

Oregon State Bar

Bar Membership for Administrative Law Judges
2023 HOD Resolution #3

June 28, 2024

OSB Workgroup on 2023 HOD Delegate Resolution #3

Re: Licensure of Administrative Law Judges

Background

At the 2023 OSB House of Delegates meeting, the body passed [Delegate Resolution 3](#), which recommended that the Board of Governors appoint a volunteer workgroup to “determine whether Good Cause exists to require membership in the Oregon State Bar by Oregon Administrative Law Judges.”

The resolution discussed the breadth of matters considered by Administrative Law Judges (ALJs), and the types of expertise that one might seek in an ALJ who handled such matters.

In response to that resolution, the Board of Governors directed OSB staff to create a workgroup to look into the status of ALJs in Oregon, and report back to the board with findings.

Charge

“Review training and educational requirements, job qualifications and system impact on governmental structures of Administrative Law Judges and report back to Board of Governors by June 1, 2024.”

Members

The workgroup was made up of 10 members:

- Co-Chair Denise Fjordbeck, Attorney-in-Charge, Civil/Administrative Appeals, Department of Justice,
- Co-Chair Kevin Shuba, Attorney at law, Garrett Hemann Robertson PC; (private practice including litigating administrative law cases)
- Kari Furnanz, BOLI ALJ, 2023 Administrative Law Section Executive Committee Chair

- Micah Moskowitz, Oregon Public Defense Commission Attorney, Former OAH ALJ (2017-2024), 2024 Administrative Law Section Executive Committee Chair
- John Lohuis, OAH Presiding Administrative Law Judge for the unemployment insurance (UI) benefits program at the Office of Administrative Hearings.
- Aaron Landau, Harrang Long PC, OSB Administrative Law Section Executive Committee
- Beth Englander, Oregon Law Center, OSB Administrative Law Section Executive Committee
- Dallas DeLuca, Shareholder, Markowitz Herbold PC
- Danny Lang, Law Office of Danny Lang, HOD Delegate (non-voting member)
- Jeff Rhoades, Chief Administrative Law Judge (non-voting member)

The workgroup met four times beginning in December of 2023 and discussed a variety of issues related to Oregon’s use of ALJs, especially those employed by the Office of Administrative Hearings (OAH).

I - Administrative Law in Oregon

Historically, most state agencies in the United States charged with enforcing executive branch regulations would employ both the staff that conducted investigations and made initial agency determinations, and the hearings officers who would make factual and legal determinations when an individual wished to challenge an agency’s decision. Beginning in the 1940s, states began experimenting with centralized hearings panels that heard cases on a variety of topics and from a variety of agencies. These new panels were staffed by state employees who were not directly affiliated with the agencies whose rules were being adjudicated.¹

In 1999, the Oregon Legislature created the Office of Administrative Hearings (then the Hearing Officer Panel). The purpose of the new agency was to provide an independent and impartial forum for citizens and businesses to dispute state agency action against them. While some agencies continue to employ administrative law judges in house, most now use ALJs employed by the OAH.

Today the OAH employs about 65 administrative law judges, and holds approximately 30,000 hearings per year on behalf of approximately 70 state agencies. In general, judicial review of these contested cases is through the Oregon Court of Appeals.

¹ Much of the history of the creation of the Office of Administrative Hearings is discussed in former Chief Administrative Law Judge Thomas Ewing’s OSB Bulletin article in April of 2005. <https://www.osbar.org/publications/bulletin/05apr/oah.html>

Important context to consider in this discussion of whether ALJs should be required to be active members of the Oregon State Bar is that agency hearings – even those that determine the most significant constitutional rights such as liberty interests – are only required to be decided by “an impartial decision maker.” That impartial decision maker can be an employee of the agency making the decision and does not need to be an administrative law judge or lawyer. [*Washington v. Harper*, 494 US 210, 233, 110 S Ct 1028, 1042, 108 LEd2d 178, 206 \(1990\)](#) (The Court was not willing to presume that members of the agency staff lack the necessary independence to provide an inmate with a full and fair hearing in accordance with the policy.) see also [*Vitek v. Jones*, 445 US 480, 496, 100 S Ct 1254, 1265, 63 LEd2d 552, 567 \(1980\)](#) (affirming District Court conclusion that the impartial decision maker making medical or correctional judgments need not come from outside the hospital or prison administration).

