

COURT REFORM COUNCIL

ADMINISTRATIVE PROCEDURE ACT SUBCOMMITTEE

Meeting #2
August 11, 2017 at 2:00 PM
40 Capitol Square SW, Atlanta, Georgia
Judicial Building, Coleman Conference Room (332)

MINUTES

At 3:00 PM, Chief Judge Michael Malihi called the second meeting of the Court Reform Council's APA Subcommittee to order and initiated introductions.

Copies of the minutes from Meeting #1 of the subcommittee were distributed and reviewed. Court of Appeals Judge Charles Bethel moved for the minutes to be approved as circulated. The motion was seconded by Carey Miller, serving as proxy for David Werner, Executive Counsel for the Office of the Governor. The subcommittee members unanimously voted to approve the minutes. *(Note: Although the motion to pass was seconded at the start of the meeting, a vote was not actually taken at that time. The oversight was pointed out prior to the close of the meeting, at which point Judge Malihi immediately called for a vote.)*

Judge Malihi gave brief introductory remarks, stating that the subcommittee had reviewed the comments made at the last meeting, and conducted additional research and sought comments from various agencies and experts. He also proposed that, of the seven potential reforms to the APA that had been discussed at the last meeting, only three be pursued. Handouts listing these three reform areas were distributed.

Lisa Boggs, OSAH's General Counsel, next gave a brief overview of the seven potential reforms, starting with the four reforms that might not be worth pursuing. The first of these four reforms involved judicial review—namely, whether final decisions under the APA should be made directly appealable to the Georgia Court of Appeals, rather than superior courts. Ms. Boggs stated that (a) reservations had been raised at the last meeting about eliminating superior-court review, including constitutional concerns; and (b) comments at the last meeting indicated that superior courts currently do not find the administrative caseload overwhelming.

The second of the four reforms to potentially discard concerned jurisdiction—namely, whether to make all agencies subject to the APA and OSAH's jurisdiction, with certain exceptions. Ms. Boggs stated that, based on the comments from the last meeting, (a) a closer case-by-case analysis would likely be needed; (b) certain policy issues would first need to be addressed; and (c) such a reform may require extensive legislative amendments.

The third of the four reforms to potentially discard involved two evidentiary matters: having the APA explicitly state that the Georgia Evidence Code applies in all administrative hearings; and giving administrative law judges (ALJs) discretion in allowing witness testimony by telephone or video. Ms. Boggs stated that, to make the Evidence Code applicable, multiple exceptions to the Code would be needed. Also, O.C.G.A. § 24-1-2 already defines how the Evidence Code would apply in administrative hearings.

Supreme Court Justice Nels Peterson asked if this was what was currently practiced in administrative hearings, and Judge Malihi answered in the affirmative.

As to allowing judges more discretion on the question of testimony by remote means, Ms. Boggs stated that Confrontation Clause concerns remained, as did questions of implementing safeguards and standards.

Justice Peterson clarified that his comments at the last meeting were not that the Confrontation Clause applied or were a legal reason not to pursue this option, but that the overall goals of the Confrontation Clause needed to be considered in the matter.

Judge Malihi commented that phone testimony makes it difficult to gauge a witness's credibility.

Fulton County Superior Court Judge Shawn LaGrua also noted that judges do not know who could be coaching people when they testify by telephone.

Judge Bethel asked about the current state of remote testimony in APA hearings, and Judge Malihi replied that both parties must agree to a telephone hearing or just one witness appear by telephone.

Justice Peterson then asked if OSAH interprets that as allowing video testimony, and Judge Malihi responded that some ALJs allow video, and some do not.

Justice Peterson commented that if phone testimony is allowed, it makes sense to allow video testimony as well.

Judge Bethel then asked whether the benefit of this reform would be to allow remote testimony over the objection of one party. Judge Malihi responded in the affirmative, stating that cases are heard in all 159 counties, and that parties may have to travel long distances to submit even small portions of testimony.

The last of the four reforms to potentially discard concerned an amendment to the APA so that it specified that the Georgia Civil Practice Act (CPA) applied in all APA hearings. Any exceptions to the CPA (e.g. discovery rules) could be explicitly listed in the APA's provisions, as opposed to promulgated rules. Ms. Boggs stated that (a) multiple exceptions to the CPA would be needed; and (b) making changes to OSAH's rules would be an easier route to take.

Justice Peterson noted that the rule could stat that the CPA generally applies, and then list exceptions or state something along the lines of "unless the judge says otherwise."

State Representative Mary Margaret Oliver asked for clarification on the reforms listed on the handout. Ms. Boggs clarified that the handout only discussed the three reforms that were proposed for further discussion, and did not list the four reforms to be discarded, which were just discussed.

Judge Malihi then asked for comments on the four reforms to potentially discard.

Bill Clark, of the Georgia Trial Lawyers Association, confirmed the four reforms that would potentially be discarded and the three reforms that would potentially move forward.

