

Filed
3-27-15

Cairns, Kelly (OIC)

From: Anderson, Jason [Anderson@carneylaw.com]
Sent: Friday, March 27, 2015 9:36 AM
To: 'finkle@jdrllc.com'
Cc: Cairns, Kelly (OIC); Stillman, Drew (OIC); Saiden, Patti
Subject: RE: Robert Timmer, Docket No. 14-0247
Attachments: Johnson order.pdf; Ch. 34.12 history.pdf

Judge Finkle,

This reply is submitted on behalf of Robert Timmer, in support of his submission of March 23, 2015, (1) invoking his right to transfer the hearing to OAH pursuant to RCW 48.04.010(5) and (2) requesting under the appearance of fairness doctrine that the ALJ be delegated the authority to enter the final order.

1. Transfer to OAH is required as a matter of law.

Transfer to OAH under RCW 48.04.010(5) is mandated upon request, as a matter of right. No element of discretion is involved. The statute unambiguously provides:

A licensee under this title may request that a hearing authorized under this section be presided over by an administrative law judge assigned under chapter 34.12 RCW. **Any such request shall not be denied.**

(Emphasis added.) Courts in Washington are obliged to assume that the legislature meant exactly what it said and to give effect to the plain language of a statute, even when the court may disagree with the result. *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993).

The OIC asserts that a licensee must invoke the transfer option at the time the initial hearing demand is made, suggesting that Mr. Timmer's request is untimely. But the statute does not require that the transfer request be made at the time of the hearing demand. Indeed, the OIC has transferred matters even when the request was made long after the hearing demand—particularly where the initial demand was made before the licensee retained counsel. *See, e.g., Matter of Johnson*, OIC No. 13-0075 (copy attached). Even assuming a transfer request made nine days before the hearing may properly be characterized as "last minute," the statute sets no deadline to invoke the transfer option.

Apparently recognizing the absence of a deadline, the OIC resorts to arguing that the APA and the insurance code "broadly" contemplate a "smooth progression to a hearing." But the OIC cites no provision of the APA or the insurance code that could be read as imposing a deadline to make a transfer request under RCW 48.04.010(5). Nor does the OIC demonstrate any ambiguity in RCW 48.04.010(5). Absent ambiguity, the court derives a statute's meaning from its language alone. *Geshwind*, 121 Wn.2d at 840. The presiding officer cannot rely on broad, unsupported generalizations to disregard, or read an element of discretion into, an explicit statutory mandate. *Id.*

In addition, when the legislature adopted subsection (5) of RCW 48.04.010 by amendment in 2000, it plainly had appearance of fairness concerns in mind, as there would have been no other reason to provide for transfer upon a licensee's the request. Indeed, OAH was created out of appearance of fairness concerns. *See* ch. 34.12 RCW history (attached). The absence of a deadline in RCW 48.04.010(5) to request transfer comports with the fact that an appearance of fairness issue may arise at any time while a proceeding is pending. In the context of an OIC hearing, the legislature chose to give licensees the absolute right to request transfer to OAH at any time, without the need to demonstrate an appearance of fairness issue. In this sense, the transfer option under RCW 48.04.010(5) functions similar to an affidavit of prejudice, which "is timely so long as it is filed before a discretionary ruling, regardless of the proximity to the time of trial." *State v. Parra*, 122 Wn.2d 590, 594, 859 P.2d 1231 (1993).

The presiding officer lacks the authority to disregard the statute and deny a transfer request. Mr. Timmer's request was made well before the start of the hearing and must be granted.

2. Delegation of authority to enter the final order is necessary to cure the appearance of fairness problem.

Mr. Timmer does not ask the presiding officer himself to delegate to the ALJ the authority to enter the final order, but instead asks "the OIC"—the commissioner—to make that delegation. The presiding officer need only determine, under the APA and the appearance of fairness doctrine, that he should not hear the matter. The APA provides that "[t]he individual whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination." RCW 34.05.425(5).

The APA further provides that, "[i]f a substitute is required for an individual who becomes unavailable as a result of disqualification or any other reason, the substitute must be appointed by the appropriate appointing authority." RCW 34.05.425(7). The presiding officer may be an ALJ designated by the agency head to make the final decision and enter the final order, and may be an ALJ assigned by OAH. RCW 34.05.425(1)(b), (c). Given that Mr. Timmer is exercising his right to have the matter heard by an ALJ with OAH in the first instance, it only makes sense to delegate to the ALJ authority to enter the final order.

