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*Editor's Note: Throughout the newsletter, links to cases and other pertinent information cited in the material are indicated in **color**. Links for cases cited within the text are provided for Oregon appellate cases decided after 1997.*

The newsletters are indexed by case name, agency, and topic, as well as by OAR, ORS, USC, CFR, and by Oregon and federal constitutional provisions. To access these indices, go to the Administrative Law Section's website at http://osbadmin.homestead.com/news.html.

NEWS FROM THE OAH OVERSIGHT COMMITTEE

John Mann
Presiding ALJ, OAH

By John Mann

The Office of Administrative Hearings Oversight Committee met on April 30, 2014, to consider some significant issues affecting the future direction of the Office of Administrative Hearings. The issues discussed included the selection of a new chief administrative law judge and a possible move of the Office of Administrative Hearings out of the Employment Department. In addition, Interim Chief Administrative Law Judge Tyler presented the office's annual report. Finally, I presented a report analyzing the outcome of proposed orders issued by the Office of Administrative Hearings from July 2012 through January 2014.

Selection of a New Chief Administrative Law Judge

The oversight committee voted to recommend that Gary Tyler be appointed to a four-year term as the chief administrative law judge. Tyler worked as a manager for the hearing office from its creation in 2000 until his retirement in June of 2013. However, at the time of his retirement, the chief administrative law judge position was vacant following the retirement of former Chief ALJ Forsythe. At the request of the Governor, Tyler agreed to serve as the interim chief administrative law judge until the Governor completed the recruitment process for the position. Ultimately, however, that process was unsuccessful when the candidate recommended for the position by the oversight committee declined the appointment.

Liani Reeves, the Governor's general counsel, oversaw the recruitment. Reeves informed the committee that while the Governor's office was considering the next steps in the process, the office received numerous positive reports of Tyler's performance as the interim chief. The Governor's office approached Tyler and asked him to consider coming out of retirement to accept a four-year appointment. Tyler initially declined, but eventually agreed to be considered. The Governor's office sought input from hearing officer employees, including union representatives and managers, and received uniformly positive feedback. The Governor's office concluded that Tyler was well qualified for the position and asked the committee to consider him for the appointment. Following a discussion of Tyler's qualifications, the committee voted to recommend the appointment. That recommendation will be forwarded to the Governor for consideration.

Potential Transfer of OAH from the Employment Department

Melissa Leoni, the Employment Department's government relations manager, informed the committee that there have been ongoing discussions concerning a possible move of the hearing office out of the Employment Department. The discussions came about as a result of the work of the Workforce Redesign Workgroup. That workgroup was tasked by the Governor with making

recommendations for improving Oregon's workforce development systems to better meet the needs of Oregonians. As part of that process, the workgroup engaged the services of a consultant, Public Financial Management, to analyze Oregon's current workforce system and to suggest possible areas for improvement. Ultimately, the consultant recommended the creation of an umbrella agency to consolidate workforce programs currently administered by a number of separate agencies. Significantly, the consultant recommended that the new umbrella agency not include the Office of Administrative Hearings. That recommendation began a series of conversations with the hearing office and the Employment Department about the future location of the office.

Leoni noted that there is some confusion with members of the public caused by having the Office of Administrative Hearings housed within the Employment Department, particularly given the large number of hearings conducted by the office on behalf of the department. Leoni also noted that with the 2009 statutory change to ORS 183.610, the chief administrative law judge is now appointed by the Governor, and not the director of the Employment Department. With those considerations in mind, initial discussions focused on identifying another agency that might be appropriate as a new administrative home for the hearing office. While other options were considered, ultimately it was concluded that the Department of Administrative Services would be the agency best suited to assume administrative responsibility for the hearing office. Unlike the Employment Department, the Department of Administrative Services refers very few hearings to the Office of Administrative Hearings. But like the hearing office, the Department of Administrative Services provides services to multiple Oregon agencies. Tyler also noted the Department of Administrative Services is familiar with the hearing office's billing system and its current information technology project, a new case management system.

Tyler shared a memorandum that he prepared outlining the major considerations that would have to be examined in moving the Office of Administrative Hearings to another agency. Although there would need to be substantial coordination, Tyler estimated that the process could be accomplished in six to nine months. Tyler noted that the transition would not require a physical relocation because most hearing staff work in buildings that are not owned or operated by the Employment Department. The Office of Administrative Hearings does have a few offices located in Employment Department facilities, including a fully staffed hearing office in Eugene and a total of three workspaces in Bend and Medford. However, Employment Department Director Lisa Nisenfeld noted that the hearing office could enter into agreements to continue to use those facilities following any transfer.

Members of the oversight committee were generally receptive to exploring the potential move. However, State Representative Paul Holvey, chair of the oversight committee, stated that he did not believe it was appropriate for the committee to take a position on the transfer until further outreach could be conducted. He suggested that the committee revisit the issue at its next meeting. Leoni noted that the Employment Department has prepared a legislative concept and is awaiting approval to move forward on drafting potential legislation. That decision is expected to be made in July. Any resulting legislation would likely be introduced during the 2015 legislative session.

Annual Report

Tyler presented a report to the committee outlining the work of the Office of Administrative Hearings over the last year. Tyler reported that the hearing office is operating within its budget and met or exceeded each of four key performance measures, as reported to the legislature at the end of the 2011-2013 biennium. Those results were:

- Unemployment insurance appeals timeliness
  The target is to resolve at least 60% of all unemployment insurance appeals within 30 days after the hearing request. The office achieved 85%.
- Non-unemployment insurance appeals timeliness
  The target is to resolve at least 90% of all non-unemployment insurance appeals within the standards established by user agencies. The office achieved 93.4%.
- Average days to issue an order
  The target is to issue all orders within 6.5 days following the close of record. The office achieved an average of 4.38 days.
- Cost per referral for hearing
  The target is an average cost per referral of $425 or less. The office achieved $371.

Tyler noted that there was a decline in the unemployment insurance timeliness numbers over the last year due largely to staff reductions at the end of the 2013 fiscal year. The hearing office has made significant progress since that time and is well on its way to meeting its target. There has also been a modest increase in the average days to issue an order and in the average costs per referral. However, Tyler is confident that the office will meet the performance targets by the end of the biennium.