Members of this Workgroup appreciate that many Oregon agencies which are required to provide contested administrative hearings go beyond the Constitutional requirements and choose to hire the Office of Administrative Hearings to conduct those hearings, using Administrative Law Judges trained in hearing procedures and substantive areas of law. As discussed later in this report, some members of the Workgroup expressed concern that a licensure requirement, because of increased costs to the agencies, could reduce use of OAH ALJs and hence potentially reduce the quality of the hearings and decisions.

Appeals from OAH Final Orders

Administrative Law Judges may, upon the conclusion of a hearing, issue either a final order or a proposed order. Final orders are generally binding upon the agency whose determination was being challenged. Proposed orders are essentially recommendations from the ALJ to the agency, which the agency has the authority to accept or not. According to OAH, the vast majority of orders issued by the agency are final orders.

It is important to note that not all ALJs reside at the OAH. Other state bodies have separate panels of ALJs, as well as varying processes for appeals. These include the Public Utilities Commission, the Employment Relations Board, Bureau of Labor & Industries, and the Workers Compensation Board, among others. Whether ALJs issue proposed orders or final orders depends on the procedure related to each specific entity.

The distinction between final and proposed orders is important because in most cases only final orders are appealable to the Oregon Court of Appeals (for final orders in contested cases at an agency) or to the circuit court (for final orders from other than contested cases.)

The Court of Appeals reviews final orders from contested cases under the standards set forth in ORS 183.482(8), which include review for "errors of law, abuse of agency discretion, and lack of substantial evidence in the record to support the challenged findings of fact." *Stop B2H Coalition v. Dept. of Energy*, 370 Or 792, 800, 525 P3d 864 (2023). Further, “the agency’s findings of facts and conclusions of law must be supported by 'substantial reason.'” *Coffey v. Board of Geologist Examiners*, 348 Or 494, 512, 235 P3d 678 (2010) (quoting *Springfield Education Assn. v. School Dist.*, 290 Or 217, 227, 621 P2d 547 (1980)).

In review of an order issuing from an agency proceeding which is other than a contested case, the circuit court engages in a similar review under ORS 185.484(5), then the Court of Appeals reviews the decision of the circuit court reviewing the agency decision on the same standards, but the record at the Court of Appeals is the record created at the circuit court, not the record at the agency.

The courts give deference to an agency for the agency's interpretations of the agency's own rules and to an agency's interpretation of the substantive statute it is charged with implementing, depending on the type of term in the statute (exact terms, inexact terms, delegative terms), under the framework that the Oregon Supreme Court established in *Springfield Education Assn. v. School District*, 290 Or 217, 621 P2d 547, 552-53 (1980).

II - Questions for OAH

The workgroup created a list of several preparatory questions which were provided to the Office of Administrative Hearings (OAH). These questions were intended to provide the workgroup with general background information on the status of ALJs currently. These questions, and the responses provided by OAH, were discussed by the workgroup. Many of the documents provided by OAH to the workgroup are linked below.

What proportion of ALJs today are or have been licensed attorneys?

The OAH provided information on [ALJs currently employed by the office](#). This does not include individuals still going through the hiring process, nor does it account for individuals who are employed by other government agencies who have their own ALJs.

[The OAH survey](#) identified 54 individual ALJs broken out by areas of responsibility. This includes 30 ALJ 1s, 16 ALJ 2s, and 8 ALJ 3s. At all levels, a majority of ALJs are either active or inactive OSB members, and several more are members of bars in other jurisdictions. Of the 54 ALJs identified, only 7 were reported as not having been a member of any bar. All ALJ 3s, who handle the most complex cases, are current members or inactive members of a state bar.

Note that the numbers above only include ALJs employed by the OAH. Some state agencies employ their own ALJs in house. While numbers on bar membership for these other ALJs are not currently available, it appears that many agencies already require bar membership.

What training is provided to ALJs, and specifically what training addressed statutory construction and how to deal with allegations of state and federal constitutional violations?

[OAH provided information](#) on [training requirements for ALJs](#), including annual and periodic training, as well as educational requirements. All ALJs are required to have some level of legal training.

Specifically, entry level ALJs must have either a J.D. or 3 years of experience conducting contested case hearings.