The appearance of fairness doctrine applies under the APA. See RCW 34.05.425(3). It requires that the adjudicative process "not only [is] fair, but appear[s] to be fair." *In re Discipline of Haskell*, 136 Wn.2d 300, 313-14, 962 P.2d 813 (1998). The purpose of the doctrine is to ensure public confidence in the proceedings. The critical concern is how the circumstances would appear to a reasonably prudent and disinterested person. *Id.* at 314. Here, the interim presiding officer is by all accounts well respected and trustworthy, and Mr. Timmer suggests no impropriety on his part. To invoke the appearance of fairness doctrine, it is sufficient to show that an outside interest *might* have influenced the decision maker, even if it did not actually affect him. *Chicago, M. St. P & P. R. Co. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 810, 557 P.2d 307 (1977).

Mr. Timmer has plainly done more than merely "speculate about institutional bias" or point to a combination of agency functions "in and of itself." An appearance of fairness problem exists for two reasons. First, the recent, publicized allegations of improper influence on the former presiding officer cast a taint over internal OIC hearings generally, under the current OIC administration. See, e.g., *State Insurance Office Defends Whistle-Blower's Removal*, The Seattle Times (May 20, 2014); *State to Pay Former Insurance Commissioner's Judge \$450,000 to Settle Job Claims*, The Olympian (November 14, 2014). Second, and more significantly for present purposes, Deputy Commissioner Hamje recently identified a potential "appearance of an impropriety" given the commissioner's announced practice of communicating agency policy to the presiding officer, noting that "the policy may not be known by or communicated to the parties in the case...and the appealing party may not be able to challenge it at the hearing." Exhibit C to March 23 e-mail. In light of these facts, a reasonably prudent and disinterested person may well conclude that Mr. Timmer cannot obtain a fair hearing within the OIC.

Thank you for your careful consideration of these issues.

Jason W. Anderson, WSBA No. 30510
Attorney for Robert R. Timmer, Licensee



Jason W. Anderson, Principal
206-607-4114 Direct | 206-622-8020 Main
[Bio](#) | [vCard](#) | [Address](#) | [Website](#)
anderson@carneylaw.com

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MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON



Phone: (360) 725-7000
www.insurance.wa.gov

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OFFICE OF
INSURANCE COMMISSIONER
HEARINGS UNIT

2013 SEP 25 A 10:29

Fax: (360) 664-2782

Patricia D. Petersen
Chief Presiding Officer
(360) 725-7105

Heatings Unit, DIC
Patricia D. Petersen
Chief Presiding Officer
Kelly C. Carlin
Paralegal
(360) 725-7002
KellyC@oic.wa.gov

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of

PRISCILLA G. JOHNSON,

Licensee.

) Docket No. 13-0075

) ORDER TERMINATING
) PROCEEDINGS

TO: Priscilla G. Johnson
5395 N. Entrada De Sabino
Tucson, AZ 85750

Priscilla G. Johnson
Farmers District Office 88-33
6340 N. Campbell Avenue, Suite 140
Tucson, AZ 85718

Jason W. Anderson, Esq.
Carney Badley Spellman
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
John F. Hamje, Deputy Commissioner, Consumer Protection Division
Marcia Stickler, Staff Attorney, Legal Affairs Division
AnnaLisa Gellermann, Esq., Deputy Commissioner, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

On February 28, 2013, the Insurance Commissioner ("OIC") entered an Order Revoking License, No. 13-0075, to Priscilla G. Johnson ("Licensee"), revoking her Washington insurance producer's license effective March 18, 2013, based upon the OIC's allegations that the Licensee allowed or directed an employee to work as an insurance producer before he was properly

Mailing Address: P. O. Box 40255 • Olympia, WA 98504-0255
Street Address: 5000 Capitol Blvd. • Tumwater, WA 98501



ORDER TERMINATING PROCEEDINGS

13-0075

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licensed, in violation of RCW 48.17.530(1)(i). On April 16, 2013, the undersigned received and filed a Demand for Hearing from the Licensee requesting a hearing to contest the OIC's Order, and on May 13, 2013, the undersigned received and filed a Notice of Appearance from the Licensee's attorney, Jason W. Anderson, Esq., who requested that this matter be presided over by an administrative law judge pursuant to RCW 48.04.010(5). Accordingly, on May 15, 2013 the undersigned transferred this matter and all contents of the hearing file to the Office of Administrative Hearings (OAH) for hearing and the entry of an Initial Order.

