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# Oregon's Office of Administrative Hearings: A Postscript

By Thomas E. Ewing, Chief Administrative Law Judge\*

2003 was the year of decision for Oregon's Hearing Officer Panel (Panel). Created in 1999,<sup>1</sup> the Panel was a pilot, due to sunset in 2004 unless the governor and legislature decided to make it permanent in the 2003 legislative session.<sup>2</sup> Permanence was by no means assured. Although never fully warming to the idea of a central panel, the Governor had supported House Bill 2525 (1999). Agency reaction, however, was different. It was not so much that they objected to the *concept* of a central panel. They objected to their *inclusion* in it.<sup>3</sup> Some of that opposition was quite vocal; most was muted because of the Governor's position. Vocal or muted, there was a general belief among agency heads (even those who wished the Panel well) that it would not survive the sunset.

The Oversight Committee—established by House Bill 2525<sup>4</sup> and comprising gubernatorial appointees, members of the Senate and House of Representatives, assistant attorneys general appointed by the Attorney General, and the Chief Hearing Officer serving *ex officio*—had met infrequently between 2000 and the first part of

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1. H.B. 2525, 70th Leg., Reg. Sess., 1999 Or. Laws 849.

2. The Panel was originally scheduled to sunset on January 1, 2004. 1999 Or. Laws 214. However, in order to relieve the Department of Administrative Services of the burden of calculating the fiscal effects of both dissolution of the Panel and its permanence, the legislature enacted a bill extending the sunset to June 30, 2005. The bill expressly required the legislature to decide the Panel's fate in 2003. H.B. 4053, 71st Leg., 3d Spec. Sess. (Or. 2002).

3. See David W. Heynderickx, *Finding Middle Ground: Oregon Experiments With A Central Panel For Contested Case Proceedings*, 36 WILLAMETTE L. REV. 219 (2000), for an excellent history of House Bill 2525 and the years preceding.

4. H.B. 2525 § 21.

2002. Its role was to review operational matters relating to the Panel. By the end of 2002, there was general agreement within the Committee that the sunset should be rescinded and the Panel made permanent. Preparations had to be made for the 2003 legislative session.

At its January 17, 2002 meeting, the Committee, chaired by Representative Lane Shetterly (key sponsor of House Bill 2525), identified seven issues for consideration: (1) rescission of the sunset provision; (2) appointing authority of the chief hearing officer (governor, agency head); (3) term of office of the chief hearing officer (at-will, civil service, term of years); (4) structure of the Panel (stand-alone agency, hosted by another agency, established within and subordinate to another agency); (5) agencies included in or exempted from the Panel; (6) name of the Panel and title of the chief hearing officer; and (7) the future role of the Oversight Committee. A subcommittee—consisting of Representative Shetterly; Philip Schradle, Special Counsel to the Attorney General; and Chess Trethewy, attorney—was formed to consider these issues and to produce a draft report under the Committee's name to the legislature.<sup>5</sup>

In the meantime, Representative Shetterly decided to seek an independent review of the Panel's operations. He was confident that such an evaluation would be positive and would help grease the legislative rails going into the 2003 session. In late 2001, he asked the Joint [Senate and House] Legislative Audit Committee (JLAC) to conduct an audit of the Panel.<sup>6</sup> That request was approved on January 10, 2002.<sup>7</sup> JLAC instructed the Legislative Fiscal Office (LFO) to determine whether the Panel was operating within its statutory authority, to assess the effectiveness and efficiency of Panel operations, and to make recommendations as appropriate.<sup>8</sup>

LFO auditors presented their draft report to the Oversight Committee on November 20, 2002.<sup>9</sup> The auditors had interviewed

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5. *Minutes of the Oversight Committee* (March 21, 2002).

6. JOINT LEGISLATIVE AUDIT COMMITTEE, REVIEW OF THE HEARING OFFICER PANEL, NO. 02-4 (December 2002) (hereinafter REVIEW).

7. *Id.*

8. Memorandum from Rick Olsen and Adrienne Sexton to the Joint Legislative Audit Committee, August 5, 2002 (on file with author).