After hire, ALJs undergo several months of training that is generally centered on the Unemployment Insurance Program, as this offers new hires a good background in the types of issues they will encounter in other cases. OAH reported that it takes approximately 2 years for a newly hired ALJ to become fully trained in the ALJ 1 program. Most ALJs hired by OAH start as ALJ 1s.

HOD Delegate Resolution No. 3 raised a concern about constitutional Due Process provided by ALJs. As to ALJs at OAH, the OAH training for the ALJs and also the structure for both hearings and written orders provides information and data points to address the procedural Due Process concerns.

Has the Oversight Committee or anyone ever identified non-licensure as a problem for these 50,000 hearings every two years, either systematically or anecdotally?

[OAH reported](#) that after consulting with staff they were unable to find any complaints made against ALJs that arose from non-licensure. However, workgroup members noted that if members of the public are generally unaware that some ALJs are not OSB members, it would not be surprising that a complaint on that basis would not be made.

Some members of the Oversight Committee expressed surprise that licensure was not currently a requirement for all ALJs.

Is there any evidence of the public (or the Bench of lawyers appearing before ALJs) lacking confidence in ALJs due to lack of bar licensure?

[OAH reported](#) on complaints made after hearings but was unable to find any official complaints regarding a lack of confidence in ALJs. In general, complaints made after administrative hearings follow patterns similar to those after cases in circuit court, and are often a function of litigants' displeasure with the outcome of the proceeding.

What would be the impact on the OAH if all ALJs were required to be lawyers and members of the OSB?

[According to OAH](#), the major impact to the state if all ALJs were required to be members of the Oregon State Bar would be financial. Starting ALJs make approximately \$70,000/year. For context, the mean compensation in 2021 for an OSB member who had been licensed to practice for between 0 and 3 years was just over \$98,000. For this reason, OAH anticipates that requiring OSB membership for ALJs would necessitate raising pay for ALJs across the board. In other state government agencies, attorney positions requiring OSB membership are compensated at much higher salary rates.

The OAH conducts contested case hearings for over 80 state agencies statewide. It is funded through fee revenue associated with providing this service. All ALJs and staff charge hourly rates to customer agencies. These rates are designed to be “cost neutral,” meaning they are benchmarked to recoup costs.

In this system, requiring OSB membership could produce a cascading effect. All ALJ positions are represented by SEIU, who would likely advocate for increased salary and pay parity with other attorney positions in state government. Such an increase would necessitate a tandem increase in rates. Thus, all contested case hearings across the board would become more expensive for state government. This would have a significant impact not only for small agencies with limited budget, such as the Board of Tax Practitioners, but also for high volume large agencies facing budget shortfalls, such as the Oregon Department of Transportation.

OAH also discussed concerns about the ability to fill some ALJ 1 positions if only active OSB members may be considered, as well as the effect on operations if existing ALJs were unable to continue in their roles.

III – Other Issues Discussed

Impact of the proposal on agencies other than the Office of Administrative Hearings?

ORS 183.635 establishes a general requirement that state agencies use ALJs from the Office of Administrative Hearings. However, the statute provides a lengthy list of exceptions to this rule.

Twenty-five agencies, boards, or other state entities are exempted from the requirement entirely, and several more are exempted for limited purposes. In addition, no agency is required to use ALJs assigned by the OAH if to do so would violate federal law, or result in the loss of federal funding. However, these entities are not precluded from using ALJs who are employed by OAH, and some contract with OAH to do so.

These other state actors are not necessarily bound by OAH’s requirements in hiring ALJs, and many specify requirements for their own ALJs in statute or administrative rule. Agencies such as the Bureau of Labor and Industries (BOLI), the Employment Relations Board and the Public Utility Commission employ Level 3 ALJs (who must be admitted to the “Bar of any state or federal jurisdiction”) in order to have ALJs with a specialized knowledge of an area of law. Similarly, the Workers’ Compensation Board within the Department of Consumer and Business Services employs administrative law judges “who must be a member in good standing of the Oregon State Bar, or the bar of the highest court of record in any other state or currently admitted to practice before the federal courts in the District of Columbia,” pursuant to ORS 656.724(1).

Workgroup members noted that it can be challenging to recruit and hire individuals with the necessary experience and background to adjudicate these cases. BOLI has experienced at least one failed ALJ recruitment over the last 10 years, and other ALJ recruitments had to be extended, leaving one of the two ALJ positions vacant for a number of months. If only OSB members could

apply for these positions, the candidate pool would be even smaller and could create longer vacancies.