Representative Oliver requested a restatement of the jurisdiction reform that would potentially be discarded; Ms. Boggs responded.

Justice Peterson directed a question to Mr. Clark, as to whether handling any changes regarding the Evidence Code's application could be handled through the rule-making process. Mr. Clark responded that his greatest concern area is workers' compensation practice, and he does not see a need to make changes to the status quo with regards to that area.

Ms. Boggs next proceeded to outline the four areas of reform that potentially could be pursued at this time: (1) final decision authority; (2) enforcement authority; and (3) filing hearing requests. The subcommittee proceeded to lead a discussion on each of these areas of reform.

(1) Final Decision Authority

Ms. Boggs stated that, during the last meeting, the subcommittee discussed the proposal to give OSAH authority to issue final decisions for all contested cases that appear before its ALJs. Ms. Boggs explained that the APA currently requires all decisions issued by OSAH ALJs to be "initial" decisions that require agency review, unless by statute or rule the agency allows the decision to be "final" and go directly to judicial review. Upon further review, this reform option was refined: The new proposal gives ALJs final-decision authority in all cases, with the following exceptions: decisions for licensing boards and commissions; or decisions for agencies constitutionally created or headed by constitutional officers. The benefit would be that parties skip a step of review. Ms. Boggs then outlined some of the agencies that potentially would fall under the exception to final-decision authority, including the Professional Licensing Board Division and the State Personnel Board.

Ms. Boggs next presented two graphs (available in the handout) showing effect this proposed change would have. Based on the number of referred cases in FY17, the number of cases that would have Initial Decisions are projected to drop from 35% to 0.4%.

Representative Oliver confirmed with Judge Malihi that this drop in cases comes primarily from Department of Human Services cases switching from Initial to Final. Judge Malihi also confirmed to Representative Oliver that Certificate of Need (CON) cases fall under the Department of Community Health, but are not referred to OSAH

Judge LaGrua asked if there was any projection to how this proposed reform would affect the number of appeals to superior court. Justice Peterson mentioned that Russell Willard, Assistant Attorney General, may be able to respond. Mr. Willard responded that with Initial Decisions, normally the agencies have been affirming the decisions.

Representative Oliver stated that she supported this change because it would avoid a delay in relief for individuals who, for example, have a benefits case.

Mr. Willard commented that cases for his "day-to-day client" for his own work fall under the 0.4% of cases that would remain Initial Decisions after the proposed reform. For others in his office who handle cases that would change from Initial to Final, there is rarely a divergence from the decision made in the Initial Decision and what happens upon agency review. Representative Oliver commented that this observation supports a finding that Initial Decisions are not a good use of time, and Mr. Willard agreed.

Justice Peterson asked whether procurement cases get challenged via the APA process. Judge Malihi stated that he has never seen one of those cases and did not know where these cases go. Justice Peterson

stated that it would be a good thing to know, so agencies to have “the last word” in these cases. Mr. Willard stated that he could confirm this with his office.

Representative Oliver circled back to CON cases, stating that she is seeking confirmation as to whether decisions of the hearing officer go straight to superior court.

Ms. Boggs proceeded to list some advantages of increasing final decision authority: (a) removing a level of review; (b) strengthening the appearance of impartiality; and (c) staying in line with recent legislation that has given OSAH final-decision authority. Disadvantages include (a) agencies losing control over decisions; and (b) losing agency expertise in the agency’s respective field.

Ms. Boggs then discussed the nationwide trend toward having final decisions. She then reviewed research conducted on the 2010 Model State Administrative Procedure Act’s stance on finality.

Judge Malihi then asked for questions or comments regarding the proposed reform on finality. Representative Oliver moved to adopt the reform on Final Decision Authority, as set forth in the earlier presentation. The motion was seconded. A vote was taken, and the motion passed unanimously. Judge Malihi stated the reform would be taken to the full Court Reform Council.

(2) Enforcement Authority

Ms. Boggs next reviewed the proposed reform on enforcement authority. She reviewed the proposed reform discussed during the June meeting, and noted that the revised option has not changed much, except to say that the APA would be modified to (a) provide the power to enforce subpoenas when parties do not appear, through the imposition of fines; and (b) provide the power to sanction individuals for such actions as disobeying or resisting lawful orders of process, or other actions.

The advantages include the following: (a) reducing the time needed to enforce subpoenas in superior court; (b) sanctioning discourages parties from issuing unnecessary subpoenas; (c) reducing superior courts’ workloads; and (d) following the precedent in state law for workers’ comp to have enforcement authority. Disadvantages include that this reform may not help with caseload for superior courts, as that caseload is not overly burdensome.

Justice Peterson asked whether “enforcement” of a subpoena means that the ALJs can simply issue fines via an order, and then the fine itself has to be enforced by superior court. Judge Malihi confirmed this was correct. Justice Peterson asked if this was what the workers’ comp board does now, and Judge Malihi confirmed this, referring to the statute for workers’ comp listed in the report.

