ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
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## CHAPTER 4. APPOINTMENT

For many hearings conducted under the Administrative Procedure Act, it is the responsibility of the governor to appoint the hearing officer. AS 44.62.350(a). The appointment process can take anywhere from two weeks to several months. An alternative to this ad hoc appointment procedure exists for agency employees who serve as hearing officers under AS 44.62.350(b).

With limited exceptions, APA hearing officers must have been admitted to the practice of law for at least two years before the appointment. AS 44.62.350(c). The appointments are made on a case-by-case basis under the terms specified in the letter of appointment.

When an agency receives notice of an APA appointment, it should send the hearing officer a copy of any administrative pleadings and entries of appearance, etc., as well as the agency's directive to the hearing officer to hear the case alone or with the agency. AS 44.62.450(a). If the hearing officer wants the agency to arrange for the hearing location (see AS 44.62.410(a)) and recording (see AS 44.62.450(d)), the hearing officer should promptly notify the agency.

## CHAPTER 5. NATURE OF THE PROCEEDINGS

Administrative proceedings under AS 44.62.330 -- 44.62.630 are initiated through either an "accusation" or a "statement of issues." See AS 44.62.360 and 44.62.370.

An accusation is filed when the purpose of the proceeding is to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned. AS 44.62.360. It is served on the subject of the accusation (the "respondent") under AS 44.62.380 and acts like a complaint in a civil case, informing the respondent of the allegations against him or her and the specific statute or rule that the respondent is alleged to have violated. Then, within 15 days, the respondent must file a "notice of defense" if he or she wants to contest the allegations. AS 44.62.390.[2] The agency may amend the accusation at any time, but, if the amended accusation presents new charges, the respondent must be given a reasonable opportunity to prepare a defense. AS 44.62.400.

In Vick v. Board of Electrical Examiners, 626 P.2d 90, 94-95 (Alaska 1981), the Alaska Supreme Court held that private individuals are not permitted to file accusations to compel agency action, absent an express provision in the agency's own statutes or regulations. Thus, third parties may file complaints against licensees with an agency and request the agency to file an accusation, but it is the agency itself that actually determines whether to file an accusation to initiate a proceeding.

Proceedings initiated by a statement of issues, on the

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[2] When the agency serves the accusation upon the respondent, it must include with it a "Notice of Defense" form which the respondent can simply sign and return to satisfy the requirement of AS 44.62.390 and thereby become entitled to a hearing on the merits.

other hand, are to determine whether an agency should grant, issue, or renew a right, authority, license, or privilege. AS 44.62.370. Some agencies treat the letter that initially informs an applicant of the adverse decision (e.g., denial of a license, refusal to renew a license, etc.) as the statement of issues, and the letter itself informs the unsuccessful applicant of his or her hearing rights. Other agencies do not; these agencies file a statement of issues only after an unsuccessful applicant requests a hearing. In either case, the statement of issues is filed by the agency, not the applicant.

The appointed hearing officer may hear the case either alone or sitting with the agency. AS 44.62.450(a); Alaska Alcoholic Beverage Control Bd. v. Malcolm, Inc., 391 P.2d 441, 442 n.2 (Alaska 1964). A party may file a motion requesting that the agency hear the case itself, but, in most instances, the agency will decide to give the hearing officer the responsibility of hearing the case alone.[3] In either situation, the hearing officer presides over the hearing (AS 44.62.450(a)) and acts in accordance with any delegation of authority under AS 44.62.340. If sitting with the agency, the hearing officer's additional responsibilities are to rule on the admission and exclusion of evidence, and to advise the agency on matters of law. AS 44.62.450(b). If sitting alone, the hearing officer's functions also include exercising all powers relating to the conduct of the hearing (AS 44.62.450(b)), and preparing a proposed decision (AS 44.62.500(b)).

A party to a proceeding under the APA may appear on his

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[3] This is subject to limitations stated in AS 44.62.340 and other specific statutory provisions.

or her own behalf or through a representative.[4] The representative may be, but need not be (so long as there is no violation of the statutes and rules regarding the unauthorized practice of law), an attorney. See AS 44.62.420(b). Although a respondent has a right to counsel, there is no right to state-appointed counsel in administrative proceedings. Kalmakoff v. State, Commercial Fisheries Entry Commission, 693 P.2d 844, 847 & n.4 (Alaska 1985).

[4] In this manual, references to a party include his or her representative.

## CHAPTER 6. DISQUALIFICATION OF A HEARING OFFICER

The need for public confidence in the hearing officer system requires that hearing officers behave in accordance with the accepted ethical canons of judicial conduct.

A hearing officer must disqualify himself or herself voluntarily and withdraw from a case in which he or she cannot accord a fair or impartial hearing or consideration. AS 44.62.450(c). Generally, the reasons stem from bias, prejudice, interest, or other causes for which a judge may be disqualified. A hearing officer may also be disqualified if necessary to eliminate the effect of an ex parte communication received in violation of AS 44.62.630. (See page 52 below for further discussion of ex parte communications.)

A party has no right to a peremptory challenge of a hearing officer. Cf. Alaska R. Civ. P. 42(c) (party has the right to peremptorily challenge a judge). However, a party may request disqualification of a hearing officer or agency member. AS 44.62.450(c). To do so, the party must file an affidavit setting out the specific grounds for claiming that disqualification is warranted. If the hearing officer is sitting with the agency, the agency determines whether disqualification is necessary; if the hearing officer is sitting alone, he or she makes that determination. It is a good idea to set out the facts and reasons for the determination in written form for the administrative record, or to announce them orally, in hearing, so that they are made a part of the record.

The hearing procedures outlined on the following pages are suggested guidelines. To the extent that specific procedures are not required by statute or regulation, the hearing officer has discretion to shape them in any manner useful for the particular hearing, so long as no provision of the federal or state

constitutions, the state statutes, or the administrative regulations is violated, and so long as the procedure accords fair treatment to all parties.

## CHAPTER 7. PREHEARING PROCEDURES

The hearing officer must first decide whether it will be feasible or desirable to conduct a prehearing conference. Although not required by the APA, a prehearing conference with all parties and the hearing officer is usually the best means of organizing a formal administrative proceeding. It permits everyone involved to consider procedural problems in advance and to assess the need for preliminary procedural steps. The prehearing conference provides a good opportunity for exploration of settlement possibilities,[5] clarification of issues, submission of evidence before the hearing, preparation of stipulations, determination of order of presenting evidence, and determinations of other discovery issues. In general, it provides an opportunity to deal with any matter that will promote the orderly and prompt conduct of the hearing.

The purpose of the prehearing conference is to simplify and expedite the proceedings, not to complicate or prolong them.

A preliminary conference is not appropriate for every case, however. If the issues are simple, the hearing officer can use alternative means of organizing and expediting the hearing procedure. In all cases, the hearing officer should confer with the parties before the hearing to determine procedures. For example, he or she may advise the parties by written notice about procedural matters and suggest the type of evidence needed. He or she may direct them to submit, before the hearing, materials such as witness lists, exhibit lists, evidence, and proposed stipulations.

In 1985, the APA was amended to allow an agency to use

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[5] Agencies, subject to possible specific statutory restrictions, might have the implied power to settle administrative cases. See Rich Vision Centers v. Bd. of Medical Examiners, 144 Cal. App. 3d 110, 115, 192 Cal. Rptr. 455, 457 (1983).

teleconferencing in the conduct of an APA hearing if the parties agree. AS 44.62.410(b). When convenient, the prehearing conference or other conferences may also be conducted by telephone. AS 44.62.635. This can eliminate the expense and inconvenience of travel and make the conference more productive when there is a need for access to information that is available at only one location, such as a party's home.

In considering and applying the following comments on prehearing conferences, their basic purpose of simplifying and expediting the proceedings must be borne in mind. The conference must be tailored to the type of case presented, and should not be allowed to become a complicated proceeding itself with costs disproportionate to the case.

A. Preparation for Prehearing Conference

The hearing officer must carefully prepare for the prehearing conference, since it is the first opportunity to clarify, isolate, and dispose of the problems involved in the case. As soon as the case is assigned, the hearing officer should obtain and study the statement of issues or accusation, the notice of defense filed by the respondent (see AS 44.62.390), and any delegation of authority. The hearing officer may then direct the parties to submit, before the prehearing conference, proposed statements clarifying the issues, proposed stipulations, requests for information, statements of position, and proposed time schedules. This direction should appear in the Notice of Prehearing Conference (as discussed immediately below) or in a supplemental letter.

B. Notice

The hearing officer sets the date, time, and place of the prehearing conference. He or she should send or deliver reasonable notice to the parties and to all persons whom he or she determines will be directly affected by the outcome of the conference. If a specific geographic area is involved, it might be appropriate to notify local governmental authorities and civic groups. The notice could include the agenda for the conference.

C. Transcript of Conference

Although AS 44.62.450(d) requires the proceedings at the hearing to be preserved to assure an accurate record (tape-recording is the most commonly used), there is no such requirement for the prehearing conference. Some hearing officers feel that transcribing the discussion at the prehearing conference inhibits frank exchange. The hearing officer may choose simply to record agreements and rulings in notes or in dictation to a secretary. In complicated cases, however, any inhibiting effect of transcribing is usually outweighed by the need to preserve the conference conditions, rulings, and agreements.

D. Conduct of Conference

The hearing officer should prepare, and may circulate to the parties in advance, a conference agenda scheduling the issues to be dealt with in a logical order. Any proposals, suggestions, or issues that affect the scope of the proceeding (i.e., identification of the issues involved) should be scheduled first. While the conference may be conducted informally, the hearing officer should insist that all remarks be addressed to him or her.

Reasonable discussion should be permitted, but when a subject is exhausted, the hearing officer should rule (or agree to do so at a later time) and move on. This should help the hearing officer maintain control over the conference proceedings.

Most conferences involve at least the following steps:

1. Opening Statement. The hearing officer should announce the name of the case, the tentative agenda, conference procedures, and other pertinent matters.

2. Appearances. If appropriate, appearance sheets should be distributed before the conference begins. This may be accomplished by simply circulating a sheet of paper with columns for each attendee's name and address, and the name and address of the person he or she is representing.