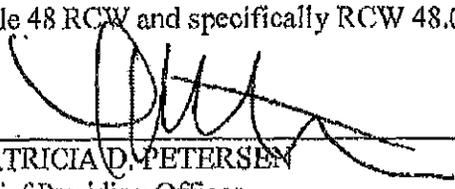
On September 11, 2013, the OIC filed a letter notifying the undersigned that the OIC had reached a settlement with the Licensee. Accompanying the letter was a copy of the Consent Order Rescinding Revocation Order 13-0075, Suspending License, and Levying a Fine, No. 13-0249, executed by the Licensee on September 9 and the OIC on September 11. A copy of the OIC's September 11 letter and the Consent Order are attached hereto and are by this reference made a part hereof. The OAH administrative law judge entered a notice of case closure on September 6, 2013 and subsequently returned the case file to the undersigned on September 9.

Relative to Consent Order Rescinding Revocation Order 13-0075, Suspending License, and Levying a Fine, No. 13-0249, it is noted that this case was settled prior to the commencement of an adjudicative proceeding. Therefore, for purposes of clarification, while this Consent Order includes statements identified as "Findings of Facts" and "Conclusions of Law," these are not Findings of Fact or Conclusions of Law which were made by an adjudicator after an adjudicative proceeding; rather, the statements contained in the referenced Consent Order which are entitled "Findings of Fact" and "Conclusions of Law" are only statements that are agreed upon between the parties.

Based upon the above activity,

IT IS HEREBY ORDERED that, by the Licensee's and the OIC's execution of the Consent Order on September 9, 2013 and September 11, 2013, respectively, the parties have fully settled this matter and the proceeding herein, Docket No. 13-0075, is dismissed with prejudice. For purposes of clarification, while the referenced Consent Order includes statements identified as "Findings of Fact" and "Conclusions of Law," these are not Findings of Fact or Conclusions of Law which were made by an adjudicator after an adjudicative proceeding; rather, the statements contained in the attached Consent Order entitled "Findings of Fact" and "Conclusions of Law" are only statements agreed upon between the parties themselves.

ENTERED AT TUMWATER, WASHINGTON, this 25th day of September, 2013, pursuant to Title 48 RCW and specifically RCW 48.04 and Title 34 RCW and regulations applicable thereto.



PATRICIA D. PETERSEN
Chief Presiding Officer

ORDER TERMINATING PROCEEDINGS

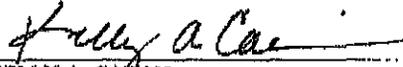
13-0075

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Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Priscilla G. Johnson, Jason W. Anderson, Esq., Mike Kreidler, James T. Odlorne, John F. Hamje, Esq., Marcia Stickler, Esq., and AnnaLisa Gellermann, Esq.

DATED this 25th day of September, 2013.


KELLY A. CAIRNS

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON



Phone: (360) 725-7000
www.insurance.wa.gov

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OFFICE OF
INSURANCE COMMISSIONER

2013 SEP 12 A 9 06

Hearings Unit, DIC
Patricia D. Petersen
Chief Hearing Officer

September 11, 2013

Chief Hearings Officer Patricia D. Petersen
Office of the Insurance Commissioner
5000 Capitol Boulevard, S.E.
Tumwater, WA 98501

HAND DELIVERED TO HEARINGS UNIT

RE: *In the Matter of: Priscilla Johnson*

Dear Judge Petersen:

Please find enclosed a copy of the Consent Order to resolve the above-referenced matter and a Notice of Case Closure signed by the ALJ Robert Krabill. Based on the Consent Order and the closure of the hearing, the parties request an order terminating proceedings.

Please feel free to contact Mr. Anderson or myself should you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Marcia G. Stickler".

Marcia G. Stickler
Staff Attorney, Legal Affairs
(360) 725-7048

cc: Jason Anderson, Attorney for Respondent





OFFICE OF
INSURANCE COMMISSIONER

IN THE MATTER OF

PRISCILLA G. JOHNSON,

Respondent.

ORDER NO. 13-0249

CONSENT ORDER RESCINDING
REVOCATION ORDER 13-0075,
SUSPENDING LICENSE, AND
LEVYING A FINE

The Insurance Commissioner of the State of Washington, pursuant to the authority set forth in RCW 48.17.530, having reviewed the official records and files of the Office of the Insurance Commissioner ("OIC"), makes the following:

FINDINGS OF FACT:

1. Priscilla G. Johnson ("Johnson") was licensed in Washington as a resident agent and producer from 1999 until she cancelled her producer license on December 5, 2012. She was appointed by Farmers Insurance in 2007.
2. EH worked in Johnson's insurance office from early September 2011 until December 5, 2012. Immediately after EH passed the Washington State insurance examination on September 23, 2011, but before he had completed the licensure process, Johnson provided EH with Farmers Insurance business cards that identified him as an "agency producer," and put him to work. Johnson confirmed to EH that as soon as he passed his exam, he could begin working as a producer. According to Johnson, she was unaware that EH had not taken the additional steps required to obtain his license and assumed that he had done so.
3. A real estate agent referred a prospective insured to EH. The prospective insured became concerned due to EH's hesitancy and inability to answer questions, even though EH told her that he was in fact licensed. The prospective insured checked EH's licensure status with the Office of the Insurance Commissioner and found that he was not licensed, and so informed EH. EH took immediate steps and was licensed on November 18, 2011. EH gave multiple quotes and sold three insurance policies while working without a license for Johnson, although Johnson signed the paperwork and did not share any commissions with him. He left Johnson's agency on December 5, 2011.

