

OREGON STATE BAR
Legislative Proposal

RE: LC 450-2 -- Standardizes provisions related to the administrative hearing process; including *ex parte* communications, discovery, contested case hearings, findings of fact, and model rules.

FROM: OSB Administrative Law Section

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1. PROBLEM PRESENTED

Procedural rules for contested case hearings need to be more even-handed, more effective, more efficient, and easier for the unrepresented party to use.

1. *Ex Parte* Communications

There is no standardized method for handling *ex parte* provisions by ALJs and final decision-makers in contested case hearings. This leads to confusion and the belief that decisions are not based on information actually in the record, but rather on secret information provided *ex parte*.

2. Discovery

Currently, discovery in a contested case hearing is within the sole discretion of the agency. Therefore, the agency determines what information in the agency file is made available to the party responding to the agency's allegations and what information the respondent can obtain from others prior to the contested case hearing. In practice, agencies refuse to allow the respondent to take depositions or review the agency's files, including exculpatory evidence in the agency files. Agencies require respondents to provide extensive testimony and documents while prohibiting access to testimony and limiting access to information the agency has accumulated.

3. Contested Case Hearings

After the passage of HB 2525, which established the OAH, the model rules for the OAH took away important aspects of the ALJ's responsibilities when conducting a contested case hearing and gave these responsibilities to the agencies.

4. Findings of Fact

This bill also addresses issues that have occurred since the creation of the OAH and attempts to clarify how agencies deal with modification of the ALJ's proposed order.

5. Model Rules

This bill addresses concerns that the model rules are not user-friendly, particularly since the vast majority of participants are not represented by attorneys.

2. SOLUTION

1. *Ex Parte* Communications

Apply successful *ex parte* provisions applicable to hearings conducted by OAH's ALJs to all contested case hearings. Create exception for agency decision-makers to receive confidential legal advice from their attorneys.

2. Discovery

Parties should have access to the agency's information in the matter. An impartial administrative law judge (ALJ), not the prosecuting agency, should determine what information is discoverable and the discovery methods to be employed.

3. Contested Case Hearings

This bill returns to the ALJ the responsibilities for conducting the hearing that were historically performed by the ALJ. This bill coincides with the intent of having the contested case hearing conducted by an impartial ALJ.

4. Findings of Fact

This bill leaves findings of historical fact to the ALJ, unless there is no substantial evidence to support the finding. The bill leaves final order authority to the agency. Agency decision-makers do not hear testimony or observe witnesses. Therefore, agencies should not be reweighing evidence they can only review in a cold record. Furthermore, agencies have no stake in determining historical facts. Facts are best found by an impartial ALJ. Only if there is no substantial evidence to support the fact found by an impartial ALJ should an agency change a historical finding of fact.

5. Model Rules

This bill requires that the model rules allow the ALJ discretion to ensure that the model rules are applied to achieve a fair and just result.

3. PUBLIC POLICY IMPLICATION

1. *Ex Parte* Communications

Decisions in contested cases must be made on information in the record. Disclosure of relevant communications made outside of the hearing to ALJs and agency decision-makers must be

provided to ensure that the decision is based on the record and parties have the opportunity to dispute any *ex parte* communications. The public must have confidence in the hearing process. Without disclosure, hearings appear as window dressing for decisions that are actually based on secret information provided to the ALJ or agency decision-makers outside of the hearing.

2. Discovery

Discovery allows the party to adequately prepare for the hearing and present evidence. Discovery ensures that the record for decision-making contains the evidence it should contain before the decision is made. Inadequate discovery inhibits settlement of cases, prolongs the hearing, and allows decisions to be made based on inadequate records. Better discovery will increase the efficient use of hearing resources, decrease the cost of hearings, and result in more equitable outcomes.

3. Contested Case Hearings

This bill coincides with the intent of having the contested case hearing conducted by an impartial ALJ. This bill is a compromise between those who wish to restrain the powers of the independent hearing office and those wishing to restore the powers traditionally exercised by ALJs.

4. Findings of Fact

This is a compromise between those wanting agencies to reweigh the evidence from a cold record and those who want ALJs to issue final orders. The bill strikes a middle ground regarding historical facts.

5. Model Rules

This is a compromise between those supporting strict application of the model rules written by the AG's office, which represents agencies, and those supporting procedural rules written by a more impartial consortium of users or the OAH.