3. Preliminary Matters. Before discussion of the agenda items, each person should be given the opportunity to propose additional items and to raise preliminary matters pertaining to the conference procedures, such as inquiries about the anticipated duration of the conference. The hearing officer should not permit discussion of matters pertaining to the merits of the case at this time.

4. Participation. The hearing officer should rule immediately on requests to intervene or to participate on some other basis. If appropriate, he or she should inform those present of their rights (or lack of rights) to participate in the conference and in the entire proceeding.

5. Scope of the Proceeding. The first matter on the

conference agenda, as mentioned above, should be identification of the issues to be presented at the hearing. After identifying the basic issues, subsidiary matters should be isolated and clarified.

6. Obtaining Evidentiary Information. As part of the prehearing discovery process, parties may request other parties to submit information. (See pages 23-26 below for a discussion of the scope of discovery.) Disposing of such requests and arranging for the preparation and exchange of the proposed evidence are frequently the most difficult parts of the conference. The hearing officer might not be able to determine whether objections to furnishing information are based on the heavy burden of preparing it, or on the party's disinclination to produce it for some other reason. Even counsel (if there is one) for the party from whom the material is sought might not actually know the value of the requested information or how difficult it will be to produce it.

As difficult as these problems might be, it is preferable to face them and resolve them at the prehearing conference stage rather than to delay their resolution. It is usually quicker, easier, and more equitable to decide these questions after a full discussion at the conference than to decide motions to quash subpoenas after they have been issued or motions to strike particular material after it has been supplied. If the decisions are made at the conference, there is time to modify them without delaying the proceeding if later investigation shows that there is some reason for a modification, such as if some requested material cannot be obtained or assembled in the form requested.

When a party resists another party's efforts to obtain information on the grounds that such production would be adverse to his or her interests, the hearing officer must decide what will be

compelled under the discovery procedures. (See page 23.) Any rulings that require the release of information should be tailored to fit the specific issues and proceeding as much as possible.

7. Exchange of Information and Proposed Evidence. The hearing officer should set dates for the exchange of information and proposed evidence after consulting with the parties. The length of time allowed depends on what material is requested, how difficult it is for a party to prepare it, and whether complex issues are involved.

8. Procedural Rules for the Hearing. The hearing officer, guided by AS 44.62.460, must establish the procedure for the hearing including the sequence and manner of presenting evidence, motions, cross-examination, and argument.

9. Place of the Hearing. Although, after stating some guidelines, AS 44.62.410(a) gives the agency the authority to select the place of the hearing, this duty is often delegated to the hearing officer when the initial appointment is made. In deciding upon a location, the hearing officer should consider the convenience of the parties, their representatives, the witnesses, and the public. If a field hearing is requested, the hearing officer should discuss the matter with the parties. The time and place of the hearing should be announced either at the conference or in the hearing officer's conference report. The same statute also authorizes the parties to select the location by agreement.

## E. Conference Report

Following the conference, the hearing officer should prepare a conference report incorporating the matters determined at

the prehearing conference. The report should consist of a list of persons who appeared and either testified or otherwise represented a party or position, agreements reached, the hearing officer's rulings, and any other matters decided. It should be served on all parties who appeared.

F. Preliminary Motions and Rulings

A party should address each motion to the hearing officer and serve copies of any filed item on all other parties. The hearing officer should make his or her decision promptly. Unless the ruling is self-explanatory or affirms a prior ruling, it should include a statement of the grounds. An order must be furnished to the parties and interested persons.[6] If the motion is one on which the hearing officer does not have authority to rule, he or she must promptly notify the parties and other interested persons.

Many motions, petitions, and requests may be disposed of without a formal order. A notice, letter, or other written communication that advises the parties and other interested persons of the disposition and the reasons for it is sufficient.

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[6] The definition of "interested persons" will vary from case to case. A hearing officer should consult the statutes, regulations, and case law relevant to the particular kind of case.

## CHAPTER 8. DISCOVERY

The types of discovery available under the APA include subpoenas to testify and subpoenas to produce documents and things (AS 44.62.430), depositions of witnesses who will be unavailable at the hearing (AS 44.62.440), and affidavits (AS 44.62.470). Generally, the agency will make its files available for examination. In addition, many hearing officers order other discovery, such as written interrogatories and requests for admission, by analogy to the Alaska Rules of Civil Procedure. Under the APA, it is unclear just what a party's full discovery rights are. As a practical matter, the parties usually stipulate to the discovery procedures to be used, since it is in everyone's best interest to see that a complete factual record is made. The hearing officer should rule on any discovery motions at the prehearing conference.

### A. Subpoenas

Not all hearing officers have subpoena power. Before the hearing begins, the agency may issue subpoenas at the request of a party in accordance with the rules of civil procedure.[7] AS 44.62.430(a). The precise time when a "hearing begins" is not made clear in our APA, and the subpoena authority is often delegated to the hearing officer under AS 44.62.340 and AS 44.62.450(b). After the hearing begins, the hearing officer sitting alone may issue subpoenas. AS 44.62.430(a).

A subpoena is issued at the request of one party, without advance notice to, and opportunity for argument by, any other parties. (Assuming exchange of witness lists, etc., a party might simply request information from another party, without immediately seeking a subpoena.) If a hearing officer issues a subpoena, he or

[7] See Rule 45, Alaska R. Civ. P., for subpoena provisions.

she need not discuss the matter with the other party until the party who obtained the subpoena serves it or discloses its existence. In Alaska, the party requesting the subpoena must pay the fees, mileage, and expenses of the subpoenaed witness. AS 44.62.430(d); Commercial Union Cos. v. Smallwood, 550 P.2d 1261, 1266 & n.20 (Alaska 1976).

Sometimes subpoenas will be requested for material that the hearing officer has previously ruled need not be produced. If the hearing officer observes this, he or she should deny the request unless there is some reason to change the earlier ruling. It is not worthwhile, however, for the hearing officer to search the record of a lengthy prehearing conference or hearing to determine whether the matter has already been considered. The subpoenaed witness can later move to quash the subpoena on that ground.

B. Depositions

Upon a party's verified petition, an agency may order that the testimony of a material witness be taken by deposition. AS 44.62.440(a). The depositions are taken in the manner prescribed by the civil rules. See Rules 26 -- 32, Alaska R. Civ. P. The statute requires, among other things, that the petition set out a showing that the witness will be unavailable at the hearing (something not required in the court rules on depositions). Again, many hearing officers will order depositions to be taken even when there is no showing of unavailability, but the extent to which this is authorized is unclear. Petitions for depositions may be granted without a hearing, but, if this occurs, a party opponent then has a right to file an appropriate motion to quash the deposition. State v. Thompson, 612 P.2d 1015, 1016-17 (Alaska 1980). If a

witness resides out of state and the deposition is to be taken out of state,[8] then it is necessary to obtain a superior court order. AS 44.62.440(b). In dealing with depositions, a hearing officer should remember the basic policy of keeping administrative hearings less complicated than judicial proceedings; as a general proposition, discovery under the APA should be less expansive than under the Alaska Rules of Civil Procedure; see, e.g., AS 44.62.460(d).

C. Testimony of Agency Personnel and Production of Agency Documents

A party might request that agency staff testify or produce documents in the agency's custody, under AS 09.25.110 -- 09.25.125 and 09.25.220 (open records) and art. I, sec. 22, of the Alaska Constitution (right of privacy). The hearing officer should use extra caution in ruling on such requests, bearing in mind the agency's interests in protecting its investigative and decisional processes as well as the public's interests with respect to open records. Ordinarily, the hearing officer should require the agency to produce the entire file and all of the relevant material, including any relevant factual statements made by any member of the agency's staff. If necessary to ascertain the relevance or materiality of the statements, the hearing officer may order them

[8] See State v. Thompson, 612 P.2d 1015, 1016 n.2 (Alaska 1980) (AS 44.62.440(b) was not intended to apply where an out-of-state resident is to be deposed in Alaska, but only where a deposition is taken outside Alaska).

## CHAPTER 9. PROCEDURAL DEVICES AND TOOLS TO SHORTEN AND SIMPLIFY COMPLEX PROCEEDINGS

Other than AS 44.62.420(a)'s hearing notice deadline, the APA provides no deadlines for administrative action. It is the hearing officer's responsibility to move matters along and to place deadlines on the parties.

The traditional formal administrative hearing resembles a trial before a judge sitting without a jury. A number of procedural tools have been developed to simplify the proceedings and make them more manageable.

Efficiency is not the only goal. The hearing must be conducted in a fair manner, and all interested parties must have an opportunity to participate. The procedures described below must be used reasonably and fairly.

### A. Preparation and Exchange of Evidence in Written Form

The following pattern for the exchange of material, with reasonable but short time periods, is often convenient:

1. each party furnishes the material requested by others;
2. each party submits proposed direct evidence;
3. each party submits proposed rebuttal evidence;
4. each party submits further rebuttal evidence, as needed.

Generally, all parties observe the same exchange dates, although this may be varied when appropriate. This pattern permits a party to examine information supplied by other parties before preparing his or her direct evidence, to study other parties' direct evidence before preparing rebuttal, and to prepare for cross-examination without interrupting the hearing or studying the transcript during recesses.

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produced for his or her in camera examination. If the hearing officer permits a party to inspect agency documents, it should be done under the immediate supervision of an agency employee to ensure that nothing is removed, defaced, or altered.

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Generally, all parties observe the same exchange dates, although this may be varied when appropriate. This pattern permits a party to examine information supplied by other parties before preparing his or her direct evidence, to study other parties' direct evidence before preparing rebuttal, and to prepare for cross-examination without interrupting the hearing or studying the transcript during recesses.

Before the hearing, the hearing officer may announce to the parties that he or she intends to take "official notice" of certain specific material in reaching the ultimate decision. AS 44.62.480. This means that the hearing officer will accept as fact a matter that has not been formally introduced into evidence. Any party, on timely request, has the right to refute the officially noticed matters. AS 44.62.480. By announcing his or her intentions beforehand, the hearing officer can determine whether any party objects to the official notice. In addition, the hearing officer should direct the parties, either at the prehearing conference or by written notice, to cite specifically any material they want officially noticed. See Rules 201 and 202, Alaska R. Evid.

