



Washington State Auditor's Office

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Performance Audit Administrative Appeals

May 11, 2016

More than 100,000 administrative appeals are conducted by 28 Washington state agencies every year. Administrative appeals processes are working as intended in Washington, and the state agencies we evaluated are managing appeals effectively. However, processes differ among agencies and can be intimidating for some participants. Administrative appeals processes are in some ways an extension of agency policy, and some stakeholders and participants believe that hearings are biased toward agencies. There are differences of opinion among stakeholders about key aspects of administrative law, particularly regarding communications with hearing officers and the proper use of informal policy making.

To address these issues, we recommend the Legislature amend parts of the Administrative Procedure Act. We also make recommendations to certain state agencies that we think will help appeals participants navigate more easily through the appeals process.



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Executive Summary

Administrative hearing processes are functioning as intended in Washington, but striking the balance between implementing agency policy and providing a fair process is challenging.

State agencies are committed to administering appeals of their decisions in an economical, expedient and impartial manner that also serves to implement agency policy. The state agency appeal and review processes we reviewed for this performance audit are designed to resolve cases impartially. However, some participants find the process difficult to navigate, while others believe the process is biased towards agencies.

Through the Administrative Procedure Act (APA) and other statutes, lawmakers intended to provide due process for appeals participants while maintaining the flexibility agencies need to implement policy. Efforts are under way to amend the Administrative Appeals Act. Differences of opinion among stakeholders – including legislators, administrative law specialists, state agency managers, hearing officers and appellants – make maintaining the right balance difficult. All agree that appeals must be impartial in both fact and appearance, but they disagree on some of the details. Two issues have generated particular controversy:

- Who should have final order authority, and what degree of influence should an agency have on the decision-maker, who is usually a hearing officer?
- How should agency policies that are not reflected in its rules (often referred to as “informal guidance”) be considered in a hearing officer’s decisions?

In response to these concerns, we set out to gain an understanding of appeals processes, identify important issues and conflicts, and determine how well appeals processes are working in Washington. We focused on two key elements: understandability and perceptions of impartiality.

The questions we set out to answer were:

1. Are administrative appeals processes understandable?
2. Do administrative appeals processes appear impartial?
3. How can the state strengthen the appearance of impartiality?

To answer these questions, we interviewed or surveyed people involved in administrative appeals and evaluated nine agency appeals processes. We also examined how five other states manage administrative appeals, looking for potentially useful practices. Once we realized that state agencies were managing appeals effectively, we focused our attention on state-level issues.

Appeals by the numbers...

100,000 *appeals*

of state agency decisions in 2014



28 *agencies*

offer appeals



3 *most common appeals:*

unemployment benefits

toll violations

workers’ compensation payments

Why use an administrative appeals process?

Through administrative appeals, state agencies provide a resolution process for people and businesses to dispute agency decisions. Intended to be more timely, informal and economical than court processes, appeals processes were designed to ensure disputes are decided impartially and fairly, while serving to enforce agency policies. Most administrative appeals cases are resolved without going to court.

Appeals processes vary among states and within Washington

Administrative appeals processes vary among states as well as among agencies within Washington. The most notable difference is whether a final decision is made within a regulating agency or by a different agency or board.

Washington uses a central panel agency – the Office of Administrative Hearings – to process a large portion of its appeals, as do about half of all states. We found that no state exclusively uses a central panel agency. We also looked more closely at appeals processes in five other states, and found Washington's processes are, on the whole, similar to them but with some important differences. Specific aspects of appeals differ from state to state, including the types of cases processed in a central panel and which agency issues a final decision – the regulating agency or a central panel. Guidelines also differ. For instance, state rules regarding communications with judges vary considerably.

Based on our analysis, we do not propose an overhaul of appeals processes

The practice of using agency-employed hearing officers has come under scrutiny, with critics in the Legislature and elsewhere suggesting it appears biased and may interfere with independent decision-making. Some stakeholders find it unfair that an agency can reverse hearing officer decisions, and that unpublished decisions or unclear policies can influence appeals decisions.

Others are concerned that certain kinds of communication with hearing officers can create the fact or appearance of improper influence. Some stakeholders believe that regulating agencies can improperly influence a hearing officer's decisions – even if the hearing officer is employed at a different agency. State statute establishes requirements for such communications, but even so, some believe improper influence can be applied even when statutory requirements are followed.

But because appeals must balance competing goals, and serve stakeholders with opposing priorities, it is likely that appeals will never be reformed to everyone's satisfaction. Even so, more can be done to help appeals be perceived as more impartial.

Recommendations

Based on our review, we recommend the Legislature clarify statutory provisions relating to permissible communications with judges and the role of informal guidance in appeals. We also offer recommendations specific to each agency reviewed, as well as suggestions for enhancing public perceptions while facilitating access to appeals. We also identified noteworthy practices, both within Washington and in other states, that agencies should consider implementing.

Throughout the report, we identify policy issues and tradeoffs, and discuss the differences of opinion among stakeholders, appeals participants and specialists. We also identify requirements that would benefit from additional clarification through amendments to statute. The Legislature, with input from stakeholders and specialists, is in the best position to accommodate differences of opinion and competing objectives, and thus determine how to proceed. For this reason, our recommendations to amend statute identify elements in need of clarification, but do not offer specific statutory language. To assist the Legislature, we present examples of approaches taken in other states in our report.

To improve perceptions of fairness and hearing officers' impartiality, both within the agencies and among stakeholders, we recommend the Legislature:

1. Amend the APA (RCW 34.05.455) and Board of Industrial Appeals statute (Chapter 51.52 RCW) regarding ex parte communications with hearing officers by clarifying:
 - What types of communication between management and hearing officers are allowed
 - When and in what capacity managers may provide direction regarding a hearing officer's performance
2. Add a new section to Part II of Chapter 34.05 regarding the role of informal guidance by clarifying:
 - In what circumstances hearing officers may apply informal guidance in developing administrative decisions
 - Whether managers may require hearing officers to apply informal guidance
 - If hearing officers may apply informal guidance, clarify whether hearing officers may apply written guidance, unwritten guidance, or both.

Recommendations to state agencies

We developed the following recommendations with the understanding that it is not practical for all agencies to have similar operating processes. With factors such as resources and volume of appeals taken into consideration, some agency processes need not be as robust as others; our recommendations to state agencies reflect this.

We recommend all agencies, with the exception of the Department of Revenue and the Office of the Insurance Commissioner, develop internal guidance regarding:

- What types of communication between management and hearing officers are allowed
- When and in what capacity managers may provide direction regarding a hearing officer's performance

Examples of internal guidance include but are not limited to a code of ethics, a memo, or an administrative policy. We excluded the Office of the Insurance Commissioner because it recently adopted such internal guidance, and the Department of Revenue, because it is not subject to the APA.

We also make recommendations to three state agencies that will help appeals participants navigate through the appeals process. We hope that this report can inform efforts to deliver appeals that inspire the public trust.

Introduction

Administrative appeals are intended to provide a timely, less formal and cost-effective resolution process for disputing agency decisions related to benefits, taxes and other matters. The objective is to make fair, impartial decisions while avoiding costly and time-consuming litigation. The vast majority of administrative appeals are in fact finalized without resorting to judicial review through courts.

The less formal nature of administrative law, however, has resulted in controversies that affect administrative appeals processes. Administrative rulemaking processes are intentionally designed to be flexible to accommodate the policymaking responsibilities of state agencies, and the Administrative Procedure Act (APA) reflects this by encouraging but not requiring formalized rulemaking by agencies. Agencies may apply informal guidance, such as advisories, when making a decision affecting a person or business, but appellants, agency management, hearing officers and other stakeholders disagree about whether or how a hearing officer should take informal guidance into consideration when making decisions.

Such disagreements can provoke considerable controversy within an agency itself. In 2014, an experienced hearing officer at the Office of the Insurance Commissioner disagreed with a supervisor about whether it was appropriate for them to discuss agency policy matters that might influence appeals decisions. The dispute, covered in the media, turned on whether these discussions – though not about a specific case – could be used to pressure a hearing officer to decide in the agency’s favor. The supervisor felt the conversations were necessary. The dispute was only resolved when the hearing officer resigned from the agency.

Balancing the agency’s need for operational flexibility and discretion with fair appeals for participants is challenging. Further, the approach selected for balancing these goals can affect appellants’ perceptions of the process. While appeals processes are designed to be impartial, elements of the process may lead some participants to perceive that the process is biased towards the agency or another participant. This is an important consideration for agencies because appellants’ perceptions can influence whether they feel they received a fair hearing, particularly if they get an unfavorable result. Agencies therefore want to ensure a process that is not only fair but has the appearance of fairness. This will help an agency minimize the number of cases appealed to the courts.

Audit objectives

We focused our analysis on the perception of impartiality because assessing impartiality would have required us to examine and revisit already-decided cases. Since we could not directly assess whether appeals processes are impartial, we focused on whether appeals processes had measurable elements of impartiality, such as transparency and ease of access, and whether stakeholders perceived the processes as impartial. To do this, we sought to answer the following questions:

1. Are administrative appeals processes understandable?
2. Do administrative appeals processes appear impartial?
3. How can the state strengthen the appearance of impartiality?

Administrative appeals affect many people and businesses

Almost 30 agencies administer more than 100,000 administrative appeals in Washington annually.

The report opens with a *Glossary of APA-Related Terms* and a *Primer on Administrative Appeals* to help the reader gain a broad understanding of administrative hearings as well as pertinent issues. The Primer includes a general discussion of administrative hearings processes, followed by information on administrative appeals processes in Washington, including a comparison to other states.

The *Audit Results* section includes a discussion of key issues and provides answers to the three audit questions based on our understanding of the system and our analysis of agency administrative appeals processes in Washington (detailed in Appendix C).

Recommendations include state-level and agency-level recommendations.

The appendices include detailed agency-level administrative appeals process analyses, survey results, information on other states' processes and practices, and a list of resources. Other appendices include how we addressed the I-900 elements of a performance audit and the methodology we used to conduct our work.

Glossary of APA-Related Terms

Adjudication – The legal process where a hearing officer reviews evidence, arguments and legal reasoning to come to a decision which determines the rights and obligations between disputing parties.

Agency action – A decision or action made by an agency related to licensing, implementing or enforcing statutes, adopting or applying agency rule or order, or granting or withholding of benefits.

Appearance of fairness – The appearance of fairness doctrine states that adjudicative proceedings must be fair in fact, but must also appear to be fair and free from any appearance of partiality, impropriety, conflict of interest, or prejudgment.

Dismiss – To terminate a case without further hearing for any number of reasons including an appellant's voluntary dismissal of a case.

Ex parte communication – During a legal proceeding, this term describes communication between one party and a hearing officer, usually without notice to or argument from the other party. Washington statute specifically defines ex parte communication and, with exceptions, prohibits it.

Final decision authority – The authority to issue a final administrative decision on a specific type of appeal. For certain types of appeals in Washington, a regulating agency may issue a final decision, while for other types, a hearing officer at a different agency carries out this function.

Hearing officer – An official who presides at an administrative hearing and who has the power to administer oaths, take testimony, rule on questions of evidence, and make factual and legal determinations. Within the context of this report, hearing officer is used interchangeably with administrative law judge and presiding officer.