CONCLUSIONS OF LAW:

1. By knowingly accepting insurance business from a person who is required to be licensed and is not so licensed, Johnson violated RCW 48.17.530(1)(i);
2. RCW 48.17.560 provides that in addition to or in lieu of the suspension, revocation, or refusal to renew any such license, the Commissioner may levy a fine upon the licensee in an amount of not more than \$1,000 per violation.

CONSENT TO ORDER:

Respondent, acknowledging her duty to comply fully with the applicable laws of the State of Washington, consents to the following in consideration of her desire to resolve this matter without further administrative or judicial proceedings. The Insurance Commissioner consents to settle the matter in consideration of her payment of a fine and on such terms and conditions as are set forth below.

1. Johnson consents to the entry of this Order, waives any and all hearing rights, and further administrative or judicial challenges to this Order.
2. By agreement of the parties, Johnson agrees to have her license suspended for three consecutive terms of twelve months each, beginning March 18, 2013.
3. By agreement of the parties, the Insurance Commissioner will impose a fine of \$1,000.00 (One Thousand Dollars) to be paid within thirty days of the entry of this Order.
4. Johnson understands and agrees that any future failure to comply with the statute that is the subject of this Order constitutes grounds for further penalties, which may be imposed in response to further violations.
5. Johnson's failure to timely pay this fine and to adhere to the conditions shall constitute grounds for revocation of her license as an insurance producer, and shall result in the recovery of the fine through a civil action brought on behalf of the Insurance Commissioner by the Attorney General of the State of Washington.

EXECUTED this 9 day of September, 2013.

PRISCILLA G. JOHNSON

Signature: Priscilla G. Johnson

ORDER

Pursuant to the foregoing Findings of Fact, Conclusions of Law, and Consent to Order, the Insurance Commissioner hereby Orders as follows:

1. Johnson shall pay a fine in the amount of \$1,000.00 (One Thousand Dollars) to be paid within thirty days of the entry of this Order.

2. Johnson's producer license is suspended for three consecutive terms of twelve months each, beginning on March 18, 2013.

3. Johnson's failure to pay the fine within the time limit set forth above shall result in the revocation of her license as an insurance producer and in the recovery of the fine through a civil action brought on behalf of the Insurance Commissioner by the Attorney General of the State of Washington.

ENTERED AT TUMWATER, WASHINGTON, this ^{11th day} ~~9~~ day of September, 2013.

MIKE KREIDLER
Insurance Commissioner

By

Marcia G. Stuckley
Marcia G. Stuckley
Legal Affairs Division

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE OFFICE OF THE INSURANCE COMMISSIONER

In The Matter Of:

Priscilla G. Johnson,

Licensee.

OAH Docket No. 2013-INS-0003

Agency No. 13-0075

Notice of Case Closure

RECEIVED

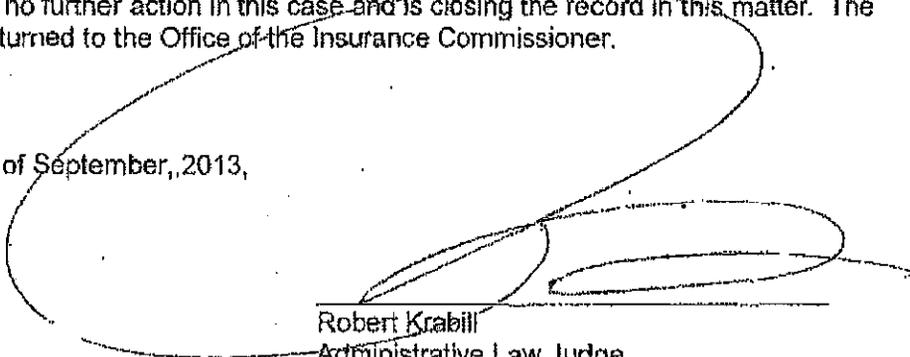
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OIC - LEGAL AFFAIRS

Ms. Johnson requested a hearing in this matter. On September 4, 2013, the parties notified the Office of Administrative Hearings that they have resolved all issues covered by the hearing request.

The hearing scheduled in this matter has been cancelled. The Office of Administrative Hearings will take no further action in this case and is closing the record in this matter. The case file will be returned to the Office of the Insurance Commissioner.