Fact stipulations and stipulations as to the reception of certain evidence are frequently useful for narrowing the issues at the hearing. Parties are often quite willing to stipulate to many of the facts in order to expedite the proceedings.[9]

B. Organizing the Hearing

Except in the shortest or simplest cases, the hearing officer should establish the order of oral presentations in the

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[9] Parties are often encouraged to enter into fact stipulations in order to streamline the proceedings and reduce costs, since attorney fees typically are not recoverable for administrative adjudications. State v. Smith, 593 P.2d 625, 630-31 (Alaska 1979) (any attorney's fees award can cover only the proceedings in superior court; they can not be awarded to compensate for costs incurred at the agency level); see also Kodiak Western Alaska Airlines v. Bob Harris Flying Service, Inc., 592 P.2d 1200, 1204-05 (Alaska 1979) (in an administrative appeal to the superior court, Civil Rule 82 has no application).

prehearing conference report or by other notice well before the hearing.

The party with the burden of persuasion or proof should usually make the initial presentation. While the APA does not specifically state who has the burden of proof, it does provide that the ordinary rules of burden of proof of judicial proceedings should apply. AS 44.62.460(e). "Ordinarily the party seeking a change in the status quo has the burden of proof." State, Alcoholic Beverage Control Bd. v. Decker, 700 P.2d 483, 485 (Alaska 1985). In Alaska Alcoholic Beverage Control Bd. v. Malcolm, Inc., 391 P.2d 441, 444 (Alaska 1964), the supreme court, quoting sec. 460(e), concluded that ordinary burden of proof rules put the burden on the complainant. That is, the party who is asserting the affirmative side of an issue has the burden of proving it. Id. In the case of initial license denial, for example, the burden is usually on the respondent; for revocation cases or refusals to renew a license, it is usually on the agency staff.

This initial presentation should be followed first by persons in support, then by persons in opposition, and then by others (if any). This order may be varied to fit the specific case. For example, individual participants with comparatively short presentations may be permitted to appear on a specific day even though it interrupts other testimony. In multi-party proceedings, each category of parties (e.g., those in support of the movant; those in opposition) may be heard in alphabetical order or in any other convenient sequence.

C. Additional Conferences

In a complex case, additional conferences may be needed for the same reasons that the original prehearing conference was held. They can also serve to revise procedures that have broken down or to cope with new problems. An additional conference may be scheduled at the opening of the hearing, but if further prehearing preparation is likely, the conference should be scheduled at a reasonable time before the hearing. However, an additional conference should be held only when absolutely necessary, to avoid unnecessary delay and expense to the parties.

D. Hearing Briefs or Opening Statements

The hearing officer may request the parties to file hearing briefs stating their principal contentions, the evidence they will present, and the reasons for submitting the evidence. The briefs may also present the results of research the hearing officer has requested on legal or technical problems. The hearing officer may instruct each party to include in the brief the argument on any procedural motions and requests, such as motions to strike proposed written evidence. The hearing officer may require an opening statement by the parties in addition to, or instead of, a hearing brief.

E. Action by Hearing Officer to Develop the Record

Throughout the proceeding, the hearing officer should take action to develop an accurate record. He or she should call attention to gaps in the evidence and ask whether they will be filled. The hearing officer should direct the parties to discuss, in oral argument or by brief, any points he or she thinks germane,

and may direct them to research a question of law or policy at any time. It is very important to develop a complete record of the proceedings, since, if the case is appealed, courts generally limit their review to the record as it existed at the agency level. Interior Paint Co. v. Rodgers, 522 P.2d 164, 169 n.7 (Alaska 1974).

A hearing officer may request that particular items of evidence, including testimony from particular witnesses, be provided if they appear to be relevant and readily available to a party. When making such a request, the hearing officer should note the reason for the request on the record. Such reasons may be to flesh out the record, corroborate other evidence, or assess credibility. If evidence is not produced after being requested, an adverse inference may be drawn in some circumstances. Grimes v. Haslett, 641 P.2d 813 (Alaska 1982). If the party complies with the request, there is no need to subpoena the evidence. On the other hand, if the request is denied, the hearing officer might want to issue an appropriate subpoena under the APA or applicable agency law.

# CHAPTER 10. HEARING

## A. Mechanics of the Hearing

There is no standard model for a formal administrative hearing, but it should have substantially the same formality, dignity, and order as a judicial proceeding. The organization and form of a particular hearing depend upon such factors as the type of case, the relevant statutes and regulations, the issues, the number of witnesses, agency custom, and the preference of the hearing officer. The goal is the development of a fair, accurate, and concise record. The hearing should move as rapidly as possible, consistent with the fundamentals of fairness, impartiality, and thoroughness. Upon the parties' mutual agreement, teleconferencing may be used to conduct the hearing. AS 44.62.410(b). See also AS 44.62.635.

1. Transcript. All formal APA proceedings must be reported "by a phonographic reporter or recorder, or other adequate means of assuring an accurate record." AS 44.62.450(d). Although any type of recording may be used (shorthand, stenotype, etc.), tape recording is often the least expensive, and is therefore quite common. The hearing officer should arrange with the agency for the recording device and operator. Alternatively, if the agency does not provide the device and operator, the hearing officer may contract with a local reporting service.

2. Hearing Officer's Opening Statement. The hearing officer should call the hearing to order, identify himself or herself, announce the title of the case, and give any preliminary

instructions concerning decorum, procedure, and hearing hours. In addition, a basic opening statement should include the following:

1. the date;
2. the time;
3. the place of hearing (and location of others who are participating by teleconference from other places);
4. the parties;
5. the parties' representatives;
6. the statute and regulations under which the hearing is being conducted (APA or agency statute and regulations);
7. compliance with notice requirements re scheduling of hearing (or else the hearing officer should obtain an affirmative waiver of them on the record by the parties);
8. the issues to be heard; and
9. identity of the party or parties who have the burden of proof and what the standard of proof is for the case.

The opening should be adapted to the type of case and the circumstances. When all interested persons are represented by knowledgeable and experienced counsel, the opening statement may be brief. If members of the public are present, or some counsel are unacquainted with the hearing procedure, the hearing officer should briefly describe what the case is about and the procedures to be followed.

3. Appearances and Preliminary Motions. Parties should enter their appearances in the same manner as at the prehearing conference (e.g., by signing a circulating attendance sheet). It is also a good idea to identify the parties and their attorneys or other representatives on the record at the beginning of the hearing, as mentioned above. The hearing officer should receive preliminary motions and either dispose of them or take them under advisement. Motions relating to hearing procedures, such as a

motion concerning order of presenting evidence, should be disposed of promptly.

B. Presenting the Case

1. Presentation of Case and Direct Examination. Each party should be called in the predetermined order to present his or her entire case, including all rebuttal testimony. Counsel may be required or permitted to make an opening statement. That statement is not subject to cross-examination, though limited questions may be permitted for clarification.

Generally, a party should first present all exhibits to be marked for identification, specifying which witness will testify as to each exhibit and the sequence of presentation. The first witness should then be called and sworn in by the hearing officer.[10] See AS 44.62.620 (hearing officer may administer oaths). Direct examination should then begin. A party's exhibits should be offered in evidence before the witness is released for cross-examination.

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[10] Oral evidence may be taken only on oath or affirmation. AS 44.62.460(a). The following form for administering the oath is suggested:

> "Do you solemnly swear [or affirm] that the testimony you will give will be the truth, the whole truth, and nothing but the truth [,so help you God]?"

For an interpreter, the following form is suggested:

> "Do you solemnly swear [or affirm] that you will truthfully and accurately translate all questions put and all answers given, to the best of your ability [,so help you God]?"

Hearing officers should give specific instructions to an interpreter, on the record, such as the following:

1. the interpreter is to give word-for-word translations of only that which is asked and that which is answered;
2. the interpreter is not to engage in discussions with the witness in order to clarify what the witness means or for any other reason; and
3. the interpreter should interrupt long passages in order to translate several shorter statements rather than one long one.

The parties should also be advised to ask their questions directly to the witness (as in "Did you go to the store?") rather than giving the interpreter directions as to what to ask (as in "Ask him if he went to the store.").

Upon motion of a party or upon the hearing officer's own motion, a prospective witness may be excluded from the hearing room while another witness is testifying. The prospective witness's testimony may be more credible if he or she has not heard another witness testifying about the same or similar matters. However, a party to the proceeding should never be excluded.

It is a good idea to have the parties furnish the hearing officer and each other with copies of their exhibits in advance of the hearing so that objections and other matters can be dealt with, thus saving time at the hearing.

A party may introduce evidence by affidavit in a hearing. The affidavit will be treated as oral evidence -- with the right to cross-examine waived -- unless the other party timely requested an opportunity to cross-examine the affiant. AS 44.62.470 sets out the procedure for this approach. This procedure was impliedly

upheld in Employers Commercial Union Ins. Group v. Schoen, 519 P.2d 819, 822-23 (Alaska 1974).

2. Receipt of Exhibits. When an exhibit is offered in evidence, the hearing officer should consider any objections. He or she should take careful note of the material objected to and the basis of objection. A party should be permitted to respond to the objection. The hearing officer should weigh the arguments, perhaps during a short recess, and rule on the admissibility of all challenged material. Motions to strike an exhibit may be entertained at a later time if required by further developments at the hearing.

The reporter should mark each exhibit "admitted" or "rejected" pursuant to the hearing officer's ruling. Excluded material should not be physically removed; instead, after it is marked "rejected," it should be attached to the record but segregated from admitted material so that there is no confusion or inadvertent consideration of rejected material. This rejected material is not a part of the record and is not considered by the agency except to rule on the correctness of its exclusion. The hearing officer should direct the parties to mark excluded portions of their own copies of offered exhibits as well.

3. Cross-examination. If there are several parties, the hearing officer should determine the order of cross-examination that will develop the most concise and clear record. This frequently cannot be determined until the direct evidence has been presented. Ordinarily, priority is given to the party who will have the most extensive cross-examination or who has the greatest interest in the direct testimony.