Impartiality and independence – Black's Law Dictionary defines impartial as "unbiased" or "disinterested." As one scholar has noted, "Impartiality as a judicial trait is often confused with independence. Impartiality is about fair-minded, neutral decision-making. Independence is created primarily by structural aspects of government."

Informal guidance – Any agency opinion about the meaning of its statute or rule that is not formalized in an appeal decision. The APA establishes two forms of informal guidance – interpretive statements and policy statements – and encourages their use. In written form, an agency may also communicate its view via manuals, directives, memos or bulletins; informal guidance can also include conversations or briefings that describe an agency's stance.

Judicial review – A review of administrative decisions carried out by the courts.

Policy – The general principles by which a government is guided in its management of public affairs. Within the context of this report, policy means formal agency rules, precedential decisions and case law.

Regulating agency – Within the context of this report, an agency whose decisions and actions may be appealed. Includes LNI, DOR, and any agency meeting the definition in RCW 34.05.010.

Remand – To send a case back to the court or tribunal it came from for some further action.

Settlement – An agreement ending a dispute among parties to a case, reached either before or after a hearing.

Scope & Methodology

The analysis in this audit focused on the *perception* of impartiality in administrative appeals; to have assessed whether decisions were indeed made impartially would have required us to examine and revisit already-decided cases. Doing so would have expanded the audit beyond a reasonable scope, and so we limited our work to assessing whether appeals processes had measurable elements of impartiality, such as transparency and ease of access, and whether stakeholders perceived the processes as impartial. Our work addressed the following questions:

1. Are administrative appeals processes understandable?
2. Do administrative appeals processes appear impartial?
3. How can the state strengthen the appearance of impartiality?

Developing an understanding of appeals and what guides them

Administrative appeals processes are complex. To gain an understanding of them, we utilized a two-tiered approach:

1. A state-level analysis based on:
 - Literature review
 - Interviews with stakeholders and experts
 - A review of practices in other states
2. An evaluation of nine agency appeals processes based on:
 - Interviews with stakeholders and experts
 - Surveys of appellants, their representatives and hearing officers
 - A criteria evaluation to determine whether appeals processes are understandable and support the appearance of impartiality.

Following is a general discussion of our approach. See **Appendix B** for more detail on our methodology.

We interviewed stakeholders and experts on administrative appeals

We spoke with stakeholders involved with administrative appeals to hear their perspectives. We spoke with advocacy groups, administrative law scholars and others who have participated in administrative appeals in some way. We used these discussions to help us gain a stronger understanding of administrative hearings, identify areas of risk and frame our evaluation of agency processes.

We surveyed people involved in the processes: Appellants, representatives, and hearing officers

We wanted to gather the perceptions of individuals, businesses, lawyers or other representatives, and hearing officers involved in each of these nine appeal processes and gather their perceptions. We used information from laws, discussions with stakeholders, a review of previously conducted surveys on similar topics and other literature to help inform our survey design. See **Appendix D** for more information on the survey results.

Our review of structures and processes in other states identified potentially useful practices for Washington

We examined five other states, some similar to and some different from Washington, to identify practices that Washington could also use to strengthen understandability of its appeals processes and the appearance of impartiality. We also reviewed administrative procedures statutes in 15 states to help us develop recommendations; these states are listed in Appendix B.

To help readers understand administrative appeals, we include both general and Washington-specific information in the report to familiarize readers with the terminology, the process and perspectives on some issues related to administrative appeals.

The five states we reviewed in depth

Arizona Oregon
Maryland South Carolina
Minnesota

We evaluated nine appeal processes to determine their understandability and whether they supported the appearance of impartiality

This audit examined each step in the appeal process, from the point at which a person or business contests a decision made by an agency to the final administrative decision. We did not evaluate the initial assessment by the agency (for example, the process by which an agency denies a benefit), except in the case of the Department of Revenue Rule 100 process, which is a continuation of the audit process. We also did not examine the quality of decisions or the process after the final administrative decisions are made (such as Superior Court review).

After identifying 28 state agencies that conduct administrative appeals, we gathered basic information about the type and volume of their appeals and how they conduct them. This included whether they conducted their appeals entirely in-house using agency-employed hearing officers (the internal model), entirely delegated using hearing officers employed by another agency (the external model), or a combination of internal and external decision-makers and hearing officers (the mixed model). The three models of operation are described in detail in the *Primer to Administrative Appeals* section of this report.

To gauge the understandability and impartiality of the process, and to seek practices that could be used by agencies across the state, we evaluated nine appeal processes in greater detail. They were chosen based on our interviews with administrative law specialists and stakeholders, public interest in the process, the volume of appeals, and potential risk to appellants. We also evaluated agency-wide processes at the Office of Administrative Hearings (OAH) and their role in the mixed-model appeals processes. **Exhibit 1** lists the nine processes, the agencies that conduct them, and the model of operation.

Exhibit 1 – The nine appeals processes and the agencies responsible for conducting them

Appeal process	APA or other	Agencies involved	Operational model
Insurance-related appeals	APA	Office of the Insurance Commissioner (OIC)	Internal
Retirement benefits	APA	Department of Retirement Systems (DRS)	Internal
Excise taxes (pre-APA appeal)	Rule 100	Department of Revenue (DOR)	Internal
Office of Administrative Hearings (OAH) agency-wide appeals	APA	Office of Administrative Hearings (OAH) <i>Note: In some appeals outside the scope of this audit, OAH holds final decision authority and would be considered in the External operational model.</i>	Mixed
Unemployment insurance benefits	APA	Employment Security Dept (ESD) and OAH	Mixed
Medicaid benefits	APA	Health Care Authority (HCA) and OAH	Mixed
Public assistance benefits	APA	Department of Social & Health Services (DSHS) and OAH	Mixed
Excise taxes (appeal of DOR decision)	APA	Board of Tax Appeals (BTA)	External
Workers' compensation	Title 51 RCW	Board of Industrial Insurance Appeals (BIIA)	External

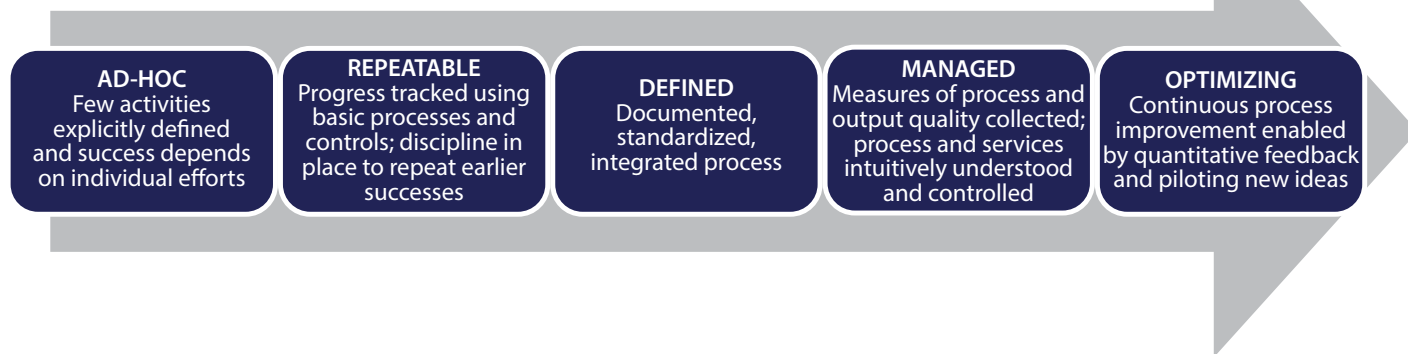
We evaluated each of the nine processes on the following qualities:

1. Accessibility and transparency
2. Impartiality
3. Performance management
4. Process for providing consistent, quality decisions

The criteria we used to measure these qualities are described in detail in Appendix B.

Using information we collected from a variety of sources, including literature review and interviews, we evaluated the appeal processes and rated them using a maturity model, illustrated in **Exhibit 2**. The term “maturity” relates to what degree a process is formalized, documented and optimized – from ad hoc, when few activities are explicitly defined, to optimizing, when continuous process improvement is enabled by quantitative feedback. This evaluation gave us an indication of how well agencies were conducting administrative hearings.

Exhibit 2 – We positioned the nine appeals processes we examined along the Maturity Model scale from Ad Hoc to Optimizing



Our analyses of agency processes, in conjunction with our state-level analysis, provided the information we needed to answer the first two audit questions: whether appeals processes are understandable and appear impartial. The state-level analysis and our examination of other states informed our answer to the third audit question about improving the appearance of impartiality.

Audit performed to standards

We conducted this performance audit under the authority of state law (RCW 43.09.470), approved as Initiative 900 by Washington voters in 2005, and in accordance with Generally Accepted Government Auditing standards (December 2011 revision) issued by the U.S Government Accountability Office. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. See **Appendix A**, which addresses the I-900 areas covered in the audit. Appendix B contains more information about our methodology.

Next steps

Our performance audits of state programs and services are reviewed by the Joint Legislative Audit and Review Committee (JLARC) and/or by other legislative committees whose members wish to consider findings and recommendations on specific topics. Representatives of the State Auditor’s Office will review this audit with JLARC’s Initiative 900 Subcommittee in Olympia. The public will have the opportunity to comment at this hearing. Please check the JLARC website for the exact date, time, and location (www.leg.wa.gov/JLARC). The State Auditor’s Office conducts periodic follow-up evaluations to assess the status of recommendations and may conduct follow-up audits at its discretion.

A Primer on Administrative Appeals

Purpose of administrative appeals

Administrative appeals serve as one means for an agency to enforce and develop policy. While serving this purpose, they must also be fair and impartial, increase public access to the law and promote administrative efficiency. Achieving these goals requires striking a balance between traditional procedural protections associated with due process and efficient case resolution. Due process protections include:

- receiving notice of a hearing
- providing all parties with a fair hearing where everyone understands the rules and policies that will serve as a basis for the administrative hearing officer's decision
- the opportunity to clarify information, present evidence and be heard

To resolve cases efficiently, procedural rules are relaxed in comparison with those used in the courts. For example, the administrative appeals process allows for inclusion of types of evidence that would be barred in traditional judicial proceedings. Evidence is generally admissible if the hearing officer considers it the kind of evidence a reasonably prudent person would rely on in the conduct of his or her affairs. Thus, evidence prohibited in a criminal proceeding, such as hearsay, may be allowed in administrative appeals proceedings.

Depending on the nature of the proceeding, administrative hearing officers may take a more active role in the proceedings than their judicial counterparts. For instance, they may question witnesses to develop any facts needed to decide cases.

The unique role of an administrative hearing officer — acting as both factfinder and decision-maker — stems from the specific, limited authority he or she is granted under the law. Traditional judges perform judicial functions. In contrast, administrative hearing officers perform executive branch functions, enforcing agency policy while ensuring that disputes related to agency decisions are handled efficiently and fairly.

Stages of administrative appeals

Whichever model — internal, mixed or external — an agency uses, it is helpful to think of administrative appeals in three stages: the prehearing stage, the hearing stage, and the result stage.