Tyler also reported that referrals have declined approximately 20% this biennium, primarily due to a drop in unemployment insurance appeals. Through March of 2014, the office had received 15,052 unemployment insurance referrals during the fiscal year. In contrast, in the previous fiscal year the office had received 19,186 unemployment insurance referrals through March 2013. Nevertheless, unemployment insurance cases still constitute the single largest block of hearing referrals.

Through March 2014, the percentages of cases referred by program area this biennium are:

Unemployment Insurance	67.07%
Department of Transportation	13.57%
Child Support Program	8.19%
Department of Human Services	4.13%
Oregon Health Authority	4.8%
Licensing and Regulatory Agencies	2.24%

Tyler noted the current priorities for the Office of Administrative Hearings include planning for a potential move to another agency and implementation of the new case management system. Initial planning is underway for the potential move that could occur as early as 2015. The new case management system, developed in conjunction with the Employment Department and an outside vendor, has been implemented for cases heard for the Employment Department and the child support program, representing approximately 75% of all referrals. Full implementation is expected to be completed by the end of the biennium.

Proposed Order Outcomes

Finally, I presented a report to the committee summarizing the outcome of proposed orders issued by the Office of Administrative Hearings from July 2012 through January 2014. During that period, the office issued a total of 424 proposed orders. In those orders:

- ALJs affirmed proposed agency action in 324 cases (76.42% of 424)
- ALJs modified proposed agency actions in 44 cases (10.38% of 424)
- ALJs reversed proposed agency action in 51 cases (12.03% of 424)

There was no underlying proposed agency action in five two-party cases for the Construction Contractors Board (1.18% of 424)

As of the date of the report, April 16, 2014, agencies had informed the Office of Administrative Hearings of the final disposition in 291 cases. Those dispositions were as follows:

- Agencies adopted 232 Proposed Orders (79.73% of 291)
- Agencies affirmed 23 Proposed Orders (7.90% of 291)
- Agencies modified 19 Proposed Orders (6.53% of 291)
- Agencies rejected six Proposed Orders (2.06% of 291)
- Agencies informed the OAH that they will not issue final orders in cases primarily due to post-hearing settlements (3.78% of 291)

The above outcomes show that agencies do not routinely reject ALJ proposed orders. In fact, of the six proposed orders rejected by the agency, two of those rejections were to change the outcome to favor the appellant. In only four of the cases examined during this period did the agency change the outcomes in a way that was contrary to the appellant's position in the cases.

Because the Office of Administrative Hearings did not receive final orders in a significant number of cases, a precise analysis of agency responses is not possible. In 99 of the 133 cases in which agencies have not provided final dispositions, the proposed order ruled in favor of the agency. It is reasonable to assume that the agency's final order in such cases were likely consistent with the ALJ's ruling. Although the Office of Administrative Hearings has not received final orders in 29 cases in which the ALJ either reversed or modified an agency's initially proposed action, those cases represent a relatively small fraction (6.84%) of the total number of proposed orders issued during the period considered in the report. Nevertheless, without knowing the final dispositions of those cases, a complete picture of agency responses is not possible.

All agencies routinely provide final orders to the Office of Administrative Hearings, but there have been a significant number of cases in which agencies have not done so. It appears that this is generally the result of an oversight and not a deliberate act to conceal the outcome of cases. Agencies that are represented by the

NEWS FROM THE OAH OVERSIGHT COMMITTEE – *Continued from page 3*

Department of Justice in contested case hearings have historically been the most consistent in providing copies of final orders. It is likely that as agency staff become more accustomed to providing final orders to the Office of Administrative Hearings as a matter of routine, the number of "missing" final orders should decline significantly.

In conclusion, the final orders the Office of Administrative Hearings has received show that agencies do not routinely reject proposed orders from ALJs because of an adverse result. Rather, it appears that agencies generally respect the process and will accept a proposed order even when the outcome is not favorable to the agency.

John Mann is a presiding administrative law judge with the Office of Administrative Hearings and member of the Oregon State Bar. He has been an administrative law judge since September 2003 and has conducted hearings in most of the Office of Administrative Hearings' program areas including unemployment, implied consent, child support, special education and numerous licensing and regulatory agencies. Mann currently serves as the program manager responsible for contested case hearings held by senior administrative law judges.


Denise G. Fjordbeck

FROM THE CHAIR

By Denise Fjordbeck

Jim Mountain, our colleague and past-chair, conceived a vision of a CLE on administrative law that would attract practitioners from both sides of the Columbia River. Jim has put a huge amount of effort into this project, and his efforts are coming to fruition with the first Northwest Administrative Law Institute, scheduled for September 19 and 20 in Vancouver, Washington. Whether you practice in both states or only one of the two, this promises to be a helpful and practical program that will cover both hot topics and the nuts-and-bolts of daily practice.

Speakers for the program include Supreme Court justices from both states, as Justice Mary Fairhurst and Justice Jack Landau discuss the judicial development of administrative law in the appellate courts. Former Supreme Court Justice Mick Gillette will set the stage with a keynote speech, and Oregon Attorney General (and former Court of Appeals and circuit court judge) Ellen Rosenblum will offer observations from both sides of the bench. Professors from three of the Northwest's law schools will comment on future developments.

The program does not neglect practical skills. In addition to an update on case law and legislation from both states, Oregon Appellate Commissioner James Nass and two experienced practitioners will discuss stay practice as it is developing and changing, and there will be breakout groups on best practices in agency hearings in each state. And our own Janice Krem will discuss the development of a program for better lawyer access to agency final orders, joined by the law librarian from the University of Washington. A session on ethics and professionalism in administrative law practice is also included.

And like it or not, both Oregon and Washington are on the cutting edge of development of entirely new administrative regimes for legal cannabis. The agency administrators from both states will address the unique challenges of regulation of a substance that is still unlawful under federal law.

This program is co-sponsored by the Washington State Bar Administrative Law Section, and the planners have included John Gray, Jr. of the Washington Office of Administrative Hearings; Jeff Litwak of the Columbia River Gorge Commission, an active practitioner on both sides of the river; Mick Gillette of Schwabe, Williamson & Wyatt; and myself. Karen Lee of the Oregon State Bar has been invaluable. The planners have had a good time putting this program together, and we are looking forward to seeing as many of our members as can be there. Save these dates!