Parties have the statutory right to cross-examine opposing witnesses on all relevant matters whether or not covered in the direct examination. AS 44.62.460(b)(3). In addition, even if the respondent does not testify on his or her own behalf, he or she can be called and examined as if under cross-examination. AS 44.62.460(c). The Alaska Supreme Court has explained that, even though the APA authorizes informal administrative proceedings, the Act was never intended to, and could not, abrogate the right to cross-examine in an adjudicative proceeding. Employers Commercial Union Ins. Group v. Schoen, 519 P.2d 819, 824 (Alaska 1974). The right to cross-examine is absolute. Id. It does not carry a "price tag"; it is not waived when to exercise the right would require the party to bear the initial cost of producing the witness at the hearing. Commercial Union Cos. v. Smallwood, 550 P.2d 1261, 1266 (Alaska 1976).

A party should not be permitted to interject questions during cross-examination by another party. However, the hearing officer may permit this when clarification would be time-saving.

4. Rebuttal Testimony. Rebuttal testimony should be included in the party's original presentation. However, if additional rebuttal evidence later becomes available, or if another party later presents new material that requires response, the hearing officer may permit additional rebuttal, either oral or written. AS 44.62.460(b)(5) gives parties the right to rebut the adverse evidence. The hearing officer may recess the hearing briefly to permit parties to prepare for cross-examination to rebut the new matters.

5. Redirect. Following cross-examination, redirect should be permitted, confined to matters brought out on cross. A

short conference between a party and his or her witness may be allowed.

6. Questions by the Hearing Officer. The hearing officer may question the witness initially if it is likely to forestall extensive examination by others. He or she should interrupt when the witness and counsel are at cross purposes, when the record may not reflect with clarity what the witness intends to convey, or when, for some other reason, assistance is needed to assure orderly development of the issues. At the close of cross or redirect, the hearing officer should question the witness to clarify any confusing or ambiguous testimony or to develop additional facts that the hearing officer believes are necessary to decide the case. Throughout the hearing, the hearing officer should be aggressive in developing the record, including questioning witnesses when reasonably necessary.

The Alaska Supreme Court expressed its approval of this technique in Tachick Freight Lines v. State, Dep't of Labor, 773 P.2d 451, 453 (Alaska 1989). In that case, the appellant alleged that the hearing officer evidenced a lack of impartiality because of his "pointed questioning" of one party at the hearing. The court found no merit to this contention; the hearing officer's job was to help develop the facts, and the questioning did not show that there was any predisposition to find against any party. Id. This role may be especially important when one of the parties is not represented by counsel. Another case regarding questioning by the hearing officer is Thorne v. Dep't of Public Safety, 774 P.2d 1326, 1333-34 (Alaska 1989), in which the court held that no bias was indicated when the hearing officer questioned the respondent's witnesses and noted that, especially when the agency is unrepresented, the hearing officer needs to question witnesses to

flesh out the story and assess credibility. Also, regarding the hearing officer's duty to develop the record, see Butz v. Economu, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978); and Walker v. Heckler, 588 F.Supp. 819 (S.D.N.Y. 1984).

7. Closing the Presentation. Normally, all of a party's witnesses (except rebuttal witnesses, if necessary in accordance with the discussion of rebuttal above) should be called and examined before the witnesses for the next party are called. A witness should be excused after giving his or her testimony, subject to recall at the hearing officer's discretion.

C. Rules of Evidence

Although adherence to the technical rules of evidence is not required for administrative proceedings under the APA (AS 44.62.460(d))[11], the hearing officer must carefully assess the probative value of proposed evidence in order to determine whether it is adequate. The hearing officer should strike, upon objection or upon his or her own motion, evidence so confusing, misleading, prejudicial, time wasting, unduly repetitious, or cumulative that its harmful influence outweighs its probative value.

1. Hearsay. Rigid rules on hearsay are not suited to administrative hearings. Hearsay may be admitted if it appears reliable and useful. AS 44.62.460(d); Cook v. Alaska Workmen's Compensation Bd., 476 P.2d 29, 31 (Alaska 1970). The hearing officer, however, also has the discretion to exclude hearsay evidence where it appears untrustworthy. Whaley v. Alaska Workers'

[11] Whaley v. Alaska Workers' Compensation Bd., 648 P.2d 955, 957 (Alaska 1982).

Compensation Bd., 648 P.2d 955, 958 (Alaska 1982). Hearsay evidence is not sufficient itself to support a finding of fact unless it would be admissible over objection in a civil action. That is, the hearsay can be used to supplement or explain direct evidence, but it cannot be the sole evidence in support of a factual finding. AS 44.62.460(d); Brown v. Northwest Airlines, 444 P.2d 529, 534-35 (Alaska 1968). This is commonly known as the "residuum rule."

In Sather v. State Div. of Motor Vehicles, 776 P.2d 1055, 1057 (Alaska 1989), the court said that California conviction records are admissible if they are "the sort that responsible persons would rely on" but that if the respondent challenges the authenticity of such hearsay, "it may well be that the state should be required to come forward with further evidence."

2. Best Evidence. A party will sometimes offer a copy of a document instead of the original. The accuracy and authenticity of the document should be assumed unless questioned. The prehearing proceedings will frequently produce stipulations concerning the principal documents at issue and the facts they contain.

3. Privileges. The rules of privilege are effective to the same extent that they are available in a civil action. AS 44.62.460(d); see generally Rules 501 -- 512, Alaska R. Evid.

D. Self-Incriminating Testimony

The Fifth Amendment right against self-incrimination is applicable to administrative proceedings. Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). The hearing

officer cannot draw an inference of guilt from a party's assertion of this right. Herscher v. State, Dep't of Commerce, 568 P.2d 996, 1006-07 (Alaska 1977). Failure to assert the Fifth Amendment protection, however, constitutes a waiver. But see Grimes, Supra p. 31, regarding non-Fifth Amendment cases.

## E. Argument on Motions and Objections

When, during a hearing, a motion is made or an objection is raised, the hearing officer may permit oral argument in support of, and in opposition to, the motion or objection. In some circumstances, the hearing officer may also request written memoranda on disputed points. In allowing argument or requesting briefing, however, the hearing officer should try very hard to avoid unnecessary expense and delay.

## F. Handling of Exhibits

It is a good idea to require or encourage the submission of exhibit lists before the hearing begins. For paper exhibits (not such things as guns, dental plates, hypodermic needles, etc.), as each exhibit is introduced, the reporter (or, in the absence of a reporter, the hearing officer) should be supplied with enough copies of each exhibit so that the reporter, the hearing officer, the witness, and each party will have one. If corrections are later required, the party submitting the exhibit should manually correct all copies or submit revised copies.

When a sufficient number of copies of an exhibit is not available at the hearing, the original should be given to the party offering it so that it can be reproduced and returned to the hearing officer, with copies to all parties. If this course is

taken, it should be clearly reflected on the record.

G. Closing the Hearing

1. Oral Argument. The hearing officer (either on his or her own motion or at the request of a party) may permit or require oral argument on the merits of the entire case or on specific issues. Oral arguments may be heard at the close of the hearing or before or after the filing of briefs, as the hearing officer directs. In most instances, it is wise for the hearing officer to limit the time for closing argument. The hearing officer should set a reasonable time limit, considering the nature of the case and the amount of evidence and testimony presented.

2. Closing the Record. After receipt of all supplemental data, the hearing officer should announce (by letter or otherwise) the closing of the record. For extraordinary reasons, such as newly discovered evidence, the record may be reopened for additional hearing or to receive additional stipulated material.

In reaching a decision, the hearing officer may take official notice[12] of certain matters either before or after the submission of a case for decision. AS 44.62.480. Any of those matters must be noted in, referred to, or appended to the record. In addition, a party present at the hearing must be given an opportunity to refute the matter on the record.

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[12] See page 28 above for further discussion of official notice.

## CHAPTER 11. TECHNIQUES OF PRESIDING

The hearing officer has a duty to elicit the facts necessary to determine the public interest as well as the interests of the parties. He or she must develop a record so concise and clear that the agency can easily review the entire case de novo. Consequently, the techniques of presiding are among the most important of the hearing officer's skills.

### A. Preparation and Concentration

The hearing officer must know the case. Before opening the hearing, the hearing officer should study the pleadings, the evidence that has been stipulated to by the parties, and the hearing briefs. He or she should analyze any anticipated legal, policy, or procedural problems.

The hearing officer should have handy copies of the pertinent statutes, regulations, procedures, and precedents so that quick consultation can be made during the course of the hearing. A current calendar should also be on hand, as well as calendars for a reasonable number of preceding years, in order to accurately pinpoint dates that are involved in the hearing.

If a hearing officer must make any lengthy statement during the course of the proceedings, it should usually be written out in advance and read into the record. A written presentation is less likely to contain errors and will be easier to understand.

### B. Judicial Attitude, Demeanor, and Behavior

The hearing officer should, if possible, arrange his or her schedule to avoid interrupting the hearing for personal business.

Because of the importance of keeping a complete record of the proceedings, the hearing officer may frequently have to ask participants to speak louder. He or she should always speak in a tone audible throughout the hearing room.

The hearing officer should be firm but considerate of participants in the hearing. Each witness should be called by name and thanked when excused from the stand. The hearing officer should not argue with participants.

The hearing officer should assist those who lack counsel so that they can participate effectively -- by advising them of the following:

1. who has the burden of proof;
2. what standard of proof must be met, i.e., preponderance of the evidence;
3. what tests must be met and what the various elements of the tests may be; and
4. that they should not hold anything back, that they should present all their evidence and make their case as strong as they can because they might not get another chance.

The hearing officer should exercise caution, however, in order to avoid the appearance of partiality.

C. Controlling the Hearing

The hearing officer must control the hearing. As soon as the subject under inquiry is exhausted or fully developed, the hearing officer should stop the party or the witness and direct him or her to go to other matters. If the question or answer is irrelevant or improper, the hearing officer should strike it without waiting for an objection. On the other hand, if a party is

usefully developing a significant factual matter, the hearing officer should let him or her proceed.

Prompt rulings on motions and objections are essential. If the hearing officer is sure of his or her rulings, argument should not be heard. Whenever the hearing officer is convinced that an earlier ruling was unsound, it should be corrected.