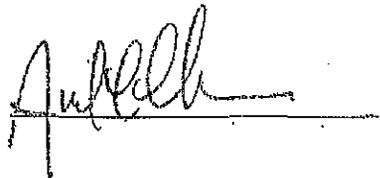
Dated this 6th day of September, 2013,



Robert Krabill
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that copies of this notice were sent by US First Class Mail, postage prepaid, to the parties listed below, this 6th day of Sept., 2013, at Tacoma, Washington.



RCW 34.12.010

ESHB 101

BRIEF TITLE: Creating an office of administrative hearings.

SPONSORS: House Committee on Ethics, Law and Justice
(Originally Sponsored By House Committee on Ethics, Law and Justice and Representatives Ellis and Ehlers)

INITIAL HOUSE COMMITTEE: Ethics, Law and Justice
ADDITIONAL HOUSE COMMITTEE: Ways and Means

SENATE COMMITTEE: Judiciary

Staff: Bill Gales (753-7719)
Committee Hearing Dates (Session): April 6, 1981; April 9, 1981

Majority Report (DPA) signed by: Senators Clarke, Hemstad, Hayner, Hughes, Newhouse, Pullen, Shinpoch, Talmadge and Woody

SYNOPSIS AS OF APRIL 13, 1981

BACKGROUND:

Individual state agencies may employ or contract for hearing officers to conduct contested case hearings under the Administrative Procedure Act. Some individuals have questioned whether an appearance of impartiality can be maintained when the hearing officer is an employee of the agency which is a party to the hearing.

SUMMARY:

An independent office of administrative law judges (ALJ's) is created. The head of the office is a chief ALJ appointed by the Governor. The chief ALJ may appoint additional ALJ's as employees of the office and may contract with persons to act as ALJ's in specific hearings. Current hearing officers and support personnel in individual agencies are transferred to the ALJ office. Administrative law judges may be disciplined and terminated, for cause, by the chief ALJ. Employees of the office other than the ALJ's are subject to the state civil service law.

Certain agencies are exempted from the bill. Those agencies are the Pollution Control Hearings Board, the Shorelines Hearings Board, the Forest Practices Appeals Board, the Environmental Hearings Office, the Board of Industrial Insurance Appeals, the State Personnel Board, the Higher Education Personnel Board, the Public Employment Relations Commission, and the Board of Tax Appeals.

Any contested case hearing not heard by agency officials responsible for the final decision in the case must be heard by an ALJ. The chief ALJ is to assign ALJ's to agencies on a long-term basis whenever practical.

Uniform procedural rules for all agencies are to be adopted by the chief ALJ. The chief ALJ may allow for variations for individual agencies as needed.

The chief ALJ is subject to the reporting requirements of the Public Disclosure Act.

New Rule Making Authority: The chief administrative law judge is granted rule-making authority.

Effective Date: An emergency is declared with respect to certain provisions of the bill. The appropriation and appointment of the chief administrative law judge take effect immediately. The remainder of the bill takes effect July 1, 1982.

Appropriation: \$120,000 is appropriated from the general fund to the office of the chief administrative law judge.

Revenue: none

Fiscal Note: available

SENATE COMMITTEE AMENDMENTS:

The amendments drop three amendatory sections from the House bill: one which conflicts with a provision in another bill; and two which require the appointment of administrative law judges for the Department of Ecology and local school districts.

ARGUMENTS AND TESTIMONY AT SENATE COMMITTEE HEARING(S)

Arguments For: Contested hearings in administrative agencies should be conducted by impartial hearings officers. The appearance of impartiality is hard to maintain when the hearings officer is an employee of the agency involved. Creating an independent agency of administrative law judges to conduct hearings is a necessary step.

Arguments Against: The list of agencies which are exempt from the bill should be increased. Employment Security felt it should because its hearings examiners were already segregated from the agency and they were under severe federal time constraints for their proceedings. The Utilities and Transportation Commission said that its hearings examiners functioned more as advisors to the Commission and that relationship should be maintained.

Testified For: Bill Gissberg, Washington Bar Association; Robert Felthous, Washington Bar Association; Nat Washington, Pollution Control Hearings Board; Ann Sandstrom; Frank Homan, Washington State Hearings Office

Testified Against: David Reis, Utilities and Transportation; Eudora Peters, Employment Security Department

EXHIBIT B

RE: HOUSE BILL 101

ROUGH DRAFT

Mr. Chairman, Representatives, Ladies and Gentlemen:

My name is Bob Falthous and I am speaking in support of House Bill #101. About a year and a half ago, the Washington State Bar Association appointed a special Task Force and charged it with the duty to examine the general question of fairness in the State's administrative process. This seven-member task force is composed of the Honorable Robert Hunter, a retired Supreme Court Justice; Professor William Andersen, a University of Washington law professor with special expertise in administrative law; three practicing lawyers, Peter Francis, a former State Senator, John Rupp and Dean Little, both with a broad background in practice before numerous Federal and State agencies; Ann Sandstrom, a non-lawyer with extensive public and civic service. I am the seventh member, a lawyer and the Chairperson.