Denise Fjordbeck is the attorney-in-charge of civil and administrative appeals at the Oregon Department of Justice. Besides chairing the Executive Committee of the Administrative Law Section, she serves on the Office of Administrative Hearings Oversight Committee.

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CASE REVIEW


Janice Krem

By Janice Krem

Court of Appeals

Nielsen v. Employment Dept.

263 Or App ___ (May 29, 2014) (OAH ALJ Micheletti)

Opinion by Tookey, J.

Nielsen sought review of a final order of the Employment Appeals Board that denied her unemployment benefits. The board determined that Nielsen was ineligible for unemployment benefits because Nielsen voluntarily left work for Westwind Landscape Supply without good cause. ORS 657.176(2)(c).

Citing *McDowell v. Employment Dept.*, 348 Or 605, 612, 236 P3d 722 (2010), and OAR 471-030-0038(4), the Court of Appeals explained that good cause was "an objective standard that asks whether a reasonable and prudent person would consider the situation so grave that he or she had no reasonable alternative to quitting."

The board, which adopted the ALJ's order, concluded that that Nielsen did not show good cause because she had reasonable alternatives to quitting. The board reasoned that she should have complained to her employer or filed a complaint with the Bureau of Labor and Industries about her employer's underpayment of wages, instead of quitting work.

The Court of Appeals disagreed. The court concluded that the board's findings and the evidence supporting them required the board to conclude that Nielsen established good cause to leave work.

The Court or Appeals explained its determination regarding Nielsen's failure to complain to her employer about her unpaid wage claim, "[U]nder the circumstances in this case, complaining to employer about unpaid wages was not a reasonable alternative to leaving work because it would have been useless or even dangerous for [Nielsen] to do so."

As to Nielsen's failure to file a complaint with the Bureau of Labor and Industries, the court opined "filing a complaint with [the bureau] while remaining employed was not a reasonable alternative to leaving work because that course of action would have exposed claimant to a substantial risk of continuing underpayment."

The Court of Appeals reversed and remanded the case and summarized its decision.

> "Under the facts found, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would not have complained to employer about the unpaid wages or continued to work indefinitely, incurring the substantial risk of underpayment, while waiting for [the bureau] to process a complaint. Rather, such a person would have considered the circumstances to be sufficiently grave that he or she had no alternative but to resign. Accordingly, under the facts of this case, leaving work was the only reasonable course of action, and the board was obligated to conclude, as a matter of law, that [Nielsen] had good cause to leave work."

IAFF, Local 3564 v. City of Grants Pass

262 Or App ___ (May 7, 2014)(Presiding Officer McCullough)

Opinion by Schuman, S. J.

The court in this case reviewed a declaratory ruling issued by the Bureau of Labor and Industries pursuant to ORS 183.410.

The firefighters union petitioned the bureau to determine if the City of Grants Pass was required to include vacation and sick leave time when calculating overtime wages for its firefighters. ORS 652.080 mandated that vacation and sick leave time count toward overtime entitlement. However, the city asserted that ORS 243.650 to 243.782, the Public Employees Collective Bargaining Act, superseded the mandate in ORS 652.080. The city argued that the city and public employee union were able to, and did, negotiate a different method of calculating overtime.

The bureau concluded that the enactment of the collective bargaining provisions did not create an exception to the overtime requirements of ORS 652.080. The bureau issued a declaratory ruling in favor of the union, and the city appealed. On appeal, the city sought reversal of that ruling, arguing that the bureau misinterpreted the Public Employees Collective Bargaining Act regarding the calculation of overtime wages for firefighters.

The Court of Appeals reviews declaratory rulings for errors of law. Citing *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009), the court explained that it was required in this case to review the text and context of the collective bargaining statutes in ORS chapter 243, any relevant legislative history, and, if necessary, statutory construction rules and maxims to determine the legislature's intent regarding overtime for firefighters

The court determined that neither the plain language in the Public Employees Collective Bargaining Act nor legislative history supported the city's argument that ORS 652.080's mandate regarding overtime was superseded by the collective bargaining provisions.

The Court of Appeals also declined to repeal the specific statutory requirement in ORS 652.080 regarding overtime calculation based on rules or maxims of statutory construction relied on by the city. The court opined:

> "[T]he days are long gone, if they ever existed, when this court would insert language into a statute in reliance on an obscure maxim of statutory construction . . . instead of applying statutorily-mandated rules of construction, in particular ORS 174.010, which, as noted above, instructs that it is our job to

> 'declare what is' and not 'to insert what has been omitted, or to omit what has been inserted.' Indeed, if we could rely on a policy-based maxim, it would be the one telling us that implied repeals are disfavored."

The Court of Appeals also was not persuaded by the city's reliance on *AFSCME v. Executive Dept.*, 52 Or App 457, 628 13 P2d 1228, *rev den*, 291 Or 771 (1981). Discussing its decision in that case, the court concluded, "In short, the lesson that we derive from *AFSCME* is not that [the collective bargaining act] silently repeals pre-existing statutes, but that we should resolve conflicts between [the act] and such statutes by harmonizing them."

In harmonizing the statutes, the court opined that the collective bargaining provisions and ORS 652.080 could be read consistently using a narrow application of entitlement to overtime. The court expanded on its analysis:

> "Furthermore, even if we were to conclude that there was an irreconcilable conflict between the two statutory schemes, our solution would not be to insert a collective bargaining exception into ORS 652.080. Rather, we would conclude that the more particular statute, which is ORS 652.080, controls. ORS 174.020 (When it is not possible to interpret statutes so as to avoid a conflict, the intent behind a provision that is particular controls the intent behind a statute that is general.)."

The Court of Appeals affirmed the declaratory ruling of the Bureau of Labor and Industries.

Lewis v. Beyer

262 Or App ___ (April 23, 2014)

Opinion by Schuman, S. J.