Sometimes one party or a group with the same interests will have several counsel in attendance. The hearing officer should insist that only one attorney examine each witness at one time and that the hearing officer's permission be obtained before co-counsel takes over the examination.

If tempers become short and an altercation threatens to disrupt the hearing, the hearing officer should call a recess, go off the record, and restore order. If a participant in the hearing becomes unruly or offensive in remarks or manner, the hearing officer should express disapproval of the conduct and warn against a repetition.

D. Hearing Facilities

Comfortable and functional hearing facilities assist in developing a good record. The hearing should be held in a "neutral" place.

If possible, the hearing officer should inspect the hearing room before the hearing. He or she should check the heating or air conditioning, lighting, furniture arrangement, seating facilities, and the sound system. The witness chair and the reporter's chair should be arranged so that everyone in the

room can see and hear the witnesses, and the recording device (or reporter) can accurately record the testimony of all witnesses and the comments of all participants. Providing a location where the parties can confer in private is also helpful.

The hearing officer is responsible for the hearing room and furniture, and should make sure they stay in the condition in which they are received. Smoking or eating in the hearing room should be prohibited whether or not the hearing is in session.

E. Hearing Hours

Many hearing officers customarily hold hearings for approximately five hours a day -- for example, 10 a.m. to 12:30 p.m. and 2 p.m. to 4:30 p.m. There is nothing magical about these hours, but such a schedule has several advantages. It permits the hearing officer, counsel, and the parties time during the evening and morning to review the previous day's hearing and prepare for the next; without adequate preparation, a party's examination might be disorganized, rambling, and ineffective. Second, counsel often need a few business hours each day to handle other matters. Finally, the constant attention required while a hearing is in session is mentally fatiguing; after approximately five hours, a party's examination is likely to become less articulate and concise, and the risk of confusing, ambiguous, or mistaken answers is increased. Sometimes it is preferable to have the hearing hours coincide with local court hours (e.g., in Anchorage, 8 a.m. to 1:30 p.m.).

The hearing officer may extend or shorten the regularly scheduled sessions as convenience requires. For example, an afternoon session may be extended to permit an out-of-town witness

to finish his or her testimony and return home. When it appears possible to complete the hearing in a single day, the hearing officer, after consultation with the parties, may begin the hearing earlier and shorten the lunch recess. In addition, the hearing officer assigned to a hearing has the power to grant continuances for good cause. AS 44.62.580.

F. Recesses and Promptness

Short recesses should be taken whenever the participants tire. One recess in the morning and one in the afternoon is usually sufficient. Recesses can be used for other purposes as well -- for example, to enable a witness and examining counsel to clear up confused communications or to agree on a lucid explanation of a complicated technical detail.

The hearing officer should establish times for convening each session and enforce them rigorously, whether or not all of the parties are present. However, if testimony of a carryover witness is to be resumed and the witness is not present, it might not be practical to interrupt the testimony and call another witness.

The times fixed for recess or adjournment should be more flexible. For example, if a witness finishes his or her testimony five or ten minutes before the scheduled adjournment time for lunch, it might be convenient to recess; if counsel is in the midst of a complicated cross-examination at the end of the day, adjournment may be postponed for a brief time.

## G. Taking Notes

The extent to which the hearing officer should take notes depends on his or her own temperament, ability, and work habits. Some hearing officers take no notes, feeling that it distracts them from the immediate task of controlling the hearing. Others prepare a simple topical index, and still others take detailed notes of the testimony of each witness, which their secretaries might later type, possibly with transcript references.

## CHAPTER 12. CONDUCT

Hearing officers who are attorneys are subject to the canons of ethics of the bar. In addition, there are certain standards of judicial conduct to be observed.

### A. Confidentiality

Analogous to court procedures, official actions must be kept absolutely secret until released to the parties. Until a proposed or final decision is rendered, the hearing officer should not reveal it to anyone other than his or her staff and associates (who are subject to the same rules). Maintaining this secrecy requires constant care.

In Anchorage School Dist. v. Daily News, 779 P.2d 1191 (Alaska 1989), the court held that, under AS 09.25.110 -- 09.25.120, a municipal school district may not keep secret the terms of the settlement of a lawsuit. By analogy, a state agency cannot keep secret the terms of a settlement affecting any of its administrative actions.

### B. Ex parte Communications

Ex parte communications (i.e., a contact with one party of which other parties do not have notice and an opportunity to respond) are improper. AS 44.62.630. This means that the hearing officer cannot receive information relating to the case from any party, including agency staff, directly or indirectly, without giving all other parties the opportunity to be present. The hearing officer should communicate with the parties only in writing, and copies of any communications to or from the hearing officer must be served on all parties. Oral communications should be limited to instances when all parties are present; the hearing officer should avoid being in the hearing room with only one party

in order to avoid charges that the merits were discussed on that occasion. Cf. 3 K. Davis, Administrative Law Treatise sec. 17:8, at 302 (2nd ed. 1978), regarding consultation with staff.

It is sometimes possible to cure an ex parte communication so the hearing officer does not feel constrained to disqualify himself or herself. Basically, the hearing officer should immediately make a record of what was said, disclose it to the other parties, give the person who made the ex parte communication an opportunity to challenge the correctness of the hearing officer's recollection, give all parties an opportunity to lodge a challenge against the hearing officer, and take the opportunity to reinforce the rule against such communications. Rarely will either side attempt to challenge the hearing officer. They will be impressed with his or her ethical conduct, and all parties will be more careful in the future. Even if they do lodge a challenge, it need not be granted in most cases if curative measures such as these are taken.

Even if there is only one party in an action before the hearing officer, if a party who is represented by counsel attempts to contact the hearing officer directly, the party should be immediately advised to contact his or her counsel and to have the counsel make the contact. The hearing officer should also advise the party's counsel of the attempted contact.

## C. The Media

The hearing officer should cooperate with the media in making available the public information about the proceeding. However, the hearing officer should not discuss the merits, either

directly or by implication, and should not grant an interview under circumstances likely to lead to questions relating to the merits.

A hearing officer should not give "off-the-record" interviews. If the material is not confidential, the hearing officer should not object to being quoted. If it is confidential, it should not be revealed.

## CHAPTER 13. THE DECISION

After receipt of all supplemental material and briefs, the hearing officer should prepare a proposed decision[13] in writing (AS 44.62.500(b)), setting out the findings of fact, a determination of the issues presented, and any penalties. AS 44.62.510. The decision must contain findings of fact. Hewing v. Alaska Workmen's Compensation Bd., 512 P.2d 896, 899 (Alaska 1973); Brown v. Northwest Airlines, 444 P.2d 529, 531-32 (Alaska 1968); Manthey v. Collier, 367 P.2d 884, 889 (Alaska 1962) (where board's written decision did not contain findings of fact, the board abused its discretion).

The doctrines of res judicata and collateral estoppel apply to administrative proceedings. (Of course, their application would have to be urged by one or more of the parties to bring them into issue.) The court recently affirmed their applicability in McKean v. Mun. of Anchorage, 783 P.2d 1169, 1171 (Alaska 1989).

A motion for summary judgment may be granted if there are no material facts in dispute. In Smith v. State, Dep't of Revenue, 790 P.2d 1352, 1353 (Alaska 1990), the court held that a respondent is not denied a fair hearing in such circumstances.

The importance of preparing a thoughtful, complete decision should be paramount for a hearing officer. In a related

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[13] The hearing officer prepares a proposed decision only if he or she sat alone. If sitting with the agency, the agency votes to determine the decision. AS 44.62.500(a).

context,[14] the Alaska Supreme Court set out the various "salutary purposes" served by producing a complete, careful decision.

> It facilitates judicial review by demonstrating those factors which were considered. It tends to ensure careful and reasoned administrative deliberation. It assists interested parties in determining whether to seek judicial review. And it tends to restrain agencies from acting beyond the bounds of their jurisdiction.

Southeast Alaska Conservation Council v. State, 665 P.2d 544, 549 (Alaska 1983) (footnote omitted). The hearing officer should bear these purposes in mind when writing the proposed decision.

The form of the text of a written decision depends largely on the nature of the case and the hearing officer's style. No special format is required, but the decision must be sufficiently detailed to enable the courts to give meaningful review. White v. Alaska Commercial Fisheries Entry Comm'n, 678 P.2d 1319, 1322 (Alaska 1984); Ship Creek Hydraulic Syndicate v. State, Dep't of Transp. and Public Facilities, 685 P.2d 715, 717-18 (Alaska 1974). The authority of a hearing officer to rule on constitutional and certain statutory questions (e.g., validity of a statute, agency authority to act) is an issue that the hearing officer should carefully research before ruling.

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[14] The court was reviewing a non-adjudicatory action of an administrative body which resulted in a "decision document."

The following suggestions for the written decision might be helpful:

(a) The opening paragraphs should describe succinctly what the case is about and may include a summary of the prior procedural steps and the applicable statutes and regulations.

(b) Although the relief requested by the parties may be described, their detailed contentions should not be recited. These unnecessarily lengthen the decision, since they must be repeated in discussing the merits. Failure to observe this proscription is perhaps the most common failing in opinion writing.

(c) If proposed findings and conclusions have been submitted, the hearing officer's ruling on each of them should be apparent from the decision and they need not be referred to individually. Likewise, insignificant or irrelevant issues raised by the parties need not be addressed specifically in the opinion but can be disposed of with a statement that all other questions raised have been considered and do not justify a change in the result.

(d) The decision should include specific findings on all the major facts in issue without going into unnecessary detail.

(e) The hearing officer should apply the law to the facts and explain the decision.[15] Whether the facts, law, and conclusions should be combined or placed in separate sections of the decision depends on the hearing officer's style and on such factors as the type of case and the nature of the record.[16]

(f) The decision should end with a summary of the principal findings of fact and conclusions of law. All of the ultimate findings should be separately numbered and framed in the applicable statutory language.

(g) Footnotes may be used for such material as citations of authority and cross-references but not for substantive discussion.

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[15] It will often be helpful for the hearing officer to look at earlier agency decisions. Most agencies maintain copies of past decisions, but few currently index them.