9. REVIEW, *supra* note 6. The November draft report was identical to the final report adopted by JLAC in December, missing only the joint response to the report by Deborah Lincoln, Director of the Employment Department, and Thomas E. Ewing, Chief Hearing Officer.

the Chief Hearing Officer and thirteen agencies,<sup>10</sup> including some of the smaller boards and commissions known to have opposed inclusion in House Bill 2525.<sup>11</sup> The report began with a survey of obstacles faced by the Panel in achieving operational efficiencies: varying levels of agency responsibility for maintaining, repairing, and upgrading equipment and different computer operating systems, hardware and software, telephones, word processing programs, and electronic mail systems. This lack of technical compatibility within the Panel resulted in "reduced efficiency in communication and the sharing of information."<sup>12</sup>

It then turned to the "Fairness issue."<sup>13</sup> It began by noting that fairness is difficult to measure and that its perception often depended upon whether the party prevailed or not at hearing. Some agencies stated that fairness had not been a problem under the previous hearings systems; others, however, felt that the perception of fairness had improved.<sup>14</sup> The report then cited the results of 210 customer-satisfaction surveys completed by agencies (160) and citizens (50).<sup>15</sup> The surveys included questions relating to staff professionalism, knowledge and expertise of the administrative law judge (ALJ), timeliness orders, clarity of decisions, and "overall" satisfaction with the Panel. In about 95 percent of agency surveys and 83 percent of citizen surveys, respondents indicated that they were overall either satisfied or very satisfied with Panel services.<sup>16</sup>

On the cost side, the report was more equivocal. For some agencies, the Panel cost no more than what they had paid previously. Others said they were paying more, but the "trade off" was a better quality of hearing.<sup>17</sup>

A more complex question was how ALJs were assigned to agency cases. Agencies reported that ALJs now hearing their cases

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10. REVIEW, *supra* note 6, at 2.

11. *Minutes of the Oversight Committee* (November 20, 2002) (statement of Rick Olson).

12. REVIEW, *supra* note 6, at 4-5.

13. *Id.*

14. REVIEW, *supra* note 6, at 7.

15. *Id.*

16. *Id.* By the close of 2003, a year after LFO reviewed the survey data, the results had remained steady, albeit improving a little: in 97 percent of agency surveys and 87 percent of citizen surveys, respondents reported either satisfaction or great satisfaction with the Panel. OFFICE OF ADMINISTRATIVE HEARINGS, CUSTOMER SATISFACTION SURVEY SUMMARY (December 17, 2003) (on file with author).

17. REVIEW, *supra* note 6, at 7-8.

were not the same as those who heard their cases prior to the Panel. Therefore, they had to spend time “briefing a new [ALJ] on the essentials of the agency’s program and laws.” This, according to agencies, led to inconsistent results: on the one hand, the agency might develop a more thorough case, thereby reducing the amount of hearing time and costs; on the other, agency costs increased because of the need for staff and legal counsel to brief the ALJ.<sup>18</sup>

The auditors also noted things that were going well with the Panel. Every agency—including those that wanted to be excluded—with which they spoke remarked on the accessibility and responsiveness of Panel management to agency concerns.<sup>19</sup> They complimented the Panel on the timeliness of scheduling and convening of hearings. “Many” agencies stated that cases were prepared by agency staff better than prior to the Panel.<sup>20</sup> Although this greater preparation made the hearings more expensive, in their opinion, the benefit was worth the additional cost.<sup>21</sup> Concluding their report, the auditors wrote:

According to some agencies, the Hearing Officer Panel is exceeding expectations. As one director said, “This has been more successful than we thought it

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18. REVIEW, *supra* note 6, at 6. The Director of the Employment Department and the Chief Hearing Officer, in a joint response, stated that they did not disagree agencies *perceived* they needed to brief ALJs more than they had previously; however, they disputed the *accuracy* of that perception:

The audit reports the comments of some agencies that they must brief new hearing officers on the essentials of agency programs and laws, thereby increasing agency costs in staff and assistant attorney general time. We respectfully disagree. This is a criticism we have occasionally heard from the smaller professional licensing boards. In fact, the law at issue in their cases is relatively simple, involving statutory standards of care (*e.g.*, “untrustworthy,” “unprofessional,” “dishonest”). The difficulty lies not in understanding these terms, but in applying them to a particular set of facts. Understandably, when a hearing officer disagrees with the agency as to the application of the term in a case, this disagreement is sometimes translated into a lack of training on the hearing officer’s part.

Response of Deborah Lincoln, Director, Oregon Employment Department, and Thomas E. Ewing, Chief Hearing Officer, appendix to REVIEW, *supra* note 6.