This case addressed attorneys fees awarded by a circuit court pursuant to ORS 183.497(1)(a) and (b) and ORS 183.486(1).[1]

Lewis and the Utility Reform Project requested declaratory and injunctive relief that required the Public Utility Commission to order four public utilities to establish automatic adjustment clauses for taxes. The relief was requested pursuant to ORS 183.490.[2] ORS 183.490 allowed a court to compel agency action "where [the agency] has unlawfully refused to act or make a decision or unreasonably delayed taking action or making a decision."

The circuit court granted the relief requested and ordered the commission to direct the utilities to establish an automatic adjustment clause for taxes. The commission did not appeal the circuit court's judgment on the merit of the claims.[3] Accordingly, the commission issued the directive to the utilities as ordered by the circuit court. However, the commission did appeal the circuit court's supplemental judgment awarding attorney fees to Lewis and the Utility Reform Project.[4]

The Court of Appeals concluded that this proceeding, brought pursuant to ORS 183.490, was not one of the proceedings for which attorney fees could be granted under ORS 183.497. It was not a proceeding for judicial review of a final agency order, a declaratory ruling, or a determination of the validity of a rule under ORS 183.400.

The Court of Appeals also rejected the award of attorney fees under ORS 183.486. The court explained:

> "Assuming, without deciding, that attorney fees are a type of 'ancillary relief' that might otherwise be available under ORS 183.486, because this is not a timely proceeding under either ORS 183.482 or ORS 183.484, we conclude that ORS 183.486 does not provide a basis for an award of attorney fees."

The Court of Appeals reversed the decision of the circuit court awarding attorney fees.

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1 The circuit court also based its decision to award attorney fees on its "equitable powers," which did not arise under the provisions in the Administrative Procedures Act, ORS chapter 183.

2 The action was also based on ORS 28.010.

3 The agency's final order regarding the automatic rate adjustment, which was effective in June 2007, also was not before the Court of Appeals in this case. Unlike the circuit court, the commission did not agree in its earlier final order that an automatic adjustment was proper.

4 The attorney fees question in this case was returned to the Court of Appeals after remand in *Lewis v. Beyer*, 235 Or App 367, 232 P3d 980 (2010), for an explanation of the circuit court's initial award of attorney fees.

CASE REVIEW – *Continued from page 7*

Ponderosa Properties, LLC v. Employment Dept.

262 Or App ___ (April 23, 2014) (ALJ Ballinger)

Opinion by DeVore, J.,

Ponderosa sought judicial review after an administrative law judge upheld a notice of tax assessment that the Employment Department had issued to Ponderosa. The ALJ determined that certain cleaners and maintenance workers, who performed services for Ponderosa, were Ponderosa's employees. Accordingly, Ponderosa was required to pay unemployment taxes on their wages. Ponderosa argued that these workers were independent contractors, not employees.

The Court of Appeals considered the legal question of whether these workers were independent contractors and applied the "the direction and control test" in ORS 670.600(2)(a) in making its determination. The court engaged in a "nuanced" analysis of the extent of control over the means and manner of providing the services at issue under this test. The court explained, "Recognizing that some oversight may exist in an independent contractor relationship, the question becomes whether that oversight relates to the desired results, or, instead, to the means and manner of performing the services."

The Court of Appeals disagreed with the department and the ALJ concerning Ponderosa's control over the means and manner of providing the services. As to the maintenance workers, the court concluded that Ponderosa's actions were aimed at achieving the desired results, rather than at providing direction and control over the workers. As to the cleaners, the court also disagreed with the department's conclusion. The court determined that the nonnegotiable pay rates, and the prepared list of cleaning jobs and the work schedules provided by Ponderosa were insufficient to establish control by Ponderosa. The court explained:

> "[T]hose facts are indicative of the results Ponderosa seeks from hiring a cleaner--that the rental unit will be clean when the tenant arrives and at a reasonable and predictable price. Likewise, Ponderosa's 'work schedules' did not indicate control. . . . . That schedule was determined by the rental schedule, which flows from the nature of the business, and not [Ponderosa's] desire to direct or control how the cleaners performed their services."

The Court of Appeals then turned to the second issue in its analysis to determine if the service providers were engaged in "independently established" businesses under ORS 670.600(2)(b). To meet this test, ORS 670.600(3) required that a service provider must meet three of the five criteria in this provision to be an independent contractor. Ponderosa argued that the cleaners satisfied the requirements of (3)(b), 3(c), and 3(e). Based on the parties' positions on these issues, the court needed to consider only two criteria pertaining to some of the workers--the "risk of loss" criterion in (3)(b) and the "contracted services for others" criterion in (3)(c).

As to ORS 670.600(3)(b), the court concluded that the workers bore the risk of loss as independent contractors. The court stated, "The fixed-price assignments demonstrate that the cleaners bore significant risk." Also, the parties stipulated that the workers had to fix defective work before being paid. The court opined, "The risk that they all bore is underscored by the requirement to fix defective work." The court concluded that the ALJ erred regarding this criteria. The court determined that all of the workers met the criterion in (3)(b) regarding the risk of loss.

Oregon State Bar Administrative Law Section

Newsletter Editor

Janice Krem

Editorial Policy

The Administrative Law Section welcomes articles for publication in the newsletter. To be considered for publication, articles expressing the opinion of the author must contain the author's name and include the author's photo. Selection for publication depends on relevance, clarity, timeliness, expertise, authority, and whether the article presents a new perspective. Submissions are subject to editing. Personalized attacks on individuals will not be published. With few exceptions, 2,000 words are the maximum length of an article expressing the opinion of the writer.

The Court of Appeals also did not agree with the ALJ's analysis under ORS 670.600(3)(c): "We conclude that the ALJ misapplied ORS 670.600(3)(c) by interposing unnecessary requirements in its analysis."

The court explained that the correct analysis did not require that the workers prove that their services were provided to others as independent contractors. The court opined, "It suffices here that Ponderosa showed that a cleaner or maintenance worker provided contracted services 'for two or more different persons.'"

The court also explained that no written contract was necessary to prove the criterion:

> "Given the unchallenged testimony, the ALJ's determination may have been based on an understanding that a formal or written contract was required to show that a person provided "contracted services for two or more different persons." The statute, however, demands no such formality when showing a cleaner or maintenance worker provided service to Ponderosa's clientele and to another management agency or property owner."