As an initial point of focus, the Task Force looked at the role of the administrative law judge in quasi-judicial proceedings. The Task Force sought input from knowledgeable sources. We started with conferences in Olympia with administrative law judges and hearing examiners, assistant attorney generals, and then the agencies. We found some agencies describe the person conducting hearings as "administrative law judge"; other agencies describe the same person as a "hearing examiner". To avoid confusion, and for clarity, the Task Force uses the term "administrative law judge", or "ALJ". We also believe it is more descriptive of the functions performed.

Perhaps at this time, a general description as to why and how administrative hearings are conducted would be of help. I am certain you appreciate that, when

EXHIBIT B

one attempts to summarize in a few words a function as complex and varied as administrative hearings conducted by numerous different agencies, exceptions can be found. But basically, this is how it works:

A State agency issues an order. The person or persons involved disagree with the order and, if the rules applicable to that particular agency are properly followed, the aggrieved is granted a hearing. The agency assigns an ALJ to conduct the hearing. In most cases, the ALJ is an employee of the agency. In many cases, the hearing is conducted in the agency facility. Sometimes the agency is represented by an assistant attorney general. His duty is to defend the agency order. The assistant attorney general is employed by the attorney general. The hearing is conducted in a manner similar to a superior court trial. The same basic rules of evidence apply, but generally an administrative hearing is more informal. Witnesses are sworn, testimony given, evidence and exhibits received and, generally, a record of the proceeding made. The ALJ rules on objections and admissibility of evidence and usually prepares written findings and conclusions. To the participants, the ALJ appears to be the judge. However, the final decision -- the order that counts -- is made by the agency, which may or may not follow the ALJ's proposed order.

Prior to the establishment of the Task Force, House Bill 986 had been filed. It created a new office, provided that the ALJs (it termed them "hearing examiners") of each agency with support staff and equipment be transferred to the new office. Some legislative hearings were had. I was advised that no further hearings would be conducted pending the Task Force recommendations.

To assist in obtaining input, the Task Force composed a questionnaire consisting of five general questions. These questions served as an outline for our interviews and conferences. Condensed, the five questions are as follows:

1. Is it appropriate for agencies for which administrative law judges hear cases to control the salaries and promotions of such ALJs?
2. Does the location of the hearing room and the offices of the ALJs in the agency facilities threaten the objectivity of the judges or the appearance of objectivity?
3. Are the really decisive principles and policies fully known in advance to all participants?
4. Are all findings based exclusively on record evidence, properly used presumptions and inferences of which the agency may appropriately take official notice?
5. Do other agency personnel participate in inappropriate ways in formulating the administrative law judge's findings and conclusions?

These questions were published in the Washington State Bar monthly newsletter and responses invited. Responses indicated clearly that problems existed in all areas. Only one response, out of about one hundred from that circulation, stated "no problem".

The ALJs, at our conferences in Olympia, were more specific. They related examples demonstrating a definite need for reform, but we found many of them reluctant to talk with us, expressing fear of agency retaliation. Here is an example of that fear: Just prior to one of our conferences, an ALJ was relating an incident of pressure by agency personnel, when an agency attorney approached. The ALJ said, "Excuse me", and disappeared. He was back in a minute, apologized and explained he did not want to be seen talking to a Task Force member. To overcome this problem, we gave assurance that no effort would be made to tie comments with the person making the comment. With that assurance of confidentiality, we obtained valuable input.

For example: A citizen we'll call "Mary" has a dispute with a state agency over how much money she has coming. She has a choice: She can either concede to the agency position, or request a hearing. She requests a hearing, and, in due time, she is advised of the date, time and place of the hearing. She arrives alone, without an attorney, to testify and present her case. She finds that the hearing room is in the center of this agency's office building. It is an area set aside from the rest of the offices simply by glass partitions. In order to get there, she has to walk by desks of case workers and other employees of this particular agency. The witness chair which she occupies is adjacent to a window, and, from that window in plain view, can be seen the very case worker Mary thinks is the cause of all her trouble. If Mary is not completely satisfied with the final decision in this case, is there any way of convincing her that she has had a fair hearing? Is there any way of proving that she has not had a fair hearing?