19. REVIEW, *supra* note 6, at 7-8.

20. REVIEW, *supra* note 6, at 8.

21. *Minutes of the Oversight Committee* (November 20, 2002) (statement of Rick Olson).

would be." This sentiment was expressed by others interviewed. While there have been and continues to be areas of concern, it is apparent that the Panel administration is passionate about the Panel concept and is working attentively to correct issues and improve the process.<sup>22</sup>

JLAC adopted the auditors' report. The Committee was of the opinion that the temporary nature of the pilot program constrained the Panel's efforts to maximize administrative efficiencies through such things as staff location and technology. Therefore, it recommended that the legislature repeal the sunset provision.<sup>23</sup>

On December 19, 2002, the Oversight Committee met and unanimously agreed to submit eight recommendations to the legislature.<sup>24</sup> On January 30, 2003, the Committee met again and adopted a report setting out the policy underpinnings of those recommendations:

- *Rescission of the sunset provision:* The Committee joined JLAC in recommending that the sunset provision be rescinded and the Panel be made permanent: the perception of fairness had improved; agencies were preparing their cases better; the Panel had generally exceeded the expectations of agencies; and the quality of contested case orders issued by the Panel had improved because of the emphasis upon selective hiring, professionalism, and training. Moreover, Panel management implemented a number of operational efficiencies, impossible under the former hearings system, to reduce costs.<sup>25</sup>

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22. REVIEW, *supra* note 6, at 8-9.

23. REVIEW, *supra* note 6, at 11-12. JLAC also recommended that the legislature consider the following questions: (1) What agencies should and should not be required to use Panel hearing services? (2) Should the Panel continue as part of another agency or become a stand-alone agency? (3) Should the Panel use two different titles: "hearing officer" for those persons handling less complex cases and "administrative law judge" for those handling more complex cases? (4) What is the appropriate employee union representation in view of the multiple unions involved in the Panel? (5) What is the appropriate funding mechanism for the Panel (General Fund, assessment, billable hours)? Finally, JLAC recommended that the Panel develop and refine performance measure data collection and analysis, which would assist the 2003 legislature in evaluating the Panel's performance. *Id.*

24. *Minutes of the Oversight Committee* (December 19, 2002).

25. It was only after completion of the JLAC audit that Panel management was able to develop some significant cost analyses of the Panel. Those efficiencies and

- *Title of hearing officer and chief hearing officer:* The Committee recommended that the name "hearing officer" be changed to "administrative law judge" and "chief hearing officer" to "chief administrative law judge." There were three reasons: "administrative law judge" had become the standard in the nation, and was used by other Oregon hearings units not part of the Panel (specifically, the Public Utilities Commission and Workers' Compensation Board); the change merely conformed to the public perception that ALJs are "judges"; and using the term "administrative law judge" instead of "hearing officer" would "elevate and dignify" contested case proceedings.<sup>26</sup>
- *Appointing authority of the chief administrative law judge:* The Committee recommended that the Panel remain within the Employment Department because of the effective working relationship established between the Chief Hearing Officer and the Director of the Employment Department and because of the value to the Panel of using the Department's expertise in processing unemployment insurance cases, thereby meeting federal timelines. On the other hand, it expressed concern over permanently leaving the Panel in the Department: The Department is the largest user of hearing services (55 percent), which "may be viewed as inconsistent with the mission of the Panel, which is both to be and be seen to be an *independent* forum for the hearing of disputes between citizens and agencies."<sup>27</sup> Moreover, it was concerned over the possible appearance of improper agency influence on the Panel's operational and decisional independence. It urged the legislature to reexamine this question at its 2005 session.<sup>28</sup>

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cost reductions are set out in *Oregon's Hearing Officer Panel*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 57, 97-98 (2003).

26. *Minutes of the Oversight Committee* (December 19, 2002).

27. *Minutes of the Oversight Committee* (December 19, 2002).

28. In April 2002, at the request of the Joint [Senate and House] Interim Judiciary Committee, the Office of the Legislative Counsel drafted Legislative Concept 67, subsequently filed pre-session as House Bill 2046, which would have repealed the sunset provision and transferred the Panel to the Department of Administrative Services. The bill never got a hearing. *Legislative Measures, 2003 Regular Session*, available at [http://www.leg.state.or.us/bills\\_laws/home.htm](http://www.leg.state.or.us/bills_laws/home.htm) (as of July 14, 2004).