The Court of Appeals remanded the case to the ALJ to make new findings using the proper analysis under ORS 670.600(3)(c).

Fox v. Employment Dept.

261 Or App ___ (March 12, 2014) (ALJ Cowden)

Nakamoto, J.

Fox sought judicial review of an order of the Employment Appeals Board that denied her unemployment insurance benefits. Fox was discharge by Kaiser Foundation Health for misconduct regarding her time records. Her benefits were denied pursuant to ORS 657.176(2)(a).

The board set aside the decision of the administrative law judge that allowed Fox benefits. The board did not consider Fox's intent during the time-keeping incident, which was the basis for her discharge.

The Court of Appeals concluded that the incident could have been an isolated instance of poor judgment under OAR 471-030-0038(3)(b), and not conduct disqualifying Fox from benefits under OAR 471-030-0038(3)(a). Citing *Dawson v. Employment Dept.*, 251 Or App 379, 386 n 2, 283 P3d 434 (2012) and *Smithee v. Employment Dept.*, 228 Or App 346, 355-56, 208 P3d 965 (2009), the court opined that, unlike the ALJ, the board failed to make the necessary findings to determine Fox's mental state. The court explained:

> "In its order, the [board] appeared to dismiss the need for findings regarding [Fox's] intent by concluding that her conduct necessarily amounted to an irreparable breach of trust because she knew that she was supposed to keep accurate time records. That knowledge, however, does not obviate the need to examine claimant's decision making process, as *Smithee* demonstrates."

Since the board did not consider Fox's intent, the court concluded that the board's order lacked substantial reason. The Court of Appeals reversed and remanded the order of the Employment Appeals Board.

Clackamas River Water v. Holloway

261 Or App ___ (March 26, 2014)

Schuman, S. J.

This case addresses Oregon's Strategic Litigation Against Public Participation statute, ORS 31.150, and its public records laws, ORS chapter 192.

The Clackamas River Water provided documents requested by a former and a current member of the water district's board, after the county's district attorney ordered the water district to provide nonexempt e-mails pursuant to the public records requests made by these current and former board members. The district attorney made it clear that the water district was obligated to identify and withhold any exempt information that it did not want to release. The water district's general manager subsequently provided the computer discs that are the subject of this case.

The water district sought a declaration by the circuit court that these board members had to return to the district the documents that they had obtained from the district's general manager. The water district wanted to

determine--after it disclosed these records--which parts of the documents should have been withheld because they were exempt from public disclosure.

In response, the board members sought relief pursuant to ORS 31.150 in Oregon's "Anti-SLAPP" statute. The circuit court granted their motions to strike the district's action based on ORS 31.150. Nevertheless, the court also ordered that the exempt public records could not be disclosed by the board members.

The board members appealed the circuit court's order regarding the non-disclosure of exempt records, arguing that this order, in effect, allowed the relief requested by the district that was dismissed by the court under the anti-SLAPP statute. The district argued that the circuit court merely followed the law in protecting exempt records from disclosure.

The court discussed the requirements of the public records laws that made it the district's responsibility to identify and withhold any exempt information that it did not want to release. The court explained: [T]he public records law does not prohibit disclosure of exempt records; it gives public agencies and officials the *option* to withhold records from disclosure." (Emphasis in original.) The court opined, "[The district] cite[ed] no authority, nor have we found any, for the proposition that an agency that has released possibly exempt documents can have second thoughts and recall them for a do-over." The court concluded, "Because [the district's] agent voluntarily released the documents, [the district] was not entitled to their return, as it requested in its complaint, nor to compel defendants to refrain from disseminating or using them, as the court ordered."

The Court of Appeals agreed with the board members that the circuit court erroneously decided the district's claim on the merits, after dismissing it. The court explained:

> "The trial court, when it granted defendants' special motion to strike, ruled that [the district] did not meet its burden, and [the district did] not appeal that decision. Nothing in the anti-SLAPP statute allows a court to grant a defendants' special motion to strike, but to then 'proceed to trial.' For that reason, the court erred in also reaching the merits of the district's] underlying complaint after granting defendants' motion to strike. Accordingly, we reverse and remand for entry of a judgment of dismissal without prejudice. ORS 31.150(1)."

Johnson v. DMV

261 Or App ___ (March 26, 2014)(ALJ Sandoval; ALJ Teppola)

Opinion by Armstrong, P. J.

The issue in this case was whether Driver and Motor Vehicle Services Division erred in rescheduling Johnson's implied consent hearing under ORS 813.440(1)(d). The hearing in an implied consent case must be held within the time limits in ORS 813.410 for the license suspension to be valid. However, the license suspension hearing may be postponed and rescheduled if one of the exceptions in ORS 813.440 applied.

After the hearing was scheduled by the Office of Administrative Hearings, the office was notified that the arresting officer was unavailable. The officer was scheduled for jury duty on the same day as the license suspension hearing. The administrative law judge concluded that the officer was unable to attend "due to court" under ORS 813.440(1)(d)[5] and OAR 735-090-0120(4).[6] Accordingly, the hearing was postponed.

At the rescheduled hearing, another ALJ concluded that the original hearing had been properly postponed due to the officer's scheduling conflict under ORS 813.440(1)(d) and OAR 735-090-0120(4). After the hearing, Johnson's license was suspended by the Driver and Motor Vehicles Division. The case was appealed to the circuit court. The circuit court affirmed the final order suspending Johnson's license. Johnson then appealed the license suspension to the Court of Appeals.

On appeal, Johnson argued that the legislature intended the duty conflicts in ORS 813.440(1)(d), which allowed the hearing to be reset, were limited to conflicts with official duties as a police officer. Consequently, Johnson contended that the postponement for jury duty was improper under ORS 813.440(1)(d).

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[5] ORS 813.440(1)(d) provided that the time requirements for the hearing could be exceeded if the officer was unable to attend "due to the officer's illness, vacation or official duty conflicts."

[6] OAR 735-090-0120(4)(b) provided, "An official duty conflict exists if the subpoenaed police officer is unable to attend the hearing due to . . . [c]ourt . . . ."