Another example: A small businessman -- let's call him "Joe" -- operates a regulated business. In order to survive, he must have a license from the State. One day he receives a letter from the regulatory State agency telling him that his license is in jeopardy and he should show just cause as to why it should not be cancelled, suspended, or a fine levied. Understandably, he is greatly concerned. This is his livelihood, that of several members of his family and four or five other employees. Joe immediately goes to Olympia, seeks a conference with the man whose name appears on the order. He is told that, while the name on the order is that of the head of the agency, he should see the enforcement officer. He finds the enforcement officer in the coffee mess. He meets him and, seated next to him at the coffee table, is a man who is introduced to Joe as "Judge so-and-so". He doesn't remember his name. Later, Joe is informed by the enforcement officer that he must defend himself at a hearing as the agency is going to press the matter. Some weeks later, Joe arrives

at the hearing and there is the enforcement officer, ready to testify against him; and at the head of the table is the judge who is going to decide the case. The judge is the same person who was having coffee with the enforcement officer when Joe was in Olympia. Later, Joe learns that the judge is a subordinate employee of the same agency that employs the enforcement officer. Now, is Joe ever going to be convinced that he had a fair hearing if the final decision is not completely satisfactory to him? Is there any way of proving that he has not had a fair hearing?

Another example: An administrative law judge and an assistant attorney general travel in separate State cars from Olympia to eastern Washington to conduct a hearing. To maintain the appearance of fairness at hearings, and insulate against conflict of interest, separate modes of transportation of the judge to hear the cause, and the attorney to represent the agency, is an official policy. But the assistant attorney general, whose duty it is to represent the agency, and defend the agency's orders, is employed by the attorney general of the State of Washington; while the administrative law judge, the person that appears to the public as the one that's going to make the decision, which may be critical of the agency, is an employee of that same agency.

Another state agency which does not conduct a large number of hearings provides that, when a dispute arises between the director of the agency and a citizen involved with the agency, the director then appoints one of the staff of his agency to conduct a fair hearing. Care is exercised, however, to see that the staff person, now acting as a judge, as far as the public is concerned in this matter, is from a different section of the agency than the section involved in the dispute.

What is the difference between that situation and the hypothetical case of the prosecuting attorney calling me up and saying that he has information which will require

him to issue a warrant for my arrest? I claim my innocence; I go to his office; he shows me the information that he has; I deny it. He says, "Well, then you want a fair hearing, don't you?" I agree, so he says, "We will give you a fair hearing." He then calls in one of his deputies (one from the civil division of his office) and says to him, "Would you be the judge in this case and give this citizen a fair hearing?"

Even if we assumed that the end result in each one of these cases related was fair, that still is not the answer, because such conduct violates the appearance of fairness and is contrary to our basic concept of fair play.

The Task Force had a total of five conferences in Olympia; two with the ALJs, two with the assistant attorney generals, and one session devoted to input from the agencies. Unfortunately, only four of the agencies appeared at that conference, so the Task Force submitted a letter to forty-four agencies (names and addresses being provided by House Staff) requesting input. We had six written responses. Several were non-committal; the others indicated no need for reform within their specific agency.

The Task force, with the information received, concludes that changes are essential and the removal of the ALJs from the agencies and insulating them by placing them in a separate office is necessary. The ALJs should clearly not be the employees of the very same agencies they are called upon to judge.

HB 101 has an added bonus. The Task Force firmly believes it will be cost effective. Under the provisions of this Bill, the existing administrative law judges in the various agencies will be transferred to this new office. Most new agencies are created to perform a new function. Not so here. This office simply consolidates the existing administrative hearing process of many agencies into one. The dollar

economies which this Bill will produce are of four types:

1. The pool economy
2. Travel efficiency
3. More efficient use of talent
4. Improvement of morale

The first three mentioned economies can be confirmed by statistical information. The efficiency of the concept of pool economy has been proven through the years. An example of the pool economy concept is the State's inter-agency car pool. At one time each State agency had its own vehicles. For efficiency and economy, the Motor Transport Division was created which provides cars for many agencies.

The peak case loads of agencies come at different times. A steady work load is much more efficient. Accelerations and decelerations are inefficient and wasteful. By consolidating and pooling the administrative hearing process of many agencies, the public will be better served and there will be less delays. Informal statistics which we have received from the Employment Security Department and DSRS demonstrate this principle. The peak case load of the Employment Security Department in 1980 came in the summer months of July and August. In the same year, the peak hearing load of DSRS was high in March and April, low in the summer months and peaked in October.