[16] It is now well-settled in Alaska that the standard of proof in administrative proceedings is the "preponderance of the evidence" standard. Amerada Hess Pipeline Corp. v. Alaska Public Utilities Comm'n, 711 P.2d 1170, 1179 n.14 (Alaska 1986); In re Walton, 676 P.2d 1078, 1084-85 (Alaska 1983), appeal dismissed sub nom Walton v. Alaska Bar Ass'n, 469 U.S. 801, 105 S.Ct. 54, 83 L.Ed.2d 6 (1984). Cf. In re Hanson, 532 P.2d 303 (Alaska 1975), where the court applied the "clear and convincing" standard in a judicial discipline case; this standard has been applied to other professions in various superior court decisions, although in Walton, id. at 1085 n.11, the supreme court mentioned that it might need to reevaluate the holding in Hanson.

(h) Citations must be sufficiently detailed to enable the researcher to find the source without difficulty. This can be assured by compliance with A Uniform System of Citation, (Harvard Law Review Association, 14th ed., 1986) (the "Blue Book") Some agencies require this by rule.

(i) Maps, charts, technical data, procedural details, and other germane background material too lengthy to be included in the text may be attached as appendices.

## CHAPTER 14. FILING THE DECISION

If a case is heard by a hearing officer alone (i.e., without the agency members being present), the hearing officer must submit the proposed decision to the agency. AS 44.62.500(b). The agency is then responsibile for it.

Once the hearing officer has submitted the proposed decision to the agency, it acquires a life of its own; under AS 44.62.500(b), the agency is to file it with the lieutenant governor and serve it on each party; the agency may then adopt it immediately. Consequently, those hearing officers who wish to submit a draft decision to the parties for their critique should make clear that the draft has not been submitted to the agency and is not to be regarded as the "proposed decision."

The agency may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision. AS 44.62.500(b). The Alaska Supreme Court has held that this subsec. (b) is not violated just because the hearing officer is present while the agency is conducting its subsec. (b) deliberations. Rosi v. State, 665 P.2d 28, 29 n.3 (Alaska), cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983); Storrs v. State Medical Bd., 664 P.2d 547, 553 (Alaska), cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d

312 (1983). Further, the agency has the discretion to receive assistance from the hearing officer in a case that clearly requires the hearing officer's assistance. Storrs, 664 P.2d at 553.

Alternatively, the agency may decide the case on the record, or may refer the case to the same or another hearing officer to take additional evidence. AS 44.62.500(c). If the agency refers a case back to a hearing officer, he or she must prepare a proposed decision, based on the additional evidence and the record of the earlier hearing, and submit it to the agency.

If the hearing officer heard the case sitting with the agency, the agency may deliberate in private (AS 44.62.310 (d)(1)), but the hearing officer who presided must be present to assist and advise. AS 44.62.500(a). The hearing officer who presided will frequently reduce the agency's decision to writing.

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (CONTINUED) Page

# TRANSCRIPT OF

# SENATE LABOR AND COMMERCE COMMITTEE

# MEETING OF MARCH 23, 1992

Whereupon, the following transcript was transcribed from tapes provided by the Senate Labor and Commerce Committee.

**SENATE LABOR AND COMMERCE COMMITTEE HEARING**

**MARCH 23, 1992**

(Tape 1, Side A)

CHAIRPERSON PEARCE: I call the Senate Labor and Commerce Committee to order. It is Monday, March 23, 1992, 3:39 p.m. Present at the moment are Senators Pearce, Craft, and Collins.

Before us today in the Labor and Commerce Committee we have a meeting with Linda Rexwinkel, the Division Director of the Division of Worker's Compensation at the Department of Labor.

I want to say at the outset that at 5:30 p.m. our committee will be moving to the larger rooms, and we will go into a work session with the Alaska Energy Authority, which all Legislators are invited tc attend.

And on Wednesday, the 25th at 3:30 p.m., we will be holding first hearings on the 28 _____ Authority Bills. There has been a lot of interest in that.

Just as an opening for the day's hearing, due to the recent press accounts which have made a number of allegations dealing with the Division of Worker's Compensation and the Worker's Compensation Board, the Committee today will be hearing from Linda Rexwinkel, who is the Director of the division. Linda has been asked to supply to the Committee any relevant documents, letters, meeting minutes, and the like, dealing with the subject at hand.

And you have a blue book -- it looks like this (indicating) -- that she has provided to the Committee.

For the record, our office, and my office, began

receiving the first of literally hundreds of pages of documents this morning. They were still arriving this afternoon. We asked the Commissioner to please provide to us also copies of the documentation he had received, and this is in your clipped pile.

We also have a copy of the minutes from the last Worker's Compensation Board meeting of March 10, 1992.

We have kept the Xerox operators busy all afternoon in trying to provide these. We have limited copies available, so we will have a master copy of each of these documents in our office and any of you can come and make your own copies, if you so desire, after the meeting this afternoon.

We also have one set available for the press, and we'll make those available.

It's the Chair's intent to call Ms. Rexwinkel to the witness table, to administer the oath, and to allow her to make a presentation.

Subsequent to the presentation, the Committee will be allowed to ask questions of Ms. Rexwinkel.

If Commissioner Mahlen, members of the Worker's Comp Board, or others, wish to address the Senate Labor and Commerce Committee on these matters, they will be afforded equal time at a later time. They will also be sworn in, in a similar manner.

Are there any questions from the Committee at this time?

FROM THE COMMITTEE: (No affirmative response.)

CHAIRPERSON PEARCE: You have in your actual committee file a copy of a letter from Senator Adams to Senator Eliason asking that one of the senate committees look into the allegations with some specific concerns about the budgetary

process.

You have a memo to Senator Adams from Senator Schultz saying that he did not want to do it, but he thought somebody should.

You have a copy of the request from myself, both to Commissioner Mahlen, for the documents which we have received, and also my request to Linda Rexwinkel that she appear before the Committee.

We also have both Senators Eliason and Adams in the back of the room. I have offered them the opportunity to come forward, and they have not yet decided they want to come out of the corner back there. If they decide to, they are welcome to; and, hopefully, we will have Senator Halford joining us soon.

Any questions?

FROM THE COMMITTEE: (No affirmative response.)

CHAIRPERSON PEARCE: Linda, if you wouldn't mind standing, since we are giving you an oath. And I just want to read from the memorandum, from the Legislative Affairs Agency.

Alaska Statute 24.25.060 provides that the President of the Senate and Speaker of the House, and the Chairman of every committee of either body, may administer an oath to a witness appearing before the respective bodies. A person who willfully swears or affirms falsely concerning any matter material to the subject under investigation or inquiry is guilty of perjury and upon convictions punishable by imprisonment for not less than one year, no more than five years.

So please raise your right hand.

LINDA REXWINKEL

a witness appearing before the Senate Labor and Commerce Committee, was duly sworn and testified under oath as follows:

CHAIRPERSON PEARCE: Linda, we have asked you today to come, and you have prepared all this information for us. Why don't we begin, as I said earlier, with you giving us an opening statement.

MS. REXWINKEL: Sounds goods.

OPENING STATEMENT BY LINDA REXWINKEL

MS. REXWINKEL: My name is Linda Rexwinkel.

(Whereupon, Ms. Rexwinkel reads from a prepared statement entitled, "Linda Rexwinkel: Response to Senate Labor and Commerce Submittee, March 23, 1992," beginning with Page 1 and ending on Page 8, end of first paragraph.)

Thank you.

CHAIRPERSON PEARCE: Thank you.

Questions from Committee Members that we have got here so far -- what we have additionally are sections relating to other specific allegations that have been made.

But are there questions having anything with Ms. Linda Rexwinkel's comments so far?

SENATOR COLLINS: Madam Chair, I might have some concerns.

CHAIRPERSON PEARCE: Senator Collins.

SENATOR COLLINS: Are we going to go into the -- get to the allegations item by item or --

CHAIRPERSON PEARCE: Whatever is your preference.

MS. REXWINKEL: Yes, we are.

SENATOR COLLINS: In that case I will hold my questions until then.

CHAIRPERSON PEARCE: I have a question.

Does the -- when you took your -- well, let's start at the beginning.

Board Members, can you -- of the present Board Members how many have been appointed since you took your position and how many have been appointed since the Governor took office, which was -- what? -- about three months before we began this?

MS. REXWINKEL: Since I have been appointed, there have been eight appointed to the Board; and that's because the vacancies -- the first -- there were three who it seems were not forwarded to the Legislator, so that created vacancies right around the end of April. And then five others, their terms expired around June 30th -- I guess June 30th or July 1st, whatever the day is. And so at that point in time five more became available. So in all total there have been eight since April of last year.

CHAIRPERSON PEARCE: And had any of those eight moved where there was previous concern on the Worker's Comp Board for other administrations, to your knowledge?

MS. REXWINKEL: These individuals, of the eight who were appointed -- Darrell Smith is a returning member of the Board, and I am not sure -- let me see when he was originally appointed.

(Ms. Rexwinkel peruses her papers before her.)

Darrell Smith was originally appointed August of 1988, so he had not completed in excess of the six years on the Board that

the Commissioner had stated was of term limitation. So he was appointed under the previous administration, was reappointed by this administration.

CHAIRPERSON PEARCE: Okay. I am kind of sorry the presiding officer left before I had a chance to ask this question: Is it typical for the Board Members to have their own PR books?

MS. REXWINKEL: I do not know, to tell you the truth.

CHAIRPERSON PEARCE: Had that been in common practice through this administration for the Board?

MS. REXWINKEL: I don't know that, either. All I know is that several members had them. We had several staff who had them, and there was never any inventory. We did not have an inventory list of any of the property to the division. We did not have an inventory of any software that we had. We did not have an inventory of the Larsen's Desk Manuals. I mean, we are taking Board Members' words that, no, they don't have one and they turned it back in.

We did not have any listing of anything. So what we did was merely say, "Everything comes back until we can figure out who's got it and what they are doing with it." And we have now brought in even all of the TR books from staff . . .

(Tape 1, Side A ends.)

(Tape 1, Side B)

(The tape picks up with Ms. Rexwinkel continuing reading her prepared presentation, picking up on Page 11, pausing in her presentation to interject as follows:)

MS. REXWINKEL: I would suppose, in retrospect based on the tone and content of Mr. Brown's memo, I should have responded. However, at the time I received a copy of it, I found it so outlandish that it did not deserve a response. I wish now I had done that. But my margin notes are there, and hopefully they are readable for you.