- In the *prehearing stage*, due process is the primary concern:
 - Do participants receive reasonable notice of hearing times? Are rules in place that ensure they do?
 - Do appellants have access to resources they need to prepare for the hearing?
- In the *hearing stage*, due process remains a central focus, especially in regard to impartiality:
 - Has the appellant been given an opportunity to be heard at a meaningful time and in a meaningful manner?
 - Is the proceeding fair and, additionally, does the proceeding appear fair to the participants and outside observers?
- In the *result stage*, legal defensibility is the primary concern:
 - Would the decision withstand scrutiny by the state's appellate courts?
 - Do agency rules help ensure that decisions will consistently withstand appellate scrutiny?

Roles of key participants

At the direction of the Legislature, *executive agencies* exist to interpret and implement statutes related to their areas of expertise. This role is made explicit through state statutes – which charge agencies with interpreting statute and developing rules, but also offer an appeals process for any citizen or business who wishes to contest an agency decision. Both the Governor and the Legislature are empowered to hold agencies accountable for actions taken to implement policy, and they may take actions to change agency policy if they wish.

Each appeal has at least two *parties*, consisting of the *appellant*, who initiates the appeal, and at least one *respondent*. For example, in Medicaid appeals at the Health Care Authority (HCA), most appellants are contesting a denial of benefits and the respondent is HCA. In other types of cases, the respondent is another person or business. Unemployment appeals often involve an employee and an employer, either of whom may be the appellant or the respondent.

For some high-volume appeals caseloads, most *people and businesses* go through the process without an attorney. To help address the challenges they face, *legal services organizations* may be able to offer free legal advice and representation. Many of these organizations specialize in specific appeals types, such as public benefits or unemployment benefits. In other types of appeals, such as disputes relating to professional licensing, appellants are more often represented. Their *representatives* – whether they come from the private sector or a legal services organization – are usually, but not always, attorneys. For example, an accountant may represent an individual contesting a tax decision.

Under the law, each *hearing officer* is tasked with enforcing policy through appeals decisions; at times their decisions function as a mechanism to develop or clarify policy. The hearing officer may be located within the agency, or at an external agency, such as the Board of Industrial Insurance Appeals (BIIA). The hearing officer is charged with conducting the appeal impartially.

Most regulating agencies are represented during the appeal. These *agency representatives*, who are often attorneys, take legal actions — such as filing motions, submitting evidence, and presenting arguments — aimed at resolving the case in the agency’s favor. In Washington, the agency representative may be employed within the agency or work for the Attorney General’s Office.

State agencies may contract with the *Office of Administrative Hearings* (OAH) to carry out some or all of their appeals process. For some caseloads, the OAH conducts only the first round of review, which consists of holding hearings and related meetings, and issuing an initial decision or order. For other caseloads, it issues a final administrative decision. OAH resolved more than 40,000 appeals last year, most of which were related to unemployment payments, child support and Medicaid benefits.

The three major types of administrative appeals processes

While the structure of appeals processes varies from agency to agency, scholars classify appeals processes into a few appeals models. According to a model developed by Jim Rossi of Vanderbilt Law School, appeals may be classified as internal, mixed or external. The three models differ from one another based on:

1. Which agency issues an initial decision
2. Which agency issues the final decision

We classified each appeal we reviewed into one of Rossi’s three models.

What types of hearing officers decide administrative appeals?

In Washington, the person who presides over and decides an administrative appeal may have any of several titles. Among agencies we reviewed, the most common titles include the word *judge*. For instance, OAH employs *administrative law judges* and BIIA employs *industrial appeals judges*.

Hearing officer means any individual who decides administrative cases, regardless of his or her job title.

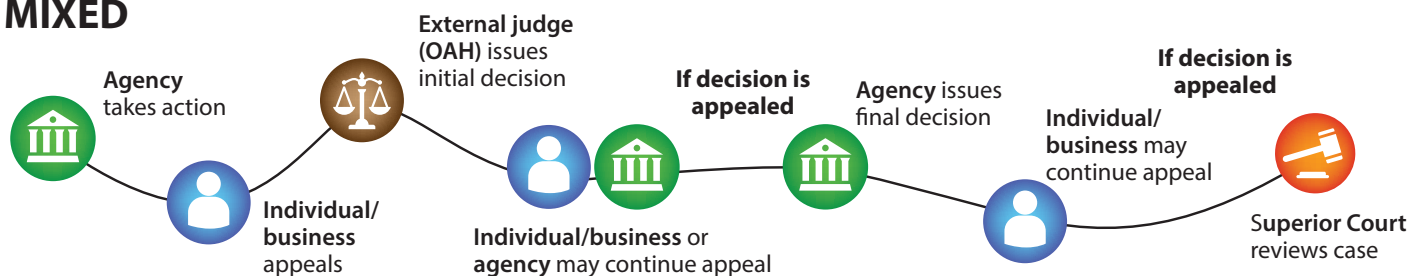
Within this report, we use the term *hearing officer* for general references. We use agency-specific titles within the agency summaries in **Appendix C**. Where necessary for the sake of clarity, we also use the terms *presiding officer* and *reviewing officer*.

INTERNAL



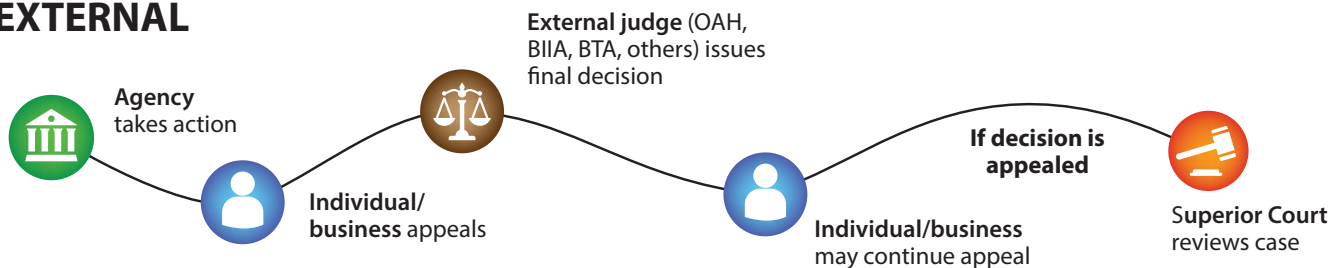
Under the **internal model**, either an in-house hearing officer or the agency head conducts a hearing and issues a final decision. Some stakeholders have criticized this arrangement, suggesting that hearing officers are likely to favor their employers in their decisions. These critics believe that in-house hearing officers are vulnerable to undue influence and inappropriate communications from agency officials.

MIXED



Over the past few decades, states have instituted **mixed models** whereby administrative hearing officers or hearing officers who are employed by a central agency that is not associated with the regulatory agency make initial decisions. Often called an Office of Administrative Hearings, these central panel agencies offer a service in which their hearing officers independently hear cases for other agencies. This concept of a separate, independent body of hearing officers has been popularized because it has the potential to offer several benefits, the most important of which is a perceived freedom for hearing officers to make decisions independent of the agencies whose cases they hear.

EXTERNAL



The **external model** offers the greatest independence for hearing officers. In this model, the regulating agency does not retain authority to review decisions. Rather, hearing officers at a different agency, such as those at the Board of Industrial Insurance Appeals, hear the appeal and issue the final decision. Scholars have often criticized this model, asserting that eliminating regulating agencies' power to issue decisions lessens their power to develop and implement policy. Nevertheless, some policymakers and stakeholders favor this model because they believe it costs less, is quicker, and appears to be more impartial than the other models.

Administrative appeals in Washington

In Washington, agreements regarding administrative procedures have been the result of lengthy discussions and resulting compromises. In the 1970s, the Washington State Bar Association assembled a task force to study options for reforming Washington's Administrative Procedure Act (APA). It included a practitioner representing business clients (who served as Chair), a practitioner representing low-income clients, a lawyer representing a large state agency, an academic, and a lay person broadly experienced in government matters. Over the course of ten years, this task force reviewed issues and gathered input, and based on this it proposed a new APA. Task force members hoped to achieve several goals, including increasing agency accountability, improving agency responsiveness to public needs and concerns, and protecting flexibility for agencies as they implement statute.

In 1981, the Uniform Law Commission issued a new State Model Administrative Procedure Act, based on lengthy discussion among experts and stakeholders from across the nation. After significant further stakeholder input and multiple draft bills, the Legislature adopted the current APA, patterned after the 1981 Model Act. For this reason, Washington's APA is in many ways similar to statutes in many other states.

Administrative Procedure Act (APA)

What is it? Washington's APA governs agency rule-making, public access to rules, and administrative appeals.

How long has the APA been in place? First enacted in 1959, the APA underwent significant reforms in 1988.

What are its goals? According to statute, the intent is to clarify the law, achieve greater consistency among state agencies, and provide greater public access to administrative decision-making. Regarding administrative appeals, underlying intent includes providing an impartial and accessible process, while allowing flexibility for agencies to carry out appeals as best fits their needs.

What are key provisions relating to appeals? Three topics are relevant to stakeholder concerns:

- *Off-the-record communications* – called *ex parte* communications – with hearing officers are generally prohibited. These restrictions are intended to ensure all parties have equal access to the hearing officer and an opportunity to rebut all arguments made against them. The APA lists exceptions to the prohibition, and requires corrective action should prohibited communication occur.
- An agency's *interpretations of statutes and its rules* should be clear to all those affected. Agencies are encouraged to issue statements explaining their interpretations, and to formalize their policies through rulemaking as much as possible. They are also required to invite public input when adopting rules.
- *Judicial standards of review* under the APA encourage courts to defer to agency policy decisions, and the statute enumerates the conditions necessary for a court to reverse or modify an agency order. Accordingly, courts have historically deferred to agencies' interpretations of the statutes they are responsible for implementing.

Are all state agencies subject to the APA? With exceptions, executive branch agencies are subject to the APA. Among agencies we reviewed, state law excludes the following from APA requirements:

- *Administrative appeals*: Appeals at BIIA, excise tax appeals at DOR, and informal appeals at BTA
- *Rulemaking*: Certain determinations by HCA and DOR. Both exclusions are limited in scope.

However, Washington's appeals processes reflect a greater degree of independence for hearing officers compared to many states. For instance, it employs a central panel agency (OAH), and agencies have delegated final decision authority to central panel hearing officers for select types of cases. This greater degree of independence reflects a longstanding perception among some stakeholders that such elements help appeals be more impartial and fair.

Since one of the objectives of the revised APA was to standardize appeals processes, OAH has adopted the Model Rules of Procedure. Each state agency is expected to "adopt as much of the model rules as is reasonable under its circumstances." Some agencies with large appeals caseloads have also adopted further rules governing the appeals process.

While the framers of the 1988 APA hoped to standardize agency processes, they also intended to offer agencies flexibility in how they conduct appeals. For this reason, the APA offers agencies several choices, including whether to use in-house hearing officers or those at OAH, and whether OAH hearing officers may issue final decisions. And while adopting the Model Rules is encouraged, each agency may adopt rules outlining procedures in greater detail than – or even contrary to – the Model Rules. So while APA appeals generally conform to the same overarching model, appeals processes also vary from agency to agency.

Not all appeals are governed by the APA

For historical reasons, a handful of Washington appeals are not governed by the APA. For instance, workers' compensation appeals are governed by a different statute, which pre-dates the 1988 APA by a few decades. While this statute differs from the APA in some of the details, it establishes an appeals process that resembles APA appeals in a number of ways.