Judge LaGrua asked whether the ALJ would have the right to impose fines for issuing unnecessary subpoenas, which does not appear covered in the first prong of the reform. Judge Malihi stated this was a very good suggestion to add such language.

Ms. Boggs referred to O.C.G.A. § 34-9-18 and § 34-9-60, regarding the subpoenas and civil penalties for workers’ comp cases. Mr. Miller stated that Judge LaGrua’s comment about subpoenas did not appear covered, and Judge Malihi again stated it would be a good idea to address this matter about “abuse of process” by a party.

Judge Viola Drew, of the State Board of Workers' Compensation, commented that the board imposes fines for violations and directs the parties to pay. Mr. Miller responded that the proposed reform shows two categories: (1) disobeying subpoenas and (2) imposing sanctions for abuse of process. Justice Peterson added that if sanctions are going to be added, it needs to be an even-handed process.

Mr. Willard asked that when drafting language to reflect this, the language should only refer to language to sanction, and does not impact an agency's ability to independently issue subpoenas outside of the OSAH context.

Judge Malihi asked whether the subcommittee was ready to vote to take this reform to the full council. Mr. Miller made the motion to approve as amended, which Representative Oliver seconded. The motion was approved.

(3) Filing Hearing Requests

Ms. Boggs reviewed the final proposed reform regarding filing hearing requests. The options discussed during the June meeting were to specify a deadline by which agencies must refer cases to OSAH, or to require parties to file hearing requests directly with OSAH. Upon review, the new proposed reform is to specify a deadline by which agencies can refer cases; once that deadline passes, parties can file for a hearing directly with OSAH.

Representative Oliver stated that delays with getting cases referred has been a large problem with parties, as large agencies with large volumes of cases can delay the referral of cases. She stated that it did not make sense for the litigant to make a request to OSAH, because the agency has to submit the record to OSAH. She asks what kind of timetable is reasonable to give to the agency. She was thinking 30 to 60 days might be a possible deadline.

Justice Peterson stated that the answer to Representative Oliver's question may depend on the case or agency. Some cases may be more complex, and a one-size-fits-all solution would not work as well.

Representative Oliver suggested that a guideline could say agencies have 30 days, unless the agency sets forth a rationale and proposed timetable for an extension, which would be determined by "X."

Judge Bethel stated that if the decision is left with the OSAH ALJ, the judge could determine whether the deadline for referrals can be extended. Representative Oliver noted that the OSAH ALJ may not be assigned to the case by then. Judge Malihi noted that Judge Bethel's solution would work, as OSAH staff can make the inquiry. Representative Oliver asked how long it takes for a case to be assigned. Judge Malihi stated that it took less than 24 hours.

Mr. Miller suggested that leaving the "reasonable time" language gives flexibility for agencies to make suggestions on the referral deadline.

Representative Oliver asked Justice Peterson whether he thought that 30 days was enough for a referral. Justice Peterson responded that a "reasonable time" will be a wide range, and can be complex.

Judge Bethel stated that once a deadline is put out, agencies will have a comment about whether the time is reasonable.

Representative Oliver stated that she did not feel strongly what the number of days should be, but that she thought the number should be set. She mentioned that she was shocked about the number of referrals for cases involving the Child Abuse Registry.

Representative Oliver mentioned CON again, and asked whether there was any consideration for those cases. Justice Peterson stated that those cases were complex and require expertise. Judge LaGrua mentioned that she has never seen CON cases. Mr. Willard mentioned that the APA is divided into two articles, and some agencies that do not fall under Article 2 (to fall under OSAH) are still covered by Article 1, as to how the case is processed. Judge Bethel noted that someone can look into CON in the meantime to see if any issues could arise with these reforms.

Dominic Capraro, OSAH Staff Attorney, commented on the timeline for Child Abuse Registry cases. He mentioned that there is a statutory deadline for referring those cases, and only one person at the agency actually refers those cases. Justice Peterson asks what happens when the agency does not send the case within the deadline. Mr. Capraro answered that it depends on whether a party makes a motion on the matter, and that the consensus was the statute is directory language. Mr. Capraro stated that the agency did a good job meeting the deadline.

Judge Malihi asked for any further comments or discussion. He then asked if the subcommittee was ready to vote to take this option to the full council.

Judge LaGrua asked whether there was a consensus on the language that would be put forth regarding this reform. Justice Peterson suggested the term “reasonable time” would be determined on a case-by-case basis. Representative Oliver noted that she wanted to keep in mind setting a certain number of days. Justice Peterson suggested that each agency could establish its own reasonable deadlines, to be approved by OSAH.

The subcommittee then unanimously voted to present the reform to the council, using “reasonable time.”

After being informed that the minutes were not officially voted on at the start of the meeting, the minutes were approved unanimously.

Meeting adjourned at approximately 3:00 PM.