CHAIRPERSON PEARCE: Questions?

(?)SENATOR COLLINS: Ms. Rexwinkel, under -- by statute, even though we are speaking here of the board approval of self-insurance certificate, that is actually also done by a three-person hearing council?

MS. REXWINKEL: That is correct.

(?)SENATOR COLLINS: It is not done by the Board.

MS. REXWINKEL: It is not done by the Board, no.

(?)SENATOR COLLINS: Okay.

MS. REXWINKEL: And there was really an error in the procedures. We had division staff approving or disapproving the certificate. and it went to the Juneau panel because they're here and they're closest to us in the ease of operations. But the problem develops: What happens when the panel down here denies the application?

The appeal for Worker's Compensation Board decisions is Superior Court. It is not another panel of the Board. And so we have altered our whole mechanism in relation to the approval of self-insurance certificates, to make sure that individuals may not handle shock and create undue and unnecessary work for division staff. So we have rectified some of that in this past year.

CHAIRPERSON PEARCE: Questions?

Okay. Myron Schweigert.

(Whereupon, Ms. Rexwinkel continues reading from her prepared presentation, resuming at Page 12, Paragraph 2, and pausing on Page 13, end of Paragraph 2.)

CHAIRPERSON PEARCE: Any questions?

Senator Collins?

SENATOR COLLINS: Well, I think going back to the statement with respect to revisions of previous decisions, are you aware of any complaints that were lodged against the Chief of Adjudications, prior to your coming on-line?

MS. REXWINKEL: Yes, I am. It was my understanding that the hearing officers, while they may have regretted and/or wished differently, the Chief of Adjudications was their supervisor and, as such, if she decided to make editing changes -- I mean, she was their supervisor.

I do know that there were several grievances some years ago lodged against the Chief of Adjudications regarding these kinds of issues and that, based on that, she did pull back a little back from the position. She did not edit them quite as much.

But it is my understanding now that, yes, she did edit the decisions and orders.

SENATOR CRAFT: Would it be possible -- do you have copies of those grievances and complaints?

MS. REXWINKEL: I believe I have copies of the grievances.

SENATOR CRAFT: Would it be possible for you to make copies of those and give them to the Committee?

MS. REXWINKEL: Oh, I'm not sure copies of the grievances are public knowledge.

SENATOR CRAFT: Okay. All right. If they're not, that's --

MS. REXWINKEL: But I will check.

SENATOR CRAFT: Okay.

CHAIRPERSON PEARCE: Other questions?

SENATOR COLLINS: Are you aware if there were ever, as a result of any of the grievances, any legal action taken against the department or against Ms. Hanson?

MS. REXWINKEL: No. I know that the grievance ended with the Commissioner's office, and I do not believe the Commissioner's office supported Ms. Hanson in her efforts.

It should be noted that some years -- there never used to be performance standards -- any kind of standards, really -- for hearing officers. And some years ago, the division -- the Worker's Compensation Board was sued because it did not conform to statutory requirements for hearings within 60 days, as well as decisions being ordered within -- issued within 30 days.

Consequently, we have taken those statutory requirements very seriously. It cost the State of Alaska several hundred thousand dollars in, I guess, punitive damages, if you will, out to the individuals who made the claim against us. And as such, we work very hard to make sure that -- all of those decisions and orders. So we have -- the former Chief of Adjudications instituted a numerical system for evaluation of the hearing officers.

And what we are currently working on at this point in time are performance standards for hearing officers. I have

instructed the current Acting Chief of Adjudications to begin work with our Personnel Department, to develop actual personnel performance standards for those individuals so that we may be able to assess and evaluate their performance.

It seems no different to me -- I mean, judges are held accountable by their decisions. I believe that panels and hearings officers should be held accountable for theirs.

CHAIRPERSON PEARCE: Senator Collins?

Senator Halford?

SENATOR HALFORD: I'm just trying to figure out: The hearing officers -- I mean, I'm not sure what you -- did you just say there are no standards for hearing officers?

Where do we get hearing officers? I mean, they are --

MS. REXWINKEL: Hearing officers are part of the Classified Bargaining Unit, GGU.

SENATOR HALFORD: How do they get the job and what is the job description?

MS. REXWINKEL: They apply for the job. There is a regular PDQ, "Position Description Questionnaire," designed for the position that talks about their educational backgrounds and the duties of that position.

But instances, just as what we are relating to here in terms of decisions being rendered which place the division at risk financially, financially for the division, but as well the situation in the IME, Edgar Stephans, a substantial issue for the Worker's Compensation process: How do we determine or how will we settle disputes between employer and employee positions if we don't have IMEs?

If now of a sudden because of a decision the division now either has to pay the cost of the IME, and/or every time we require one somebody objects to it, it places the entire process at risk; and the claimant is left out there hanging.

Those kinds of decisions should -- the hearing officers who are the individuals who are knowledgeable in Worker's Compensation Law, who do this as a living, should be held accountable. They are to give advice to the Board Members, the lay members sitting there.

SENATOR HALFORD: Okay. These people are classified. What pay grade are they?

MS. REXWINKEL: 21, I believe.

SENATOR HALFORD: They're 21s, and you don't know what the -- it just sounds --

MS. REXWINKEL: I can provide you with a copy of the PDQ.

SENATOR HALFORD: I would like that.

And is there any recourse -- if one of these people loses us $100,000 in legal fees or $500,000 in just the straight up, is there any recourse?

MS. REXWINKEL: No, because it is not -- that kind of criteria is not incorporated into a performance standard and, consequently, cannot be incorporated into their evaluations.

SENATOR HALFORD: What is their background? I mean, the people that you've got, the people we're talking about, what are their backgrounds?

MS. REXWINKEL: Some have graduated from law school; some have not. Some have passed the Alaska Bar; some have not.

SENATOR HALFORD: Yes, but they are attorneys?

MS. REXWINKEL: Most of them are, yes.

SENATOR HALFORD: The hearing officers are attorneys?

MS. REXWINKEL: Most of them are, yes. They are not required to be attorneys, but most of them are. Some are not licensed in the state.

I guess "attorneys" to me means a practicing attorney who is licensed within the State of Alaska; and there are only several of those hearing officers.

SENATOR HALFORD: But they are.

MS. REXWINKEL: They have graduated from law school.

SENATOR HALFORD: How long do they stay in these jobs?

MS. REXWINKEL: Most of the hearing officers who have been with the division have been with them for five years or more.

SENATOR HALFORD: I was just wondering what kind of attorneys you get for 21 that will stay at the job for five years or more.

MS. REXWINKEL: Attorneys that have failed the Bar.

SENATOR PEARCE: I believe the Department of Commerce (unintelligible due to noise on tape) has a Code of Professional Conduct for their Administrative Hearing Officers which they adopted, which was adopted by their Chief Hearing Officer and, I assume, is used in their evaluation. Would you care tc rise your performance standards that you're working on as being something along the lines of a Code of Professional Conduct?

MS. REXWINKEL: I think it is much more than that. We are looking at actually incorporating -- and our Chief Hearing Officer is working with Personnel out at the Department of Labor to develop those performance standards, what is acceptable in terms of number of decisions and orders or the number of compromise and release settlements which are reviewed; what are acceptable in terms of the number of days to issue; what are acceptable in terms of how well they chair the hearings or well they move the hearings along.

As chairmen, they can move the hearings along or they can allow the parties to go off on tangents and those kinds of things. So as the presiding officer, they are to corral the parties, if you will, into the issues which were framed for that particular hearing. We would like to make sure we see how well they do and hold them accountable to a standard.

SENATOR CRAFT: If we could go back to your statement in our books that's on Page 13, I believe that you were talking about looking at evaluation written by the former Chief; and it was actually Senator Collins who said, "Ms. Hanson." I assume that that is the Chief which you are referring to?

MS. REXWINKEL: She was the Chief, yes.

SENATOR CRAFT: And that was Jan Hanson, who was the Chief of Adjudications?

MS. REXWINKEL: That is correct.

SENATOR CRAFT: And she left when?

MS. REXWINKEL: She left July 26, 1981.

SENATOR CRAFT: Okay.

These were evaluations of hearing officers?

MS. REXWINKEL: That is correct.

SENATOR CRAFT: Which were on an annual basis?

MS. REXWINKEL: Most of these came from their exit. She did as when -- when a supervisor leaves, there is an evaluation which is done, a Change of Supervisor Evaluation. Jan Hanson was terminating as their supervisor; and, consequently, she does an evaluation of their performance, if you will, up to that point in time. After that period of time, then, the person who is in the Chief of Adjudications would do the evaluations. At that it was myself.

SENATOR CRAFT: Okay. So the specific quotes you have given us are from evaluations that were done in 1981, in June or July before she left, but after you came into be in the division?

MS. REXWINKEL: That is correct.

SENATOR CRAFT: And when she said --

MS. REXWINKEL: And they regularly --

SENATOR CRAFT: -- I don't know what your form is like, but, for example, "I don't often need to make suggestions for significant changes, but when I do, so-and-so is usually responsive." It was in an area where it was clear that we were talking about changes to --

MS. REXWINKEL: About decisions and orders, yes.

SENATOR CRAFT: Changes and orders?

MS. REXWINKEL: That is correct.

CHAIRPERSON PEARCE: Could you make copies of those, or are those -- because they are personnel, they are classified?

MS. REXWINKEL: I think they are confidential.

SENATOR HALFORD: Well -- Madam Chair.

CHAIRPERSON PEARCE: Senator Halford.

SENATOR HALFORD: I think it is critical to have those statements, whether we have the personnel record complete or not. I mean, we are not looking at the individual. I think that is a very significant quote, and I would like to see it somewhere; and there ought to be some way that the AG's office can --

MS. REXWINKEL: Let me check with Personnel.

SENATOR CRAFT: You can black the name out.

MR. HALFORD: -- not give us the whole personnel record, yet give us those statements.

CHAIRPERSON PEARCE: I am sure that that is true. We don't need to know whether --

MS. REXWINKEL: Or at least the paragraph so that you would know the context.