Excise tax appeals at the Department of Revenue (DOR) are also governed by an older statute. This less formal appeals process differs from APA appeals. For instance, DOR hearing officers may hold hearings only with the appealing party and his or her representative; DOR attorneys need not be present. In some instances, hearing officers must communicate with other DOR officials to determine how to apply agency policy.

The process differs so much from other state appeals that, to clarify the process for the public, DOR leadership has recently renamed the process to call it an *informal administrative review*, to better reflect its intent. Upon completing this review, a taxpayer has an option to continue contesting the decision, by filing an APA appeal through the Board of Tax Appeals.

State agencies in Washington use all three model types

Twenty-eight agencies in Washington conduct a wide array of administrative appeals that in 2014 totaled more than 100,000. Exhibit 3 lists agencies, by model, that conducted appeals in 2014.

Exhibit 3 – Overview of administrative appeals in Washington in 2014

Internal (Agencies use model for some or all of their appeals)	Number
Licensing, Department of	11,641
Corrections, Department of	547
Health, Department of	429
Liquor and Cannabis Board ¹	154
Fish and Wildlife, Department of	93
Revenue, Department of	895
Insurance Commissioner, Office of ¹	33
Health Care Authority	32
Public Disclosure Commission	13
Utilities and Transportation Commission	6
Retirement Systems, Department of	4
Archaeology and Historic Preservation, Department of ¹	2
Financial Institutions, Department of	1
Total internal	13,033
Mixed (Agencies use model for some or all of their appeals)	Number
Employment Security, Department of	29,907
Health Care Authority	7,788
Social and Health Services, Department of	1,004
Liquor and Cannabis Board ¹	154
Financial Institutions, Department of	53
Gambling Commission	56
Licensing, Department of ¹	51
Insurance Commissioner, Office of ¹	22
Lottery Commission	3
Board of Accountancy	2
Archaeology and Historic Preservation, Department of ¹	2
Total mixed	39,042
External (Agencies use model for some or all of their appeals)	Number
Transportation, Department of	21,010
Board of Industrial Insurance Appeals	13,665
Social and Health Services, Department of	14,783
Board of Tax Appeals	2,361
Revenue, Department of	78
Environmental & Land Use Hearings Office	206
Ecology, Department of	91
Public Employment Relations Commission	79
Early Learning, Department of	2
Veterans Affairs, Department of	2
Total external	53,124

Half of all 2014 cases were heard under an external model.

Data source: Self-reported data from agencies.

Notes: Within the timeframe requested, two agencies received no requests for appeals.

1. Agencies indicated using multiple models for appeals. When unable to distinguish the number of appeals conducted under each model, appeals were counted twice. These appeals account for less than 1 percent of total appeals.

How does Washington compare to other states?

Reviewing administrative appeals processes in other states gave us several insights into Washington's system, reflecting the inherent differences as well as the similarities. For example, more than half of the nation's states use a central panel agency, including the five we researched for the purposes of this audit. We did not find any states that rely entirely on a central panel agency or that exclusively use an external appeals model. No two states' systems are identical, yet enough similarities exist to convince us that Washington's system is not out of the ordinary.

We reviewed appeals processes in five states, focusing on their central panel agencies and state agencies that carry out functions similar to those of the nine Washington processes we evaluated. While all five states demonstrate a combination of internal, mixed and external models, the specific practices vary greatly from state to state (see **Appendix F** for detailed information from our review). Cases and agencies that fall under a mixed model in one state may be entirely internal or external in another.

In Minnesota, for example, Medicaid and public assistance appeals — two appeal types that make up a large portion of OAH appeals in Washington — are conducted by a hearing officer within the Department of Human Services. Unemployment appeals — the most numerous appeal type heard by Washington's OAH — are heard internally by an unemployment law judge within the Department of Employment and Economic Development. Workers' compensation appeals — a case type that Washington's OAH has no jurisdiction over — make up 93 percent of Minnesota's OAH hearings. Other states, including Oregon, more closely mirror Washington in their agency appeals processes and OAH jurisdiction.

Which agency issues a final decision also varies significantly from state to state. Central panel hearing officers in Washington, Maryland, Minnesota and Oregon issue both proposed and final orders. In Arizona, most final decisions for appeals heard through their OAH lie with the agencies. South Carolina's APA grants its central panel final decision authority over virtually all cases. According to its most recent report, South Carolina's Administrative Law Court heard 8,248 cases; in contrast, Washington's OAH hears more than 45,000 cases annually. This vast difference in caseload can be largely attributed to South Carolina's practice of filtering appeals through progressive levels of internal agency adjudication before appellants may apply for a central panel hearing. For example, unemployment appeals in South Carolina filter through an internal administrative hearing within the Department of Employment and Workforce and a subsequent external board review before advancing to the independent central panel adjudication.

The five states selected for review

- Arizona
- Maryland
- Minnesota
- Oregon
- South Carolina

Audit Results

In order to answer our audit questions, we first needed to identify key issues and goals for administrative appeals. We found there are significant differences of opinion on how to carry out appeals, which we summarize below. We also describe trade-offs that the Legislature and agencies must consider when determining how to conduct fair and impartial administrative appeals, followed by a summary of our evaluation of nine agency appeals processes. The section concludes with answers to the audit questions.

Appeals processes must meet competing goals

Developing an appeals process that satisfies stakeholders presents a challenge, because appeals processes are expected to meet competing policy goals. From the start, administrative appeals were intended to protect the due process rights of aggrieved individuals. Policymakers also intended them to be more informal, accessible and economical than traditional court appeals. At the same time, administrative appeals serve as a means of implementing agency policy.

To compound the challenge posed by these multiple goals, appeals processes also have a multitude of stakeholders, each holding strong opinions about how appeals should operate. While the diversity of viewpoints reflects the complexity of administrative law, stakeholders may be classified according to their priorities: either for greater agency control or for greater independence for hearing officers.

Those who favor greater agency control include officials of regulating agencies, administrative law scholars and some legislators. While they support an impartial process, they prioritize each agency's responsibility to implement statute as directed by lawmakers: they emphasize that an agency must be held accountable for its implementation of policy, and note that agency accountability necessitates agency influence over appeals decisions. They tend to prefer policy options supporting agency influence, such as final decisions issued by the regulating agency, an expectation that hearing officers will apply informal guidance, and a broader view of what sorts of communications with hearing officers should be allowed.

Those who prioritize independence include many hearing officers, advocates for appellants and some legislators. They often stress the importance of transparency in decision-making and impartiality in fact and appearance; they are concerned about the perceived unfair advantages regulating agencies have in internal model processes and the challenges unrepresented parties face in the process. They tend to prefer policy options believed to enhance perceptions of impartiality and transparency, such as final decisions issued outside the regulating agency, an expectation that hearing officers will use their discretion regarding application of informal guidance, and a narrower view of what sorts of communications with hearing officers should be allowed.

Policymakers who are interested in reforming administrative law must address the varied concerns brought up by stakeholders while balancing the competing objectives administrative appeals were designed to meet.

For example, appeals must be rapid and economical for the state, yet they should also meet due process requirements by providing sufficient notice, a fair hearing and a quality decision. To support a rapid and economical process, an agency

See the Glossary on page 8 for a description of informal guidance.

may limit the time a hearing officer spends on each case. When a hearing officer is pressed for time, he or she may dedicate less time to fact-finding or writing a decision. If too little time is spent on these activities, quality can suffer, and participants may find the process biased.

To provide another example, an agency must balance its responsibility to implement its statutes and rules according to its interpretations with stakeholders' demands for transparency and impartiality. While an agency may prefer to maintain greater control by issuing final decisions, using informal guidance, or taking a looser view of ex parte rules, such elements can lead observers and participants to find the process unfair or lacking transparency.

History of differing priorities has led to compromise

The presence of competing policy objectives coupled with a stakeholder community with differing priorities means reforming the appeals process to everyone's satisfaction has presented a challenge. Debates and compromise at the national level go back to the 1930s and 1940s.

In Washington, agreements regarding administrative procedures have also stemmed from lengthy discussions and resulting compromises. In the 1970s, the Washington State Bar Association convened a task force to study options for reforming Washington's APA. Over the course of 10 years, this task force reviewed issues and gathered input before proposing a new APA. Task force members hoped to achieve several goals, including increasing agency accountability, improving agency responsiveness to public needs and concerns, and protecting flexibility for agencies as they implement statute. After significant stakeholder input and multiple draft bills, the Legislature adopted the current Administrative Procedure Act in 1988.

Debates and occasional reforms continue to this day. At the national level, development of the 2010 model state APA provides an example. This document resulted from the labor of 18 committee members, who considered input from diverse stakeholders over the course of six years. The committee developed more than 30 drafts before agreeing on a final version. Such extensive discussion underscores the intense differences of opinion within the legal and scholastic communities.

Washington stakeholders disagree about two key elements of appeals policy

In the course of our research, we observed two related areas of disagreement.

First, stakeholders do not agree on *what types of communications* with a hearing officer should be allowed. Second, we found that expectations regarding the *role of informal guidance* varied among agencies, and even within agencies.

At times, these differences of opinion have drawn the attention of legislators and decision-makers. That stakeholders do not agree on fundamental principles guiding the appeals process suggests that clarification would promote greater understanding for all involved, even if there will always be differences of opinion regarding what is appropriate.

What types of communications with hearing officers should be allowed?

Historically, stakeholders view limiting off-the-record communications (also called ex parte communications) as essential to a fair and impartial process. However, they have repeatedly engaged in debate over specifically what should be

allowed. Reflecting such concerns, the APA requires that communications with hearing officers outside of a hearing be limited to procedural and administrative matters, to prevent influence, or an appearance of influence, over a hearing officer's decisions. Today's stakeholders continue to emphasize the importance of upholding rules regarding hearing officers' communications.

Some stakeholders have a strict view on what is allowable

Supporters of a more independent role for hearing officers typically have a stricter view on permissible communications. At OAH, managers are expected to avoid offering unsolicited guidance on substantive issues to hearing officers, even after a case is closed. Two hearing officers from another agency said that general direction on how to interpret the law and regulations would be permissible only if a hearing officer requests the advice.

Stakeholders have also disagreed whether hearing officers should discuss closed cases with their supervisors. More than one hearing officer expressed concern that agency representatives had contacted their supervisors to complain about substantive analysis in a closed decision. While such communications are permissible under the APA, these hearing officers felt that such conversations were aimed at influencing future decisions and believed they were improper. In at least one instance, these differences of opinion resulted in ongoing conflict between hearing officers and their manager.

Others support greater agency freedom to communicate with hearing officers

Those who support a stronger agency role usually support greater freedom in agency communications with hearing officers. In the course of our interviews, agency officials stressed the importance of ex parte rules but we found their interpretations of what types of communications to prevent varied. For instance, a hearing officer from DRS told us that she will not discuss an open case with the agency director, except with respect to certain procedural choices. Once she has entered a final order, she may debrief managers on a case's outcome and issues. On the other hand, supervisors at other agencies we reviewed also review hearing officers' decisions and may suggest changes before a decision is issued.

