

- The record is closed:
- (1) At the end of the hearing if the ALJ does not allow more time to send in evidence or argument; or

  (2) After the deadline for sending in evidence or argument is over.

WAC 388-02-0510
What happens when the record is closed?

- No more evidence may be taken without good cause after the record is closed.