The cost of travel is going to increase. It is in the public's best interest that, where possible, hearings be held in various locations convenient to the public. So the practice of conducting public hearings by the agencies out of the Olympia area should be encouraged. At the present time, each State agency schedules and conducts its own hearings out of Olympia, sending its own ALJs, its own court reporter. A consolidation of this function will allow one ALJ and one court reporter to hear cases involving a number of agencies. Let me give you a hypothetical example: Let us

assume that in the month of January, DSHS, Employment Security and Utilities and Transportation all have hearings scheduled for Port Angeles. Under the existing rules, each agency would send its own ALJ and its own court reporter, with no inter-agency coordination of hearing schedules. There is no reason why a properly trained and experienced ALJ could not hear the proceedings of all three agencies. Some agencies feel that specialization of an ALJ's function is such that ALJs can hear only a single agency's case. This is a misconception. Agencies handle a variety of cases themselves. One of the best examples is the Utilities and Transportation, where the ALJs in that agency hear transportation cases and utility cases, two types of cases that are probably as opposite and different as one can find in the administrative process.

A third area of economy is more efficient use of talent. Cases differ in complexity. Pooling brings about greater flexibility. The availability for assignment of ALJs of differing experience, qualifications and ability to fit each case will increase efficiency and reduce costs.

A final bonus will be the improvement of morale of the ALJs resulting in better decisions and attracting more qualified ALJs. Numerous ALJs told the Task Force of their frustration in making decisions critical of their own agency. Direct and indirect pressure from agency heads and staff is often felt by the ALJs prior to specific decisions. After a decision against their own agency, ALJs experience a cooling of relations, not only with their superiors, but also with agency staff who feel a loyalty to the agency. A supervisory ALJ of a large agency told us of the boredom with accompanying reduction of quantity and quality of decisions experienced by his ALJs. Although this agency conducts many different types of hearings, it is still insufficient to provide the new learning experiences that capable and ambitious ALJs should have.

The Task Force concludes that the creation of this new office will definitely be

cost effective and represent a saving to the State of Washington.

In summary, the Task Force concluded that reform is necessary and sought then a Bill that would accomplish these six general objectives:

1. Create an open door, full disclosure policy with state agency administrative hearings and decisions.
2. Increase the fairness, quality, uniformity and consistency of the administrative hearing process.
3. Improve, simplify, and increase the accessibility of the administrative hearing process with the public.
4. Expedite and speed up the administrative hearing and decision process. Cut red tape.
5. Reduce the cost of the administrative hearing process.
6. Improve the appearance of fairness in the entire administrative hearing process.

We believe that HB 101 accomplishes these objectives.

EXHIBIT C

"Washington's only exclusive representative of small business"



INDEPENDENT BUSINESS ASSOCIATION

1644 - 116th N.E.
Bellevue, Washington 98005
Phone (206) 453-8621

January 27, 1981

The Honorable Skeeter Ellis
Chairman
House Ethics, Law and Justice Committee
Olympia, WA 98504

Dear Chairman Ellis and Members of House Ethics, Law and Justice
Committee:

Independent Business Association of Washington wishes to express its support for HB 101, establishing an office of administrative hearings. Small businesses have found the existing situation of having the agency being challenged also deciding on the challenge very concerning.

Small businesses understand that they may appeal a decision of any agency through the judicial system under the administrative procedures act. However, small businesses are also keenly aware of the congestion in the courts and the cost involved in such an appeal. Such an appeal is both costly and maybe delayed too long to provide the relief needed by the challenging small business.

There are numerous examples of where decisions on contested cases by an agency needed an appeal in the mind of the small business. One example that clearly describes the broad interpretation used by an agency is where a firm was found to be in violation of the regulations dealing with the application of pesticides. The agency responsible for enforcing the regulation also issued the violation and arbitrarily decided to withhold the enforcement of the penalty until the peak business season of the business. The penalty was a suspension of the pesticide applicators license. This arbitrary decision severely harmed the small business and was unjustifiable in the particular case. However an appeal of this decision could not be timely enough to save this business from this harm.

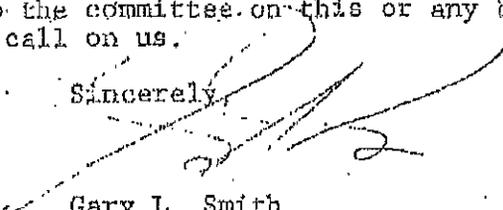
The need for a disinterested and objective third party to gather the facts and issue an objective opinion on a contested case is essential to equitable justice. This is also needed to reduce to the greatest degree possible costs in bringing contested cases, and to reduce court congestion.

EXHIBIT C

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For these reasons, IBA supports the intent of HB 101. If IBA can be of further assistance to the committee on this or any other issue, please feel free to call on us.

Sincerely,



Gary L. Smith
Executive Director