An expert in administrative law told us the intent of the law is to ensure that every argument made regarding a case be made during the hearing, so that each party has a chance to rebut it. Another told us that agency policy staff, except those acting as adversaries in a case, should be allowed to communicate about policy with hearing officers, so that policy will be properly applied and developed.

What is the proper role of informal guidance?

Because it is impractical to adopt a rule to address every situation, agencies sometimes write their rules in such a way as to leave room for interpretation. They also employ informal guidance. The drafters of the APA gave agencies the flexibility to decide the extent to which they would adopt rules or employ informal guidance.

While this flexibility facilitates agency implementation of statute, we found that stakeholders hold differing views on the role of informal guidance in appeals. For instance, nearly all hearing officers employed in a mixed or external model told us they do not apply informal guidance in their decisions. However, proponents of a stronger agency role told us that while hearing officers are not required by law to consider informal guidance, in their opinion they should do so. An OIC official and a DRS hearing officer told us they do apply informal guidance in their decisions.

These contrasting views on the role of informal guidance tend to align with differing opinions on what sorts of communications with hearing officers are allowed.

Hearing officers and others have voiced concerns about management's attempts to direct hearing officers by expecting them to consider informal guidance an appellant may not know about. They believe this could put the appellant at a disadvantage. From an agency's perspective, such direction can seem necessary if applicable statutes and rules are not sufficiently clear to allow the hearing officer to understand the agency's position.

If a final decision misinterprets a rule or statute, either party may use legal avenues to have the decision corrected. But if a final decision does not adhere to informal guidance, the agency's advocate has no recourse for modifying the decision through legal channels. The latter is an unsatisfactory outcome from the agency's point of view: it is in the agency's best interests to keep hearing officers informed of all informal guidance that could affect a decision.

Because of these differing perspectives, disagreements have sometimes arisen when a supervisor has tried to discuss decisions with hearing officers.

Structural elements affect perceptions of impartiality

Some of the largest caseloads, including unemployment appeals and DSHS appeals, are initially decided by OAH hearing officers. An OAH hearing officer issues a final decision for some large caseloads as well. Some stakeholders have expressed interest in employing the external model, in which a final decision is made by a hearing officer outside of the regulating agency, for even more case types. As with questions regarding ex parte communications and the role of informal guidance, we observed stakeholders held differing views.

When considering the models available for a given appeal, five considerations arise:

1. Location of hearing officers – within the regulating agency or externally
2. Final administrative decision location – within the regulating agency or elsewhere
3. Whether or not agencies should be required to use OAH
4. The number of appeals required (one or two) before an appellant may appeal to the courts
5. Central panel agency funding

We present stakeholder viewpoints on each of these considerations below.

1. Location of hearing officers. Some agencies have found it advantageous to keep hearing officers within their agencies. Their officials told us they prefer an in-house hearing officer specialized in their area of law. They expect in-house hearing officers to have more expertise than an OAH hearing officer – who may preside over a variety of types of cases.

Advocates for using a central panel point to these advantages:

- Decisions are generally perceived as more impartial than decisions by an in-house hearing officer
- Centralizing hearing officers who serve multiple agencies results in more efficient operations
- Central panel judges are required to develop agency-specific expertise, and have done so
- A central agency can offer more uniform procedures, compared to appeals offered by different agencies.

2. Final administration decision location. In Washington, a final administrative decision is made externally for select caseloads, including decisions on child support, workers' compensation benefits and food assistance. Because some stakeholders question the ability of a hearing officer employed by an agency that is prosecuting a case to decide impartially, employing a central panel hearing officer to issue a final decision can promote a greater perception of impartiality.

However, regulating agencies often prefer that internal hearing officers issue final decisions, citing a need for consistent application of policy and the benefits of more in-depth review. Similarly, others argue that agencies must have authority over final decisions, as only the agency can be held accountable for its decisions. Federal regulations in fact require the regulating agency to have final decision authority for certain types of appeals. Agency officials have also worried that under the external model, appellants would take more cases to the courts, which would cost more and take longer than reviewing these cases within the regulating agency.

3. Whether or not agencies should be required to use OAH. Some groups recommend that OAH hear all appeals in order to minimize favor towards regulating agencies. We were told that internal hearing officers may be vulnerable to agency pressure, with an inherent bias toward the agency that employs them. Hearing officers from agencies with elected officials may be particularly vulnerable if they are pressured to make some decisions for political reasons.

However, since using OAH is optional for agencies, some hearing officers have reported they feel pressure to favor agencies, since the agency is able to stop using OAH services, which would eliminate a source of revenue for OAH. In mixed-model situations, some stakeholders believe OAH hearings do not appear impartial because the regulating agency can still issue final decisions.

4. The number of appeals required (one or two) before an appellant may appeal to the courts. In Washington, many types of cases may be reviewed twice: first by a presiding officer who conducts a hearing, then by a reviewing officer. From the regulating agency's perspective, a second round of review offers two benefits. It helps ensure decisions are consistent with one another and with agency policy, and it enables reviewing officers to review cases with greater depth, because they have more time for each case than the typical OAH hearing officer. However, critics have complained that requiring a second round of review unnecessarily lengthens the time required before a case may be taken to the courts.

Most appeals cases in Washington are already subject to two rounds of review, and regulating agencies retain final decision authority for many appeals types. While these two issues are often considered together, they are distinct. In Washington, an external final decision is made with two tiers of review for several caseloads, including cases relating to workers compensation, excise tax decisions and child care licensing.

5. Central panel agency funding. Some participants and stakeholders feel that central panel hearing officers can feel pressure to rule in favor of agencies, particularly when the central panel's budget is funded by payments from the agencies it serves. Hearing officers and other stakeholders have sometimes perceived pressure from client agencies to favor the agencies in their decision, or to finish proceedings quickly in order to control costs, so the customer agency will continue to use its services.

States generally pay for their central panel agencies in one or more of the following three ways:

- Funding directly from the state general fund or its equivalent
- Assessments to client agencies for their share of OAH costs
- Billing client agencies

Washington's OAH bills agencies each month for the number of hours worked on the previous month's caseloads. (See Appendix C for more on OAH and its budget.)

Each method of funding has advantages and disadvantages. Of particular interest for this audit are the risks to and implications for the impartiality of the hearings office and officers. The table in **Exhibit 4** describes three of the most common funding methods and their associated risks and benefits.

Exhibit 4 – Each of the three common funding models offers benefits but also presents risks to the appearance of impartiality

Type	Funding by general fund	Assessments to agencies	Hourly rate billed to agencies
Funding	Central panels funded by appropriation rely entirely or primarily on funds from their state's general fund revenues.	A typical assessment approach involves allocating a portion of the central panel's operational costs to the state agencies that are expected to request hearings during that budget cycle. Assessments are based on each agency's historical use of hearing services, and appear as budget line items in each requesting agency's budget.	The central panel bills agencies at an hourly rate for time that officers spend on their hearings.
Benefits	The main advantages are simplicity and predictability. Funding by general fund is also financially advantageous to requesting agencies, because they do not have to project and budget for annual hearing costs; small agencies in particular benefit because it relieves them of unanticipated hearing costs. Greatly reduces the perception and risk that the hearing office may be under pressure to produce a result favorable to an agency paying the bill.	Because this method places intermediaries in the financial dealings between the hearing office and the requesting agencies, it reduces the risk that agencies would use financial pressure to influence the outcomes of hearings. It reduces anxiety at the central panel that annual revenues from billing will be insufficient to cover annual costs. It also offers agencies a fiscal incentive to avoid hearings in order to reduce their annual assessments.	Unanticipated increases in caseloads are less debilitating to the central panel because billings assure it sufficient funds. Charging agencies the full cost of administrative hearings also creates a financial incentive for agencies to settle disputes that might otherwise result in hearings.
Risks	Set budget appropriations make it difficult for central panel agencies to adapt to unexpected increases in caseload. When funding is directly appropriated to the central panel agency, requesting agencies have few fiscal incentives to settle cases and avoid hearings.	Periodic assessments create less fiscal stability than funding by general fund.	Presents the greatest opportunity for agencies to exert financial pressure on the central panel. Hearing officers may spend less time on individual cases out of concern for costs. The perception of partiality and lack of neutrality is strongest where the requesting agency is billed directly for the cost of its hearings. This approach can also create financial instability if hearing volumes fluctuate unpredictably.

Of the five states we examined, South Carolina is funded through a general fund appropriation, Maryland and Oregon assess agencies for costs of administering hearings, while Arizona and Minnesota have a mix of appropriations and payments from agencies. Washington's reliance on an hourly billing method is uncommon. In 2001, the last time a comprehensive analysis of central panel funding mechanisms was done, only Washington, California and North Dakota billed hourly.

Independence and Impartiality

Judicial independence is sometimes brought up in discussions of impartiality and fairness in administrative appeals. While distinct from impartiality, the concept is relevant, as the term suggests the hearing officer is isolated from influences that might sway decisions. One element supporting independence is structural separation of the hearing officer from potential influences, either in a different agency or in a separate division within the same agency.

For OAH hearing officers, the concept of independence is refined beyond structural separation. Their Code of Ethics states a hearing officer "should not be influenced by partisan demands or other pressures... nor be apprehensive of unjust criticism."

The OAH Code of Ethics also defines impartial as the "absence of bias or prejudice... as well as maintenance of an open mind in considering issues."

While an independent hearing officer may still harbor biases that detract from impartiality, some stakeholders believe that greater independence supports a greater perception that hearing officers are impartial.

2015 legislation highlights disagreement regarding administrative hearings

In the wake of public concern regarding the separation of an in-house hearing officer from the OIC, the 2015 Legislature considered several reforms for appeals. Of these, SSB 6019 advanced the furthest, with unanimous approval in the Senate. It would have granted all presiding officers final decision authority. It also would have addressed concerns regarding communications with hearing officers, stating an agency may not require a presiding officer to decide a case according to unwritten policies.

The House unanimously approved another version of the bill, which differed considerably from the Senate proposal. This version maintained current law regarding initial orders and final decisions. It also clarified that while no employee may seek to improperly influence a hearing officer's decision, expecting the hearing officer to consider written agency policies is allowed. It did not address the role of unwritten policies.

The Senate and House did not come to agreement on the legislation by the end of the session.

Agencies we reviewed are delivering appeals effectively.

In our analysis of administrative appeals, we took a policy-oriented approach, in which we analyzed administrative appeals as a system. But in order to determine whether the system is working as intended, we also analyzed nine individual agency appeals processes that reflect a diversity of approaches. This analysis helped us determine whether improvements were needed at the agency level. We developed criteria relevant to administrative appeals processes and evaluated the agencies against a maturity model, both of which are described in Appendix B. The detailed agency appeals process reviews are in Appendix C.

We found that the nine agencies we analyzed are each operating at an acceptable or better level – between the high end of “repeatable” and “managed” on the maturity model scale. Each agency employs a process to support appellant understanding and promote a perception of impartiality.

Although it is natural for an appellant to feel displeased after “losing” an appeal, agencies still have opportunities to ensure the process is viewed as fair and impartial, and that each potential appellant has the best possible understanding of how an appeal process will work. A primary goal of this performance audit is to identify ways agencies can improve the public perceptions of appeals. We identified opportunities for agencies to improve their processes and we have made recommendations to eight agencies.

Question 1: Are administrative appeals processes understandable?