- *Term of office of the chief administrative law judge:* The Committee recommended that the chief administrative law judge serve for a term of six years, removable only "for cause." The independence and impartiality of the Panel, in the Committee's view, depended on "insulating the chief [administrative law judge] from inappropriate political influences. This is all the more important because, under current law, the chief [administrative law judge] serves at the pleasure of the director of the Employment Department, which is the largest customer of Panel services."<sup>29</sup> It noted further that "for cause" protection of the Panel head is consistent with the practice of other central panels—of 21 surveyed, only two had chiefs who were "at-will" employees. It recommended a six-year term in order to avoid politicization of appointments, which could occur if a term coincided with a gubernatorial election.
- *Name of the Hearing Officer Panel:* The Committee recommended changing the name of "Hearing Officer Panel" to "Office of Administrative Hearings." Again, there were three reasons: if the name "hearing officer" were changed, necessarily the name "Hearing Officer Panel" should change as well; the name "Office of Administrative Hearings" was used (with some variation) by over half of all state central panels; and the acronym "HOP" often resulted in "humorous play on words which may not be consistent with the seriousness of the Panel's work and mission."<sup>30</sup>
- *Agencies subject to the Office of Administrative Hearings:* The Committee recommended that the status quo be maintained with respect to agencies both included in and exempt from House Bill 2525. The Committee feared that, by bringing more agencies in, management efforts to raise the professionalism of ALJs and improve operational effectiveness and efficiency might be jeopardized. Moreover, there would be a fiscal effect associated with increasing the Panel's size. On the other hand, it could see no reason why those agencies currently in the Panel should not remain so.

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29. *Minutes of the Oversight Committee* (December 19, 2002).

30. *Minutes of the Oversight Committee* (December 19, 2002).



- *Future Role of the Oversight Committee:* The Oversight Committee should remain in existence and continue to review the efficiency, fairness, and effectiveness of Panel operations. Additionally, the Director of the Employment Department should consult with it in the appointment of a new OAH chief.<sup>31</sup>

The Committee asked its legislative members<sup>32</sup> to sponsor the bill, House Bill 2526 (2003) ("one better than House Bill 2525," according to Representative Shetterly, who had specifically requested the Chief Clerk of the House to assign this number to the bill). It progressed relatively speedily through the legislature. The House Judiciary Committee met on February 26, 2003. Testifying in support of the bill were Representative Shetterly; Philip Schradle, Special Counsel, on behalf of the Attorney General; Janice Krem and Diana Godwin, former Chair and Chair-elect respectively of the Administrative Law Section, Oregon State Bar; and Thomas E. Ewing, Chief Hearing Officer. There was no testimony in opposition. The Committee unanimously recommended passage.<sup>33</sup> Representative Shetterly carried the bill to the House floor on March 17. After explaining its provisions, he said:

One of the things that the Joint Legislative Audit Committee did note was that the Panel has proved to be a success, and in fact even more of a success than perhaps was hoped for when it was initially passed, and adopted, and made effective in the 1999 legislative session. This is something that the Legislature should be proud of in the work that we have done over the past four years by creating the forum for the fair and impartial conduct of contested

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31. OVERSIGHT COMMITTEE'S RECOMMENDATIONS TO THE 72ND LEGISLATIVE ASSEMBLY ON THE HEARING OFFICER PANEL, HOUSE BILL 2525 (1999). The Committee also recommended that the newly renamed Office of Administrative Hearings be authorized by statute to hire law clerks, exempt from the six-month employment limitation of temporary employees set by statute. *Id.*; OR. REV. STATUTES § 240.309.

32. The legislative members were Representatives Shetterly (Chair of the Oversight Committee) and Phil Barnhart, and Senators Roger Beyer and Peter Courtney (President of the Senate).

33. *H.B. 2526, Hearing Before the House Judiciary Committee* (February 26, 2003), available at <http://www.leg.state.or.us/listn/listenset.htm> (as of July 14, 2004).

case proceedings involving state agencies. It has advanced the integrity of the process in which more than 35,000 hearings are conducted every year involving thousands upon thousands of our constituents, who find themselves involved in state agency contested case proceedings. By repealing the sunset on the Panel, we can make it permanent. We can make these improvements to the Panel to allow it to move forward to become even more useful in its purpose in providing fair and impartial venues for the conduct of contested hearings between agencies and citizens who find themselves before those agencies for some administrative action. I urge your support of House Bill 2526.<sup>34</sup>

The House passed the bill by 56 to 0 (four members absent).<sup>35</sup> On April 8, it came before the Senate Judiciary Committee. Representative Shetterly again introduced the bill. Again, there was no testimony in opposition. The Committee unanimously recommended passage.<sup>36</sup> On April 18, Senator John Minnis, chair of the Committee, carried the bill to the Senate floor. It passed by 21 votes to 1 (eight senators absent).<sup>37</sup> House Bill 2525-B, Enrolled, as signed by the Governor on May 22, 2003,<sup>38</sup> included all of the

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34. *Archives of House Chamber Sessions from 2003 Regular Session*, (March 17, 2003) (statement of Rep. Lane Shetterly), available at <http://www.leg.state.or.us/listn/listenset.htm> (as of July 14, 2004).