The Court of Appeals considered whether the reset based on OAR 735-090-0120(4) conflicted with the meaning of "official duty conflicts" as used in ORS 813.440(1)(d). Reviewing the text of the term, the court concluded that the plain meaning of subsection (1)(d) "tend[ed] to support [Johnson's] proposed construction" that official duty conflicts were limited to conflicts with official duties as a police officer.

The division argued that "official duty conflicts" could include any conflict that, by rule,[7] the division reasonably concluded conflicted with the officer's duty to attend a license-suspension hearing. The Court of Appeals was not persuaded. Instead, the court considered the division's interpretation to be circular reasoning and declined to make the statutory phrase "official duty" redundant.

The Court of Appeals also considered the context of the term to support its conclusion that the term meant official duties as a police officer. Because the statute provided three bases for a reset, the court explained:

> "The statute is written in the disjunctive--*viz.*, 'illness, vacation or official duty conflicts'--demonstrating that the legislature intended that any of the three categories would constitute a valid reason to reschedule a hearing. If, instead, the legislature intended 'official duty conflicts' to encompass any circumstance that, in [the division's] view, reasonably interferes with an officer's ability to attend the hearing, then the first two listed categories would be subsumed within the third and, therefore, unnecessary verbiage. Again, we are obliged, if possible, to construe a statute so as to give effect to all relevant provisions. (Citations omitted.) In short, [the division's] interpretation of 'official duty conflicts' is not a plausible reading of the text of the statute in context." (Footnote deleted.)

The division also argued that jury duty qualified as an official duty of the officer; and therefore, the division interpretation was consistent with ORS 813.440(1)(d). Because the record did not contain argument or evidence supporting the contention that the officer's jury duty was his obligation as a police officer, the Court of Appeals rejected the division's argument without further discussion.

The Court of Appeals set aside Johnson's conviction because the Driver and Motor Vehicle Services Division erred when it concluded that the hearing was properly rescheduled due to an official duty conflict under ORS 813.440(1)(d).

Supreme Court

Noble v. Dept. of Fish and Wildlife

355 Or ___ (May 15, 2014) (ALJ Murphy)

Baldwin, J.

The Nobles sought review of the Court of Appeals' decision in *Noble v. Dept. of Fish and Wildlife*, 250 Or App 252, 264, 279 P3d 345 (2012). The Court of Appeals held that the Oregon Department of Fish and Wildlife had plausibly construed its own rules and that the rules, as interpreted, were not inconsistent with the controlling statutes.

Property owners downstream of the Noble's property had erected dams and sought approval of their fishways by the department. These fishways were considered "channel-spanning fishways" and they provided fish passage for native migratory fish when water was moving over the top of the associated dam. The dams were the fishways; however, water was not flowing over these dams at all times. Also, the amount of water flowing over the dams was affected by outlet pipes for irrigation, evaporation, and seepage.

The department allowed these fishways and the Nobles requested a contested case hearing. The Nobles argued that the department violated its own rules, particularly OAR 635-412-0035(1)(a)(A) to (C) and OAR 635-412-0035(2)(a), when it issued these permits. Differences between channel-spanning fishways and traditional fish ladders on large dams that divert water for fish passage affected the department's interpretation of its rules in this case.

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[7] ORS 813.440(1)(d) also provided: "The [Department of Transportation] shall set forth by rule the conditions that constitute official duty conflicts."

OAR 635-412-0035(1)(a) required the department to determine the life history stages of native migratory fish and what dates of the year and conditions the dam operator must provide for fish passage, unless a fishway provided year-round fish passage. The department determined that, for channel-spanning fishways, the term "year-round fish passage" in OAR 635-412-0035(1) incorporated a caveat that limited fish passage to when water was flowing through the fishway itself.[8] The fishways under review were treated as providing year-round fish passage under the department's interpretation. Consequently, the department did not make the determinations in OAR 635-412-0035(1)(a)(A) to (C) because they were not required to do so by the rule, as interpreted by the department.

The department also concluded that the calculation of the design streamflow range as contemplated by OAR 635-412-0035(2)(a) was unnecessary for channel-spanning fishways because the streamflow range was the amount of water flowing over the dams. Under this interpretation, the department did not measure the streamflow at different levels in the obstructed stream. The department considered the streamflow as the water passing over the dam, irrespective of any irrigation outlets, or other bases for water loss.

On appeal, the Nobles challenged the department's interpretation of these rules. The Supreme Court explained that it must construe an agency's rules as it would a statute, giving deference to the agency's interpretations of its own rules:

> "We are required to affirm that interpretation if it is 'plausible,' that is, if it is not 'inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law.' *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994)."

Applying this analysis, the Supreme Court concluded that the agency was bound by the plain meaning of OAR 635-412-0035 regarding the need to make the scientific determinations prescribed in OAR 635-412-0035(1)(a)(A) to (C), without the department's caveat that limited the meaning of year-round fish passage.

The Supreme Court opined that the department could amend OAR 635-412-0035(1)(a) to take into account the current situation, which was not anticipated when it promulgated the rule. However, this would be an amendment of a prior rule that required rulemaking according to the procedures in ORS chapter 183. The court concluded, "Until it does so, [the department] is bound by the rule and the clear meaning that it conveys . . . ." Accordingly, the court concluded that "in the absence of determinations under OAR 635-412-0035(1)(a)(A) to (C) as to which fish require passage and when, a dam operator must provide fish passage throughout the year at all flows within the design streamflow range."

The Supreme Court then turned to the meaning of the term "streamflow" in OAR 635-412-0035(2)(a). The court reiterated that "even for channel-spanning fishways, a dam operator's choice to provide 'year-round fish passage' under OAR 635-412-0035(1)(a) means that, under OAR 635-412-0035(2)(a), the operator must provide passage throughout the year at all streamflows that are 'within the design streamflow range.'"

Considering the term streamflow in context, the Supreme Court concluded that "it would seem that there is no way to give general application to the interpretation of the term 'streamflow' in OAR 635-412-0035(2)(a) that [the department proposed] in a manner that would comport with the standard expressed in OAR 635-412-0020(1)."[9] The court explained that the department's interpretation that the streamflow was the amount of water flowing over the dam did not adequately account for the biological needs of the fish:

> "Under [the department's] interpretation, the availability and timing of fish passage always would be dictated by the planned or existing configuration of the dam--and some configurations that provide fish passage at all 'streamflows' within the design streamflow range would utterly fail to conform to the basic fish passage requirement set out in OAR 635-412-0020(1)." (Footnote deleted.)