Answer in brief

Appeals are readily understood by many appeals participants, but agencies have opportunities to enhance user understanding and accessibility.

Agencies we reviewed are generally effective at informing people about their rights to appeal and how the process works. Most agencies offer brochures and websites aimed at guiding appellants, and some offer additional services such as video tutorials and phone assistance in multiple languages.

However, while professionals who specialize in administrative appeals understand how the processes work, some appellants told us they did not fully understand the process. They face multiple barriers to understanding appeals. For instance, parties are often navigating a complex legal process for the first time, usually without representation. And a disproportionate number of public benefits appellants have limitations, such as a disability, that further restrict their ability to understand and participate in an appeal. In order for the administrative appeals process to work, individuals need to understand their right to appeal a decision, and how to take advantage of that right.

Stakeholders generally understand how appeals work, but some view the process as unfair, particularly when an agency’s in-house hearing officers issue decisions. They may be unaware of the intent behind administrative appeals – to design an economical and accessible way for agencies to implement policy while fulfilling constitutional due process requirements. Further educating participants about the intent behind appeals might alleviate their concerns, or at least promote a greater understanding.

Participants’ comments

“It was actually very straightforward, although I can see some people might have trouble understanding the forms.”

– Participant,
unemployment appeal

“The translator isn’t even “my people,” I think he’s American. So I don’t think he and the judge were understanding me. I feel like this happens to people like me, people with language problems.”

– Appellant,
Medicaid appeal

Improvements are possible

Appellant outreach is inherently challenging, given the technical nature of appeals and the fact that most appellants navigate the process without the help of an attorney. While we found that each agency's outreach is at least adequate, additional outreach efforts should help improve understanding. These include:

1. **Doing more to inform appellants about available accommodations.**

We found that all agencies whose processes we reviewed meet APA requirements, including telling appellants that accommodations are available, but several did not provide much explanation in their outreach materials. Because many appellants face limitations that restrict their ability to participate fully, providing more information early in the process about their options can enhance access at little or no cost. For example, the Access to Justice Board of the American Bar Association suggests agencies provide a list of available accommodations on hearing notices.

2. **Simplifying print materials and writing them using accessible language.**

One-quarter of OAH hearing officers surveyed thought that less legalese and simpler language would help make processes clear for those with limited education or limited English proficiency.

3. **Explaining the underlying intent of the process,** as well as the practices the agency employs to ensure that decisions are impartial, so the public is better informed.

In addition to these suggestions, we offer recommendations specific to each agency.

Question 2: Do administrative appeals processes appear impartial?

Answer in brief

Appeals processes we analyzed are designed to be impartial, but stakeholder and participant perceptions vary.

We found that the appeals processes we analyzed are designed to result in impartial decisions. Participants expressed differing views regarding whether appeals are impartial, however. While a large majority (88 percent) of hearing officers believe their agency offers an impartial review to all parties, two appellant advocates we interviewed thought that in-house hearing officers tend to favor the agency's point of view. And while more than 80 percent of appellants who responded to our survey felt they were treated with courtesy and respect and given the opportunity to be heard, half of them did not agree that the process was fair. Experts and state decision-makers also hold differing opinions about the proper role of administrative adjudication, as we explain at the beginning of the Audit Results section of this report.

Our interviews with agency officials and other stakeholders help explain the disconnect between the intent of the processes and participant perceptions. Certain aspects of appeals processes have resulted in some participants perceiving decisions as biased in favor of regulating agencies. These include:

1. **The acceptability of informal guidance in decision-making**

For regulating agencies, developing informal guidance is simpler and more flexible than adopting rules, but appeals participants may find the process unfair if they do not have access to agency and court interpretation of statutes and rules applied in their cases. Facilitating access to such information may enhance transparency.

Agencies are using more accessible language

Three agencies in our review are already trying to simplify communications.

The **BIIA** regularly convenes its Plain Talk committee to explore ways to clarify forms, brochures and other documents.

The **DOR** has hired a consultant to help it ensure that communications are clear and easy to read.

The **OAH** has revised its forms and communications in recent years.

Black's Law Dictionary defines the term impartial as "unbiased." Appellants should expect that a decision is based on the merits of the case, rather than reflecting the presiding officer's personal preferences.

2. Potential influence over hearing officers

While discussion of open cases is not allowed, agency management, stakeholders and participants have differing opinions regarding what types of conversations are appropriate among agency management, supervisors and hearing officers. Regulating agency managers may want to ensure that hearing officers are aware of agency views, but some consider efforts to inform hearing officers as improper influence.

3. Final decision authority residing with the agency making the initial decision

While there are merits to both external and internal approaches, making the final decision within a regulating agency suggests bias to some participants.

Managing decision quality and timeliness can help agencies promote a perception of impartiality

Appeals processes were designed to yield timely decisions that reflect high-quality analysis and consistent treatment of similar cases. There are several activities agencies can undertake to support consistent, quality decisions. They can review decisions for quality and train new hearing officers. One reviewing officer also told us their work helps support consistent treatment of similar cases, since reviewing officers typically have more time than OAH hearing officers to analyze cases.

Supervisors' review can also help support decision quality. Some agency officials we spoke with emphasized the importance of such reviews, stating they use them to ensure their agencies issues decisions consistent with published decisions and that decisions are of sufficient legal quality. They indicated the reviews provide hearing officers with guidance prior to issuing decisions. Guidance to hearing officers is not always aimed at affecting a decision; it may instead focus on whether the decision is complete, analysis is sound, or whether a required style is used. While some agencies review each decision before issuing it, others review decisions only after issuance.

Performance measures relating to timeliness can enhance transparency and also guide performance management efforts. Ideally, parties should receive a decision within a reasonable period of time, as it may significantly impact their livelihood or well-being. For this reason, federal standards require that unemployment benefits cases be resolved in a timely fashion. Similarly, the APA imposes time requirements for case resolution.

In spite of the agencies' well-intentioned efforts to deliver an impartial process, the fact that some participants have negative feelings about the administrative hearing process suggests that more should be done to improve perceptions of impartiality among stakeholders, participants and the general public. The following section offers suggestions for strengthening the appearance of impartiality.

Question 3: How can the state strengthen the appearance of impartiality?

Answer in brief

Two issues would benefit from clarification in statute:

- Clarification regarding permissible communication, particularly between hearing officers and other agency staff and management
- The use of informal guidance in decisions

Statute should be amended to help clarify ex parte communications

Given the ongoing concern about communications with hearing officers – even among those who are closely involved with appeals – we believe Washington statute could be made more clear. BIIA statute does not address. While the APA is clear about prohibited communications with people who are not employed within an agency that is deciding or advocating in a case, and the communications a hearing officer may initiate with agency officials, it does not clearly address the following:

- Whether a hearing officer's supervisor may direct a hearing officer's decision on substantive questions in an open case
- Whether a hearing officer's supervisor may direct a hearing officer on how to decide substantive questions in future cases

State statutes also do not address whether an agency representative may complain to a hearing officer's supervisor about a hearing officer's decision or order.

We reviewed statute, rule and agency guidance in 15 other states to determine if others have provided greater clarity on these questions. The accompanying text box presents examples of states that have both more and less restrictive laws regarding communications.

Among those we reviewed, Alaska provided the greatest clarity. Alaska statute requires hearing officers to follow a statutory code of conduct. In 2011, questions from state employees prompted Alaska's Chief Administrative Law Judge (ALJ) to issue an opinion clarifying official views on whether supervisory involvement in a hearing officer's decisions could create the fact or appearance of improper influence. See the panel below for more details.

To clarify ex parte rules, where should statute be amended?

- For APA appeals, an amendment to RCW 34.05.455, which outlines ex parte rules.
- A new section within the BIIA statute (Chapter 51.52 RCW), since this chapter has no section relating to ex parte contact with hearing officers.

States vary in how they define acceptable communications with hearing officers

Alaska: The Chief ALJ circulated a written opinion to all executive branch hearing officers and administrative law judges to help clarify whether the involvement of peer reviewers or supervisors in the deliberative process violates canons of conduct on decisional independence, creating the fact or appearance of improper influence. The opinion described a case in which an executive director participated in meetings to develop a board's decision. The Alaska Supreme Court concluded that the appearance, not just the fact, of improper influence can result in violation of a party's due process rights. The circulated ALJ opinion was used as a forum to provide suggested informal guidance, addressing the lack of clarity surrounding communications with hearing officers.

Oregon: In addition to a party, their representative, and anyone with personal knowledge of the facts relevant to the proceeding, communications with a hearing officer are also considered ex parte when communication is made "directly or indirectly" by 1) any officer, employee or agent of an agency (aside from other hearing officers), or 2) any person who has a "direct or indirect interest in the outcome of the proceeding." A hearing officer's supervisor could conceivably be considered to have an "indirect interest."

Iowa and South Carolina: Both states explicitly allow communication between a hearing officer and agency employees, including supervisors. Iowa's administrative code does state, however, that the communication may occur with persons "other than those with a personal interest in the case."

Statute is not clear on the role of informal guidance

The APA encourages agencies to adopt rules, which must be published. It also distinguishes between “interpretive rules,” which may not be used to impose penalties, and “legislative rules,” which can form the basis for a penalty. Agencies are “encouraged” to inform the public of their views by issuing informal guidance as interpretive statements or policy statements, which are “advisory only.” Agencies must also make certain interpretations of statutes and rules available to the public.

The APA does not clearly describe the role of informal guidance in decision-making. The courts have issued opinions on this question, but the law remains unclear. For instance, the state Supreme Court has stated “we accord deference to an interpretation of law in matters involving the agency’s special knowledge and expertise.” But Washington courts have also found that an agency’s informal guidance has no legal or regulatory effect, and that conduct contrary to informal guidance does not subject a person to penalties.

Among the 15 states we reviewed, we found three provide greater clarity about the role of informal guidance in appeals, but each takes a different approach:

- Arizona has a lengthy statute that restricts the use of informal guidance.
- Georgia’s rules of procedure detail the kinds of evidence that a hearing officer may use to make a decision, including how informal guidance may be used.
- Florida law supports transparency by requiring all appeals decisions be posted in a searchable database.

State agencies could do more to clarify expectations

Four agencies we reviewed – OAH, BIIA, DSHS and OIC – use internal guidance to set expectations about ex parte communications, informal guidance, or both. And both OAH and BIIA instruct hearing officers to follow codes of ethics requiring them to comply with ex parte prohibitions. In addition, DOR has written guidance about the scope of its internal communications and the role it has in informal decisions. While the codes of ethics help reinforce the expectation that ex parte communications are prohibited, they do not address unresolved questions about communications with hearing officers or the role of informal guidance. (Appendix G presents examples of policies and codes of ethics.) Other agencies we reviewed have not issued internal guidelines relating to these questions.

DSHS has adopted a policy that clearly prohibits the use of certain informal guidance in decisions by its reviewing officers. The policy states: “A DSHS administrative policy is not a statute, a rule, or a document intended to be relied upon or to create any substantive legal right enforceable in a court of law or administrative proceeding.”