Public Perception and Expectations

As noted earlier, some members of the workgroup expressed surprise that active OSB membership is not currently a requirement for all Administrative Law Judges. Some workgroup members believed that having ALJs who are not members of the Bar detracts from the public perception that ALJs are fully qualified. Likewise, some felt that requiring ALJs to possess the same education and qualifications and judges in the state court system would inspire greater public confidence in OAH hearings.

OAH Code of Conduct

OAH has a [Code of Conduct](#) that incorporates ethical standards, and training includes ethical considerations. This Code of Conduct is enforceable as part of the state human resources process and can be brought into any investigation regarding the purported conduct of an ALJ. Furthermore, as Executive Branch employees all ALJs are covered by state policies and procedures required of all state employees, which includes anti-bias training among a host of other requirements. The Office of Administrative Hearings Oversight Committee, the legislature and the Federal Department of Labor also provide oversight regarding the work of ALJs. Bar membership, however, could add additional oversight over the ethical practices of ALJs.

The Oregon State Bar does not have the authority to enforce the Code of Conduct against an individual who is not an OSB member. In the case of an ALJ who is an OSB member, violations of the Code of Conduct could implicate the Oregon Rules of Professional Conduct (RPCs). In general, the RPCs do apply to OSB members who are participating in administrative proceedings, as the definition of “tribunal” explicitly includes administrative agencies acting in an adjudicative capacity.

Some members of the workgroup expressed concerns that this could result in different ALJs being subject to different standards or requirements, potentially resulting in differing outcomes for litigants.

OSB Services Available to ALJs

Some workgroup members noted that services the bar offers to address ethics questions might be unavailable to ALJs. For example, the bar’s Ethics Hotline may be unable to answer and advise ALJs who reach out, both because the ALJ themselves may not be OSB members, and because bar ethics staff would not be familiar with the OAH’s Code of Conduct.

Other services offered to OSB members could be of value to ALJs as well. Many OSB CLEs are available to circuit court judges free of charge, and the OSB Board of Governors could consider making these available to ALJs as well.

Some members of the workgroup felt that licensure would provide a benefit by making ALJs more attuned to Oregon law, Oregon constitutional issues, and Oregon evidence rules, because of the CLE requirement all OSB members must meet. Others disagreed that licensure is a solution to those problems (if they exist), because licensure does not necessarily require additional training in these areas. Additionally, the training that OAH currently provides covers these topics to the extent necessary for the types of hearings that individual ALJs conduct.

Access to Justice Concerns

OAH conducts tens of thousands of hearings for unemployment insurance benefits every year. Some members expressed concerns that a licensure requirement would make hiring ALJs and retaining them more difficult. If so, this could result in a reduction in the number of OAH ALJs and could result in hearing delays (and hence delays for benefits) in areas such as unemployment. This may present an access to justice problem, at least with respect to some service areas.

Separation of Powers Concerns

ALJs are not a part of the judicial branch of Oregon's government. They make decisions within the executive branch which may later be reviewable by the judiciary.

Some workgroup members expressed concerns that if the bar – as an instrumentality of the judicial branch – were to attempt to require ALJs to become members, it might be seen as one branch of government encroaching on the authority of another. As mentioned earlier in the report, the Oregon State Bar has the authority to regulate its members, regardless of what branch they are employed by, but does not have any direct regulatory authority over state agencies. As a practical matter, this means some current ALJs are bound by rules promulgated by the judicial branch, and other ALJs are not. Some workgroup members expressed concerns about this situation resulting in disparate outcomes.

Conclusion (Issues for future consideration)

The proposal to require all administrative law judges in Oregon to be members of the Oregon State Bar raises several separate but related policy questions. Any decision on this question would, at its core, involve striking a balance between perceived improvements in service delivery, and likely financial and organizational challenges that could be imposed on the OAH and other state actors.

To the extent that this question involves a decision on how to allocate state resources, this is a largely a policy question for the Oregon Legislature. Whether the bar could or should properly weigh in on such a budget question is a matter for future discussion.

Two additional questions are the extent to which requiring OSB membership would result in any actual improvements in service delivery, or to what extent public perception of ALJs would be improved. While reasonable arguments can be made for either of these propositions, there is little

empirical data one way or the other. This could be a matter for some other body to investigate, though there would undoubtedly be costs associated with doing so.