35. *House Measure History*, available at <http://www.leg.state.or.us/searchmeas.html> (as of July 14, 2004) Following this vote, the Senate Judiciary Committee made some housekeeping amendments, requiring the bill to return to the House floor for another vote. On April 21, the House again voted in favor by 53 to 2 (five members absent). *Id.* Interestingly, the two representatives who voted against the bill had voted for it previously.

36. *H.B. 2526, Hearing before the Senate Judiciary Committee* (April 8, 2003), available at <http://www.leg.state.or.us/listn/listenset.htm> (as of July 14, 2004).

37. *House Measure History*, *supra* note 31. The single senator to vote against the bill explained that he was concerned the bill would be one of those which promised to save money but did not. Senator Minnis responded: "This particular bill, the Hearing Officer Panel bill, actually saves money. . . . The Hearing Officer Panel actually saves litigation and saves costs to agencies in resolving disputes up front." Statement of Senator John Minnis before the Senate (April 18, 2003), available at <http://www.leg.state.or.us/listn/listenset.htm> (as of July 14, 2004).

38. *H.B. 2526, 72nd. Leg. Reg. Sess., 2003, Or. Laws ch. 75*, compiled at ORS 183.600 *et seq.*

Oversight Committee's recommendations.<sup>39</sup> The Office of Administrative Hearings was now a permanent fixture in Oregon state government.

## CONCLUSION

During the legislative session of 1999, when House Bill 2525 was being considered, the private bar had actively promoted an independent central panel. But agencies, at best, suffered the idea in silence; at worst, they were outright opposed. Over the next three years, however, agency reaction shifted— from opposition, to skepticism, to grudging acceptance, and finally to active support in many cases.

There are several explanations. Agencies found the Panel less expensive than they had feared. They discovered the political benefit of surrendering their former adjudicatory role to an independent administrative judiciary. Important too was the responsiveness of Panel management to agency complaints, real and imagined—the therapy was not always adequate, but no pain went unfelt; often, that was enough. For the Oregon legislature and the Governor's office, the decision was easy: This central panel had proved itself to be much more efficient and economical than the former Balkanized hearings system. This was *especially* important during the 2003 legislative session, when Oregon (like other states) faced a budget crisis requiring six special sessions to solve. The previous argument of 1999—that a central panel is about independence, not about money—was no longer viable in 2003. It was *all* about money.

But perhaps the most important reason for the success of Oregon's central panel, after twenty years of fruitless efforts to create one, was the presence of an unflinching, enthusiastic champion in the

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39. Although the Oversight Committee recommended a six year term for the chief administrative law judge, Legislative Counsel informed the Committee Chair that the Oregon Constitution, Article XV, section 2, permitted only four-year terms. *Minutes of the Oversight Committee* (January 30, 2003). With one exception, all agencies previously subject to House Bill 2525 remained subject to House Bill 2526. Prior to Panel, the Board of Maritime Pilots had contracted with the Public Utility Commission (P.U.C.) hearings unit to conduct hearings on its behalf. It had enjoyed P.U.C.'s practice, by which the ALJ, agency staff, and members of the Commission worked together and out of the presence of the parties after the hearing to produce a consensual decision. The Board requested the Chief Hearing Officer to permit it to have similar access to ALJs assigned to their cases. The request was denied. The Board later sought and obtained exemption from House Bill 2526. S.B. 190, 72nd Leg. Reg. Sess., 2003, Or. Laws ch. 619.

Oregon legislature, Representative Lane Shetterly.<sup>40</sup> A private attorney himself and a moderate Republican, Shetterly was deeply respected by both sides of the aisle and by the Governor's office. He was able to parlay his reputation as a fair dealer by skillfully navigating both House Bills 2525 and 2526 through the political currents of the 1999 and 2003 legislative sessions. Without Lane Shetterly, the Office of Administrative Hearings would never have been born. Without him, it would not have survived.

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40. There is always a risk in singling out one person to the exclusion of others. Nevertheless, one who should not be excluded is Deborah Lincoln, Director of the Employment Department, whose support and counsel helped Panel management avoid many political snares.