The court again stated that the department could provide rules for the kinds of fishways involved to address practical differences between fish ladders for large-scale dams and the fishways in this case, but that would require formal rulemaking.

> "[The department] is free to make different rules for different categories of dams and fishways, but until it does so, using proper rulemaking procedures under the Oregon APA, it is bound by the rules

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[8] The department's interpretation regarding fish ladders was different: "[F]or more traditional fishways, 'year-round fish passage' would *not* be limited to times when water [was] present in the fishway itself." (Emphasis in original.)

[9] OAR 635-412-0020(1) reiterated the prohibition expressed in ORS 509.585(2) and provided, "No person shall construct or maintain any artificial obstruction across any waters of this state that are inhabited, or were historically inhabited, by native migratory fish without providing passage for native migratory fish."

> as promulgated. OAR 635-412-0035(2)(a), as promulgated, applies to all dams and fishways, and the plausibility of the meaning with that [which the department] argues for must be assessed accordingly. As we have discussed above, [the department's] interpretation is implausible because, when uniformly applied, it conflicts with the basic requirement expressed in OAR 635-412-0035(1) that dam operators provide passage that meets the biological and life cycle needs of fish."

The Supreme Court also considered two other arguments by the department regarding its interpretation of "streamflow." The court rejected the department's contention that its interpretation was dictated by its need to balance the competing interests expressed in ORS 509.585, ORS 537.405 and ORS 537.409. The court opined:

> "The policies expressed in ORS 509.585, on the one hand, and ORS 537.405 and ORS 537.409, on the other, are compatible, and each can and should be implemented. There is no basis for [the department] to balance one policy against the other in its rules. And, as discussed, the interpretation of OAR 635-412-0035(2)(a) the [department] claims is the product of such balancing is implausible in the context of other related rules." (Footnote deleted.)

The Supreme Court also rejected the department's argument that the Water Resources Commission and the Water Resources Department regulate dams and, consequently, the streamflow to be calculated by the Department of Fish and Wildlife could not reflect the impact of outlet pipes and other water permit issues that are not within its authority. The court disagreed:

> "While it may be true that [the Water Resources Department's] authority over dam configuration and outlet pipes puts many components of a stream's flow beyond the [Department of Fish and Wildlife's] control, we cannot see how that fact translates into a necessity that those components be ignored for purposes of fish passage."

The Supreme Court summarized its basis for reversing and remanding the case.

> "We conclude that [the department's] proffered interpretation of OAR 635-412-0035(2)(a) is implausible because its uniform application would conflict with the basic regulatory requirement at OAR 635-412-0020(1)--that dams must provide passage for native migratory fish at the times and under the conditions that are required by their life cycles. . . . Because [the department's] interpretation of OAR 635-412-0035(2)(a) is implausible, [the department's] basis for not making an actual determination of the design streamflow range, which the rule requires, is erroneous. We therefore remand to [the Department of Fish and Wildlife] to apply OAR 635-412-0035(2)(a) to the two fishways—that is, to determine, at each site, the design streamflow range and whether the fishway provides passage at all flows within the design streamflow range during the period that [the department] determines fish require passage." (Footnote deleted.)

Janice Krem serves on the section's Executive Committee and is chair-elect for 2015. In using or modifying these materials, you must depend on your own research, knowledge of the law, and expertise. The author makes no express or implied warranties regarding the use of these materials.

New AG Administrative Law Manual Available

On July 1, 2014, a new edition of the *Attorney General's Administrative Law Manual* became available for purchase. The new edition contains the latest statutes, rules, forms, and commentary. It also contains an improved index, which many of you requested. You can order the manual by clicking on this link: *www.doj.state.or.us/pdf/publications_orderform.pdf.*

WINE TO GO: THE BACKSTORY ON OREGON'S GROWLERS


Judith A. Parker

By Judith A. Parker

The next time you open a bottle of wine, take a moment to look at the label. The U.S. Alcohol and Tobacco Tax and Trade Bureau enforces and regulates record-keeping requirements, labeling, advertising, and marketing of all alcoholic beverages sold in the United States.[1] Wine labels must disclose, among others, the percentages of alcohol, sugar, acid, and other chemicals.[2] The labels document the amount of liquid and the presence of sulfites.[3] A labeled wine means that the winemaker is attesting that what you read is what you drink.

Beer is also regulated by the Alcohol and Tobacco Tax and Trade Bureau – but with slightly different labeling and record-keeping requirements.[4] One primary difference comes from another federal function – the taxation of wines *prior* to record-keeping.[5] The timing of the record-keeping of beer and its taxation are not regulated like wine is. If a brewer fills a "bottle" on the brewery or brewpub premises, the beer's tax is determined upon the removal for consumption or sale (with the tax determined on the bottle's stated net contents). However, if a brewer fills a "glass" on the premises, the brewer must fill it from a tank that is tax determined.[6] Beer can thus be sold either in bottles or *growlers* – customer-owned containers up to two gallons for consumption later and at a different place. Growlers give consumers the ability to consume beer later in time and in a different place.

In 2013, Oregon's winemakers successfully lobbied for the passage of HB 2443.[7] This bill authorized OLCC-licensed retail establishments to sell wine, ciders, and malt beverages by filling two-gallon growlers[8] for consumption later and in a different place. (The practice had been permitted for wineries already.) Oregon was the first state to allow wine growlers; Washington followed shortly thereafter.[9] Other countries have been using wine growlers for years, though – Croatia, Spain, and Chile among them.

Growlers are a cost-effective way for winemakers to reach consumers. Using refillable bottles keeps local wineries competitive, according to testimony on HB 2443. The environmental reasons are also staggering, saving the winery roughly $6 per bottle (plus labels, corks, and labor costs). Research into Washington's growler law establishes that up to 65% of a winery's carbon footprint is derived from glass consumption.