The OIC has taken a more thorough approach. In January 2015, Commissioner Kreidler issued a memo outlining procedures aimed at eliminating perceived conflicts of interest and ex parte communications. It first outlines the reporting relationships for its hearing officer, addressing lines of authority regarding both appeals and administrative matters such as performance evaluations. Next, it outlines the “screen” established between the Hearings Unit (including the hearing officer) and OIC investigators and prosecutors. The memo goes on to list the types of policy discussions that are permitted between Hearings Unit staff and other employees, and outlines specific procedures aimed at supporting the “screen” between them. See Appendix G for more information.

To clarify the role of informal guidance, where should statute be amended?

- A new section in Part II of the APA (Chapter 34.05 RCW) could clarify requirements.

Recommendations

State recommendations

The Legislature should take steps to instill further confidence in administrative appeals. While processes are working as intended, we also found that public perceptions present a challenge. The Legislature and agencies have opportunities to improve public confidence, and in so doing, better fulfill the vision of those who designed appeals as impartial and expedient means for resolving disputes with state agencies.

As we have noted, anecdotal evidence suggests that many individuals perceive hearings as more impartial if they are held by an independent agency. However, we did not systematically analyze whether having an independent agency administer appeals significantly impacts perceptions. For this reason, we are unable to make a recommendation relating to the institutional structure of the appeals process.

Throughout the report, we identify policy issues and tradeoffs, and discuss the differences of opinion among stakeholders, appeals participants and specialists. We also identify requirements that would benefit from additional clarification through amendments to statute.

The Legislature, with input from stakeholders, agencies and specialists, is in the best position to accommodate differences of opinion and competing objectives, as well as agency-specific needs, and thus determine how to proceed. For this reason, our recommendations to amend statute identify elements in need of clarification, but do not offer specific statutory language.

To improve perceptions of fairness and hearing officers' impartiality, both within the agencies and among stakeholders, **we recommend the Legislature:**

- Amend RCW 34.05.455 regarding ex parte communications with hearing officers by clarifying:
 - What types of communication between management and hearing officers are allowed
 - When and in what capacity managers may provide direction regarding a hearing officer's performance
- Amend Chapter RCW 51.52 regarding ex parte communications with hearing officers by clarifying:
 - What types of communication between management and hearing officers are allowed
 - When and in what capacity managers may provide direction regarding a hearing officer's performance
- Add a new section to either Part II or Part IV of Chapter RCW 34.05 regarding the role of informal guidance by clarifying:
 - In what circumstances hearing officers may apply informal guidance in developing administrative decisions
 - Whether managers may require hearing officers to apply informal guidance
 - If hearing officers may apply informal guidance, clarify whether the hearing officers may apply written guidance, unwritten guidance, or both.

Agency recommendations

We developed the following recommendations with the understanding that it would not be practical for all agencies to have similar operating processes. With factors such as resources and volume of appeals taken into consideration, some agency processes need not be as robust as others; the recommendations below reflect this.

We recommend **all agencies, with the exception of the Department of Revenue and the Office of the Insurance Commissioner**, develop internal guidance regarding:

- What types of communication between management and hearing officers are allowed.
- When and in what capacity managers may provide direction regarding a hearing officer's performance.

Examples of internal guidance include but are not limited to a code of ethics, a memo, or an administrative policy.

We recommend the **Department of Retirement Systems (DRS)**:

- Post information about the appeals process on the DRS website. An online link to the appeals brochure would facilitate access to it.
- Post the index of decisions on the DRS website.

We recommend the **Department of Revenue (DOR)**:

- Add a link to the appeal website in notices and communications in order to facilitate access.
- Review communications with appellants – such as the hearing officers' hearing script – to identify opportunities to state that the process is not intended to be independent.

We recommend the **Health Care Authority (HCA)**:

- Develop a process for updating significant decisions. HCA's Board of Appeals can improve transparency by updating its published list of significant decisions as they become available. To do so, the Board should continue to develop a process for indexing significant decisions.
- Further develop policy to clarify what types of communication with hearing officers are allowable.

Agency Response



STATE OF WASHINGTON

OFFICE OF FINANCIAL MANAGEMENT

Insurance Building, PO Box 43113 • Olympia, Washington 98504-3113 • (360) 902-0555

May 6, 2016

The Honorable Troy Kelley
State Auditor
P.O. Box 40021
Olympia, WA 98504-0021

Dear Auditor Kelley:

On behalf of the audited agencies, thank you for the opportunity to review and respond to the State Auditor's Office (SAO) performance audit report, "Administrative Appeals." To provide this consolidated response, the Office of Financial Management worked with the Board of Industrial Insurance Appeals, Board of Tax Appeals, Health Care Authority, Office of Administrative Hearings, and the departments of Employment Security, Retirement Systems, Revenue, and Social and Health Services.

We appreciate the report's acknowledgment that administrative appeal processes are working as intended and that agencies are committed to administering appeals in an economical, expedient and impartial manner. We also agree with the SAO's statement that it is not practical for all agencies to have similar operating processes.

The audited agencies provide a broad range of services for the people of Washington. As noted in your report, the appeals must balance competing goals and serve stakeholders with opposing priorities. We welcome your recommendations to improve communications between management and hearings officers so we can improve perceptions of stakeholders and participants. We believe that improving general communications and refining or developing policies will address these opportunities.

We hope you will extend our thanks to your staff for preparing this report.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Schumacher", with a long horizontal line extending to the right.

David Schumacher
Director

Enclosure

Honorable Troy Kelley
May 6, 2016
Page 2 of 2

cc: David Postman, Chief of Staff, Office of the Governor
Kelly Wicker, Deputy Chief of Staff, Office of the Governor
Miguel Pérez-Gibson, Executive Director of Legislative Affairs, Office of the Governor
Matt Steuerwalt, Executive Director of Policy
Tracy Guerin, Deputy Director, Office of Financial Management
Wendy Korthuis-Smith, Director, Results Washington, Office of the Governor
Tammy Firkins, Performance Audit Liaison, Results Washington, Office of the Governor
David Threedy, Chairperson, Board of Industrial Insurance Appeals
Kate Adams, Executive Director, Board of Tax Appeals
Dorothy Frost Teeter, Director, Health Care Authority
Lorraine Lee, Chief Administrative Law Judge, Office of Administrative Hearings
Dale Peinecke, Commissioner, Employment Security Department
Marcie Frost, Director, Department of Retirement Systems
Vikki Smith, Director, Department of Revenue
Pat Lashway, Acting Secretary, Department of Social and Health Services

COORDINATED STATE AGENCY MANAGEMENT RESPONSE TO PERFORMANCE AUDIT ON ADMINISTRATIVE APPEALS – MAY 6, 2016

This coordinated management response to the State Auditor’s Office (SAO) performance audit report received on April 15, 2016, is provided by the Board of Industrial Insurance Appeals (BIIA), Board of Tax Appeals (BTA), Health Care Authority (HCA), Office of Administrative Hearings (OAH), Office of Financial Management (OFM), and the departments of Employment Security (ESD), Retirement Systems (DRS), Revenue (DOR), and Social and Health Services (DSHS).

SAO PERFORMANCE AUDIT OBJECTIVES:

The SAO objectives were designed to answer:

1. Are administrative appeals processes understandable?
 2. Do administrative appeals processes appear impartial?
 3. How can the state strengthen the appearance of impartiality?
-

SAO Findings:

1. Appeals are readily understood by many appeals participants, but agencies have opportunities to enhance user understanding and accessibility.
 2. Appeals processes we analyzed are designed to be impartial, but stakeholder and participant perceptions vary.
 3. Clarification regarding permissible communication, particularly between hearing officers and other agency staff and management, and the use of informal guidance in decisions would improve the appearance of impartiality.
-

SAO Recommendation 1: To improve perceptions of fairness and hearing officers’ impartiality, both within the agencies and among stakeholders, we recommend the Legislature:

- Amend RCW 34.05.455 regarding ex parte communications with hearing officers by clarifying:
 - What types of communication between management and hearing officers are allowed
 - When and in what capacity managers may provide direction regarding a hearing officer’s performance
- Amend Chapter RCW 51.52 regarding ex parte communications with hearing officers by clarifying:
 - What types of communication between management and hearing officers are allowed
 - When and in what capacity managers may provide direction regarding a hearing officer’s performance
- Add a new section to either Part II or Part IV of Chapter RCW 34.05 regarding the role of informal guidance by clarifying:

- In what circumstances hearing officers may apply informal guidance in developing administrative decisions
- Whether managers may require hearing officers to apply informal guidance
- If hearing officers may apply informal guidance, clarify whether the hearing officers may apply written guidance, unwritten guidance, or both.

STATE RESPONSE: The SAO found that clarifying permissible communication — particularly between hearings officers and other agency staff and management — and clarifying the use of informal guidance in decisions would improve the appearance of impartiality.

We do not believe a statutory change is warranted. The Administrative Procedures Act (APA) sufficiently and clearly addresses ex parte communications¹ between management and hearings officers regarding a case. Washington closely modeled the APA after the federal APA. This is a rich and consistent source of guidance for state agencies and the courts.

The SAO’s report focuses on knowledge and understanding of current procedures that govern the array of agencies’ proceedings covered by the APA. The SAO identified the tension between greater agency control of policy development on the one hand and greater appearance of impartiality on the other.

The report also acknowledges the concepts of judicial and structural independence. While we recognize that independence and impartiality are very distinct concepts, we wished the report more closely examined how changes to structural and funding independence might influence the appearance of impartiality in our state.

Agency work and customer needs are diverse, and as the SAO’s report pointed out, “state agencies are committed to administering appeals of their decisions in an economical, expedient and impartial manner that also serves to implement agency policy.”

We believe policies tailored to the unique circumstances of each agency will better address perceptions of fairness and impartiality. Rather than propose legislative changes, the audited agencies governed by the APA or Chapter 51.52 RCW are committed to reviewing and developing or refining agency-specific policy to explain the differences in communication as a management tool for process versus having influence on decision making.

Action Steps and Time Frame

- BIIA, BTA, HCA, OAH, ESD, DRS and DSHS will have a policy that explains the types and purpose of communication between management and hearings officers. *By October 31, 2016.*
 - DSHS policy in the EA-Z manual already reflects the statute’s prohibitions on ex parte communications to ensure a fair process for participants.

¹ Ex parte communications are addressed in the Administrative Procedures Act (RCW 34.05.455).

SAO Recommendation 2: We recommend all agencies, with the exception of the Department of Revenue and the Office of the Insurance Commissioner, develop internal guidance regarding:

- a) What types of communication between management and hearing officers are allowed.
- b) When and in what capacity managers may provide direction regarding a hearing officer's performance.

Examples of internal guidance include but are not limited to a code of ethics, a memo, or an administrative policy.

STATE RESPONSE: We appreciate the SAO acknowledging that it would not be practical for all agencies to have similar operating processes and agree there is an opportunity to improve communications between management and hearings officers. The root issue in the SAO's report appears to be knowledge and understanding of what procedures govern the array of proceedings covered by the APA and Chapter 51.52 RCW.

Board of Industrial Insurance Appeals (BIIA)

The BIIA will change its policy and/or provide a written directive to supervisors, managers and board members that is consistent with the recommendations made to the BIIA in the performance audit.

Board of Tax Appeals (BTA)

The Board of Tax Appeals will develop a written policy addressing appropriate communications between hearings officers and persons employed by the agency.