SENATOR CRAFT: Yes, to make sure that it is in context with this.

I must say that taken in the context that is given here, without benefit of seeing the entire section, it certainly appears that it is not unusual at all for previous people to insert themselves into editing decisions and orders --

SENATOR COLLINS: As standard practice.

SENATOR CRAFT: -- as standard practice. Whether that is right or wrong is another question. I suppose between our legal people in the Department of Law, we can come up with some sort of decision on that.

CHAIRPERSON PEARCE: Other questions on that portion?

SENATOR HALFORD: Well, I don't know when you are going to get there, but at some point I would like to ask questions in terms of where this has all come about, what is going on?

CHAIRPERSON PEARCE: Okay. We've got one more specific, and then you can ask all you want.

The last one you have here is --

MS. REXWINKEL: Is "Days to issue."

CHAIRPERSON PEARCE: -- "Days to issue."

MS. REXWINKEL: Part of my responsibility is to make sure that the processes of Worker's Compensation are completed in a manner appropriate to provide integrity to the system. And in Section 9 what we have included, and one of the things which is of concern to me, is the days to issue. And I'll read what I have here.

(Whereupon, Ms. Rexwinkel continues reading from her prepared presentation, resuming on Page 13, Paragraph 3, and interjecting at Paragraph 4 of Page 13.)

MS. REXWINKEL: "It should be noted that previously, a hearing officer's evaluation was based in part on the days to issue."

It is a mathematical calculation. If you had a hearing on the first of the month and you had 30 days to get that decision out, then by the 30th you should have it. Now, part of the evaluation was were your decisions and orders issued timely so that met the 30-day requirement.

But the former Chief also incorporated a section in there that dealt with days to issue, so that if you got your Decision out on the 10th day of the month instead of the 29th day of the month,

you got extra points. And that's the basis of the second paragraph.

". . . Review of the file prior to the hearing, assists the hearing officer in framing the issues and providing a familiarity with the case, especially one that is complex. However, this criteria proved to be discriminatory to the staff in the Anchorage office based on the fact that they were denied access to the case files until the day prior the hearings."

So here you have an hearing officer's evaluation, which includes as part of that evaluation a point based on the days to issue for his or her decisions.

The staff in Anchorage did not have available to them the file beforehand; and, consequently, their days to issue were much longer from the staff in Fairbanks or in Juneau who had access to that file readily for several days, weeks, before the hearing date.

I guess in my capacity as Acting Chief of Adjudications, I canceled that part of the evaluation; and I said, based on the fact that it was unfair to staff in Anchorage. And what we strive to do is provide equity not only in the workload but in the working conditions, the work place conditions. It is extremely important to provide that equity to your employees. And as a consequence of that, I discontinued of including that in the evaluations.

CHAIRPERSON PEARCE: Any questions about that?

Okay. That leads us to a number of specific sections that you have provided to us.

Senator Halford, other questions?

SENATOR HALFORD: Well, I mean, it seems that there

is significant documentation here, that the things that are complained about are past practices or improvements of past practices.

What I am curious about is where all the incentives are?

I mean, yes, you've tightened up on a lot of things that were benefits; and I'm sure there is some resistance in any bureaucracy in doing that. But this seems to be more than that, and yet it's coming from people who have done the same thing before, who are complaining about something.

Either the records are wrong, or I would like to have some more people under oath, I guess.

CHAIRPERSON PEARCE: We can certainly do that.

Do you have any specific questions for Ms. Rexwinkel?

SENATOR HALFORD: What has happened? Why has it happened?

MS. REXWINKEL: There are a couple of things going on.

First, you have the change in the Director coming on with the new administration, in a division and a department which has previously has not been tuned in to the political party of the current administration. That's No. 1.

No. 2. My philosophy is different than the former Acting Director or former other director and/or the Chief of Adjudications.

I believe we have a responsibility to injured workers. There is another participant in the process that deserves equitable treatment as well, and that is the employer. Both of them have rights and responsibilities under the Act, and it is our obligation

to make sure that that Act is equitably enforced.

And let me tell you, there are abuses on both sides of the aisle. It's not just one side or the other side; it's both sides.

So our job is to walk that line, to make that both sides conform. That's No. 1.

No. 2. The Division of Worker's Compensation -- and I guess maybe if I went through the "Conclusion" that it would state that a little bit more. We've had a substantial budget reduction. While most state agencies are looking at budget reductions for this upcoming year, we had a substantial reduction last year. As a result of that, we made some changes. Changes are not always welcomed in any situation, let alone a reduced budget. There is always the fear that producing some sort of efficiency might mean your job is eliminated.

And so as we are working towards these efficiencies, we need to incorporate efficiencies to keep current with the workload with the staff that we have.

So there are some budget anxieties.

Staff has been fully informed that there is a reduction coming this next year, and we have a vacancy factor of $166,000. I have no vacant positions, none, which means I have to lay off somebody. That is not a pleasant thought.

In this year, the clerical staff took the majority of the cuts. On the next section that really has to be addressed is the area of Adjudications. And I think it is in Section 2 -- no, Section 1, a couple of pages prior to the ending, right behind the budget document, is the workload documentation. And you can see

where the area of workload is in Adjudications. It appears down in Fairbanks, at least for one of the hearing officers; and the Juneau hearing officer is not quite par with his counterpart who does decisions and orders and compromises and releases in Anchorage.

Looking in Anchorage, there were a total -- Mark Torgerson, there was a total of 54 decisions and orders for an average of 4.5 a month; and he also did 98 CNRs for a monthly average of 8.2.

We're in Section 1, a couple of pages right before the end.

(Brief pause while the Committee finds the reference.)

Paul Losanki did 53 decisions and orders last year for a monthly average of 4.4; Dres Mohlder did 58, with a monthly average of 4.8; Rebecca Ostrom did 54, with an average of 4.5. She as well did 391 compromise and release reviews for a monthly total of 32.6. Fred Brown, while he is stationed in Fairbanks, he comes down to Anchorage and other places to assist with the workload. He did 1.2 in Anchorage last year.

The prehearings held in Anchorage -- and there is 1.5 full-time equivalents there. More were averaged 96.9 per month.

If you look at Fairbanks, Fred Brown in Fairbanks did 27 per month, an average of 2.3. William Walters did 54, for an average of 4.5.

And the prehearings held, with one full-time equivalent, were 21.7 a month.

Well, if you look at Anchorage, at one and a half, at 96.9, and you look at Fairbanks, with one, and it's only 21.7, what's going on?

In Juneau, Larson Laird did 46 decisions and orders, with 3.8 per month. As well, he reviewed 332 CNRs, for a monthly average of 27.7.

The few prehearings held in Juneau for -- and we have about a third of a person allocated to that -- were 16.8 per month; and part of that is just the fact that there aren't very many prehearings held in Juneau.

There aren't very many prehearings held in Fairbanks, either. But allocating only 3.5 FTEs to the position in Juneau means that we have the availability of utilizing that person for other purposes. This individual spends half of her time evaluating rehab requests. She also does a whole lot of special projects for me, and I use her a lot, almost as an administrative assistant.

Now, you look at FY 92 and find out where we are. In FY 92 Rebecca Ostrom went to seasonal. She is permanent part-time. She works nine months out of the year. In looking at that, her workload has not diminished that much.

Paul Sandee, based on the fact that he is Acting Chief of Adjudications, as well as a hearing officer, I requested that he reduce his hearing officer load to half-time. That means he is only doing one and a half jobs, instead of one -- instead of two.

Anyway, his decisions and orders would really be up to 4.6.

And you look at the numbers and you can tell that there are some problems, that we need to be able to relocate individuals to accommodate where the workload is.

(Tape 1, Side B ends.)

(Tape 2, Side A)

MS. REXWINKEL: . . . and by William Walters' own words, one and a quarter hearing officers in Fairbanks, as well as probably a half time Work Comp Officer.

In the other areas, in the Anchorage office, we're struggling to keep people afloat in the prehearing area. So we're trying to make some adjustments.

Budget reductions, fear of layoffs, a dissatisfaction with the direction we are taking, changes in the criteria by which we judge people, all have an effect on individuals to produce anxiety and resistance to this new direction. That's where I think it is coming from.

CHAIRPERSON PEARCE: Senator Collins?

SENATOR COLLINS: Thank you, Madam Chair.

Last year I sat on the Labor and Commerce Subcommittee and my recollection was that Senator Schultz, who chairs that committee, recommended that the department be restructure and that you come back this year with additional cuts and restructuring. So I guess in that sense -- I know that information has been out there for a long time. And the fact that you had to do that, I know that last year we did discuss the possibility of closing the Fairbanks office or the Southeast office, given the -- you know, given the case loads that they had and the diminished workload.

And I guess you have given all of that information that predated perhaps the decision to transfer Mr. Walters, I guess I want to know: Prior to the hearing in which he made all these allegations, prior to that, have you had discussion with him, specific discussion with him, about his being transferred?

Did he learn about the transfer from a conversation with you, or did he learn it from reading a bunch of documents?

MS. REXWINKEL: We have had a discussion for some time. Last year when I offered William Walters the Acting Chief Adjudications position, and then retracted it based on the fact that he could not supervise the staff in Anchorage because he was in Fairbanks and the majority of the people were in Anchorage, I had a heart-to-heart discussion with William. And I told him at that point in time, retracting that invitation was very difficult because I knew if I did that and he was not in the Acting position, it placed him at risk. He was low man on the totem pole. He is the least senior of the hearing officers in Fairbanks.

By his own account, he recognized the fact that I only needed one and a quarter hearing officers in Fairbanks. That has got to weight very heavy on him. So we had discussed that all of last year.

He is also aware of the fact that we had discussed things like the workload in Fairbanks, and there have been a great many discussions. In fact, in the fall, we went and reduced the number of hearings per month in Fairbanks from two per month to one per month. And rightfully we could be able to hold one hearing per month in Fairbanks and, about every third month, you would have to put in an extra hearing to catch up with the workload. But you could schedule one hearing per month.

Well, all of a sudden in came a slew of applications. And consequently we had to go back to the two hearings per month. Those numbers of applications began rising about the first part of this year, in anticipation of us reducing the number of hearing