The wine stewards at New Seasons Market embrace the growler model. "It gets people excited about trying lesser known wines," said Mary Anne Lowe, wine manager of the store on Williams and Fremont. In fact, she seeks out wines which aren't carried in bottle form at the store. "I'm carrying wines-for-growlers that might only be available at the winery itself," she explained.

One landmark wine market isn't planning on turning to growlers anytime soon – John's Marketplace in Multnomah Village is renowned for its wide array of local and international wines. Well-informed patrons prowl the shelves intently focused on the brightly-colored labels affixing the bottles. Dave the Wine Guy, the store's wine buyer, is decidedly more pessimistic on the long-term viability of the wine growlers' success. "Growlers are a hipster fad," he whispered to me, one eyebrow raised. "It's for folks overly conscious about recycling. And it's not cost

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1 27 CFR 24.300-.323.

2 27 CFR Part 4.

3 27 CFR 4.32.

4 27 CFR 7.22.

5 26 USC 5352 (specifying that a person bottling wine – but not beer – must have authority to establish a "tax-paid wine bottling house").

6 27 CFR Part 25.

7 HB 2443 was signed by Governor Kitzhaber into law on April 11, 2013.

8 Two gallons is equal to 7,570 ml, which is a little more than ten traditional 750 ml wine bottles. A traditional 64 ounce beer growler converts to around two and a half traditional wine bottles.

9 Washington's SHB 1742 allowing sales of growlers of wine was signed into law on March 17, 2014.

effective – no one can drink that much wine in the few days before the wine oxides! Growlers will die out in five years. No one will remember this even happened."

New Seasons wine manager Lowe disagrees with Dave's prediction. "There are definitely a handful of folks who come in regularly and order whatever is on keg," she said. "Our customers – and Oregonians in general – want to be sustainable, want to save the bottles and save the earth, and still enjoy a bang for their buck."

But in March of this year, the Alcohol and Tobacco Tax and Trade Bureau put the brakes on wine growlers. TTB Ruling 2014-3 said that such retailers had to maintain labels, licenses, and records as if they were bottling themselves.

In essence, the bureau would force Mary Anne Lowe and Dave the Wine Guy to maintain the same records as Jim Fischer, who is the lead winemaker at Fossil & Fawn and was described by the Oregonian as one of our state's rising stars. "There's quite a technical process to bottle wine," he told me. "I fill each bottle with inert gas to make sure that it is clean from dust and debris. Once the wine goes into the bottle, it becomes a stable product and I sign off on it. If the winemaker isn't the one filling this vessel, how will the consumer – or the government – know that that the wine is compliant?"


Fossil & Fawn's 2013 Pinot Gris bottling process. (Photo by Fischer)

Fischer paused for a second before explaining why he doesn't have a problem with the bureau's ruling. "If your wine is being poured at a filling station, you're losing control over your art and how your customers experience your wine. We've worked hard as an industry here to compete with California wines on quality, rather than quantity, but now the growler theory makes wine more large-scale and industrialized. It didn't work in Croatia and it won't work here."

Nonetheless, the Alcohol and Tobacco Tax and Trade Bureau's ruling on Oregon's growler law caused umbrage. Our congressional delegation sprang to action. On April 1, 2014, all seven members of the delegation wrote to the bureau's administrator, John J. Manfreda, decrying TTB 2014-3. "If left to stand," said the delegation in a joint letter, the ruling "could undermine Oregon's successful winemaking industry, impacting business, communities and jobs."

The winemaking industry does provide a valuable economic benefit to the state. Oregon is ranked fourth in the country for wine production and third for wine grape production, according to the Employment Department. Our state has over nine hundred vineyards and over five hundred wineries. The annual wage of wineries is a little less than $29,000.[10] And much like a flowering pinot noir, the ancillary industries benefit - trucking, bottling companies, tourism, and yes, even lawyers - contribute millions more to Oregon's economy. Wine-related tourism alone generated $158,500,000 to the state in 2010.

Bowing to the congressional pressure, within a few weeks, the bureau agreed to suspend the requirements of TTB 2014-3. The bureau stated that it did not mean to "unduly burden the lawful sales of wine growlers in states such as Oregon" in issuing its ruling. The bureau further pledged to "modernize [their] regulations to specifically address the filling of growlers with tax-paid wine" and to open a new comment period.

Where are we left? The growlers of wine advocates see a cleaner, brighter future, while others worry about the loss of control of their product. I am wary of the feasibility of transporting wine in containers much larger than the typical bottle size. How much wine do I waste if I can't drink it within three days? But I am pleased that the federal agency recognizes that Oregon's winemaking industry has an equal voice in this debate.

Judith A. Parker represents wineries, winemakers, and licensed professionals in employment matters, before the appropriate administrative agency, and in court when sued in their professional capacity. She is licensed in Oregon and Washington and graduated from Willamette University College of Law and Baylor University. She is currently the secretary of the Administrative Law Section.

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[10] Some of these lower wages are attributable to seasonal hires - folks like me that work in tasting rooms during "the season" between Memorial Day and harvest, which are open primarily on weekends.

Attorney General

Attorney General Rosenblum appointed **Erious Johnson Jr.**, a Salem lawyer, as her civil rights director. Johnson has been a member of the Oregon State Bar since 2013.


Erious Johnson Jr.


Vince Porter

Governor's Office

Vince Porter accepted Governor Kitzhaber's offer to become the Governor's policy advisor for jobs and the economy.

The Governor's latest list of nominees for Senate confirmation is available at http://www.oregon.gov/gov/docs/senate_hearing_report_may2014.pdf.

To read the full report on Cover Oregon requested by the Governor's office, go to http://www.oregon.gov/DAS/pages/coreview.aspx.

Agencies, Boards, and Commissions

The Oregon Health Authority has begun issuing licenses to medical marijuana dispensaries.

Legislature

May Senate confirmations are at https://www.oregonlegislature.gov/secretary-of-senate/Documents/2013InterimEA.pdf

Public Records

The Oregonian challenged the information it was given by the Oregon Department of Transportation regarding oil trains. The Oregonian charged:

> "During the investigation and after, the agency's officials obfuscated facts, making it harder for Oregonians to learn the basics about oil trains. This became clear during a presentation at [an] Oregon Transportation Commission meeting, when a top state rail official contradicted what his agency has previously said about oil trains."