Health Care Authority (HCA)

The Chief Review Judge directly supervises the Review Judges within HCA's Board of Appeals and has delegated authority as a presiding officer. The Chief Review Judge is responsible for evaluating the performance of the Review Judges on an annual basis through Performance Development Plans (PDPs) and to provide feedback throughout the year. To reduce the risk of ex parte communications, HCA is developing an administrative policy.

Office of Administrative Hearings (OAH)

OAH will develop new policy, clarify existing policy and/or provide written direction to administrative law judges and other employees that is consistent with the SAO's recommendations to OAH.

Employment Security Department (ESD)

In order to improve the appearance of impartiality between the Commissioner and the agency program divisions with regard to administrative appeals, ESD will issue a memorandum to all agency staff formalizing ESD's screening protocol on all matters subject to administrative review by the Commissioner and his delegates at the Commissioner's Review Office. The screening protocol will be similar in style and scope to the one issued by the Office of the Insurance Commissioner contained in the SAO audit in Appendix G. Additionally, the Commissioner's Review Office of ESD will develop and adopt a specific Code of Ethics for the Review Judges of that office that will establish parameters for proper management oversight.

Department of Social and Health Services (DSHS)

The Department of Social and Health Services appreciates, acknowledges and supports the State Auditor's Office's (SAO) mission. We agree that it would not be practical for all agencies to have similar operating processes and agree there is an opportunity to improve communications between management and hearings officers.

To more clearly articulate when management may and may not communicate with hearings officers, DSHS will be drafting a protocols memo from the Assistant Secretary for the Economic Services Administration (ESA) that will address multiple issues such as: raising safety issues, like domestic violence concerns/restraining orders when there are multiple parties (child support hearings); administrative communication (not of a substantive nature) to facilitate hearings, such as an appellant running late or documents being faxed; and when managers and hearings officers should have the ability to provide comments or guidance on draft policy procedures related to administrative hearings.

DSHS will develop a method to provide feedback to hearings officers' superiors regarding issues in the hearing process, such as timelines; clear patterns of not following DSHS regulation; or failure to meet requirements under interagency agreements. This could even be in a dispute resolution process built into the DSHS Memorandum of Understanding. DSHS' ESA has ultimate responsibility to our clients, the federal government and the taxpayers for our programs. To not have any ability to discuss hearings officers' performance seems unjust.

Action Steps and Time Frame

- **BIIA:** Change its policy and/or provide a written directive to supervisors, managers and board members that is consistent with the SAO's recommendations. *By October 31, 2016.*
- **BTA:** Develop written policy addressing appropriate communications. *By July 15, 2016.*
- **HCA:** Create administrative policy on ex parte communications. *By September 1, 2016.*
- **OAH:** Develop new policy, clarify existing policy and/or provide written direction to administrative law judges and other employees that is consistent with the SAO's recommendations. *By October 31, 2016.*
- **ESD:** (1) Develop and issue a memorandum from the Commissioner to all agency staff regarding ESD's screening protocol on all matters subject to administrative review before the Commissioner and the Commissioner's delegates at the Commissioner's Review Office. *By October 1, 2016.*
(2) Develop and adopt a specific Code of Ethics for the Review Judges at the Commissioner's Review Office. *By October 1, 2016.*
- **DRS:** Develop internal guidance to document the types of communication allowed between agency management and the hearings officer and when and in what capacity managers may provide direction regarding the hearings officer's performance. *By October 31, 2016.*
- **DSHS:** (1) Develop a memo or administrative policy clarifying what types of communication between management and hearings officers are allowed and in what capacity managers may provide direction regarding a hearings officer's performance. *By October 31, 2016.*
(2) Develop a feedback method for hearings officers' superiors regarding issues in the hearing process. *By October 31, 2016.*

SAO Recommendation 3: We recommend the Department of Retirement Systems (DRS):

- a) Post information about the appeals process on the DRS website. An online link to the appeals brochure would facilitate access to it.
- b) Post the index of decisions on the DRS website.

STATE RESPONSE: The Department of Retirement Systems agrees the recommendations made by the SAO provide opportunities to enhance user understanding of the department’s administrative appeals process.

Action Steps and Time Frame

- Information about the appeals process will be made more readily available on the DRS website by posting a link to the appeals brochure. *By June 30, 2016.*
 - An index of decisions will be made available on the DRS website. *By December 31, 2016.*
-

SAO Recommendation 4: We recommend the Department of Revenue (DOR):

- a) Add a link to the appeal website in notices and communications in order to facilitate access.
- b) Review communications with appellants – such as the hearing officers’ hearing script – to identify opportunities to state that the process is not intended to be independent.

STATE RESPONSE: After an extensive year-long process, DOR’s [Rule 100](#) (WAC 458.20.100) was updated and became effective April 1, 2016. Rule 100 is now titled “Informal administrative reviews.” The changes were intended to strengthen the important role of our Administrative Review and Hearings Division (ARHD) (formerly Appeals) in ensuring Revenue’s tax policy decisions are fair and consistently applied. The changes also clarify for our customers and stakeholders that the Rule 100 process is an internal, administrative review, and not an independent one.

Rule 100 provides a process for the ARHD staff to take a “second look” at a division’s decision after a taxpayer challenge. When gathering facts for this second look, our ARHD staff have full authority to talk to other divisions to understand what went into making the initial agency tax decision.

Rule 100 is important to the taxpayer community. It allows a faster, less costly review of a department decision outside of a challenge at the Board of Tax Appeals or Thurston County Superior Court.

Action Steps and Time Frame

- Add links to documents generated by the ARHD for the [rule](#), [website](#), or [administrative support](#) as applicable. *Completed April 1, 2016.*
- Update the ARHD website and forms. *Completed April 1, 2016.*

- Update processes, including the hearing script, to align with the updated Rule 100 “Informal administrative reviews.” *By June 30, 2016.*
-

SAO Recommendation 5: We recommend the Health Care Authority (HCA):

- a) Develop a process for updating significant decisions. HCA’s Board of Appeals can improve transparency by updating its published list of significant decisions as they become available. To do so, the Board should continue to develop a process for indexing significant decisions.
- b) Further develop policy to clarify what types of communication with hearing officers are allowable.

STATE RESPONSE: HCA is developing a process to index decisions. Additionally, HCA is developing an administrative policy on ex parte communications.

Action Steps and Time Frame

- Develop index process for decisions. *By September 1, 2016.*
- Develop administrative policy on ex parte communications. *By September 1, 2016.*

Appendix A: Initiative 900

Initiative 900, approved by Washington voters in 2005 and enacted into state law in 2006, authorized the State Auditor's Office to conduct independent, comprehensive performance audits of state and local governments.

Specifically, the law directs the Auditor's Office to "review and analyze the economy, efficiency, and effectiveness of the policies, management, fiscal affairs, and operations of state and local governments, agencies, programs, and accounts." Performance audits are to be conducted according to U.S. General Accountability Office government auditing standards.

In addition, the law identifies nine elements that are to be considered within the scope of each performance audit. The State Auditor's Office evaluates the relevance of all nine elements to each audit. The table below indicates which elements are addressed in the audit. Specific issues are discussed in the Results and Recommendations sections of this report.

I-900 element	Addressed in the audit
1. Identify cost savings	No. Although funding was considered, it was not addressed in the context of cost savings. The focus was on elements that promote impartial and fair appeals.
2. Identify services that can be reduced or eliminated	Yes. Appeals as a service were considered, but we did not identify any that should be reduced or eliminated.
3. Identify programs or services that can be transferred to the private sector	Yes. Early in planning the audit, we recognized that quasi-judicial processes are a core function of government and therefore not appropriate to transfer to the private sector.
4. Analyze gaps or overlaps in programs or services and provide recommendations to correct them	Yes. As part of reviewing the various administrative appeals processes, potential gaps or overlaps were evaluated and recommendations provided.
5. Assess feasibility of pooling information technology systems within the department	No. This audit focused on administrative appeals processes across a number of agencies. Each agency process is different making pooling of information technology systems impractical.
6. Analyze departmental roles and functions, and provide recommendations to change or eliminate them	Yes. Roles and functions associated with the administrative appeals were evaluated to gain an understanding of process.
7. Provide recommendations for statutory or regulatory changes that may be necessary for the department to properly carry out its functions	Yes. Statutory and regulatory requirements were reviewed as part of this audit, and areas needing clarification were identified.
8. Analyze departmental performance, data performance measures, and self-assessment systems	Yes. Analysis was conducted on nine agency appeals processes. We found that the rigor of the performance measurement systems varied across agencies.
9. Identify relevant best practices	Yes. We identified noteworthy practices at Washington state agencies and in five other states.

Appendix B: Methodology

This audit was designed to answer the following questions:

1. Are administrative appeals processes understandable?
2. Do administrative appeals processes appear impartial?
3. How can the state strengthen the appearance of impartiality?

To answer our audit questions, we:

- Interviewed leading authors and educators on administrative law and advocacy organizations.
- Read publications by these experts and others to gain an understanding of administrative appeals, the history of administrative law, and viewpoints on the different methods of structuring appeals.
- Analyzed nine appeals processes across the state and the policies guiding them. This analysis helped us determine the accessibility, transparency, and impartiality of appeals processes as well as consistency and quality of decisions.
- Surveyed stakeholders of the nine appeals processes we analyzed. We surveyed appellants, their representatives, other parties to appeals and hearing officers about their perceptions and experiences with the processes. The results provide anecdotal information related to our findings.
- Reviewed other states for policies and practices that could be helpful to Washington's agencies. This information helps illustrate the similarities and differences among states and helped us identify practices agencies can use to improve the understandability and impartiality of administrative appeals.

Identify agencies that conduct administrative appeals

After identifying 28 agencies that conduct administrative appeals, we requested basic information on the type and number of appeal requests they receive and how they conduct them. This information is summarized in Appendix C: Administrative Appeals in Washington.

Because appeals can span more than one agency or department, we decided to use the appeal process as our unit of analysis rather than the agency. We evaluated each process, which includes each agency or department an appellant could potentially interact with. We selected nine appeals processes based on public interest in the process, the volume of appeals, diversity in the type of model used, and potential risk to appellants.

Example:

Multiple agencies in Medicaid appeals

Medicaid recipients can appeal a decision made by Health Care Authority (HCA). The appeal will be heard at the Office of Administrative Hearings (OAH) and if appealed again, it will be heard at HCA's Board of Appeals.

Survey appellants, representatives and hearing officers

We developed and conducted three stakeholder surveys: appellants or parties to a hearing, legal representatives, and hearing officers. Surveys were used to gather more information relating to concerns raised in stakeholder interviews and also to gather perceptions directly from individuals participating in appeals.

Survey design

To develop our surveys, we reviewed previously conducted surveys on similar topics and other literature:

- Washington State University's Judicial Performance Evaluation of the Hearing and Mediation Judges of the Washington Board of Industrial Insurance Appeals (September 2013), which was designed and conducted to evaluate judge behavior.

- Minnesota Management and Budget Office's February 2011 survey, which tried to identify what the judges do well and how to improve their performance using feedback from parties (appellants and their attorneys) who have appeared before the judges.
- Christopher McNeil's doctoral dissertation, published in 2008 at University of Nevada, Reno, which included a survey that evaluated whether litigants, defense lawyers and hearing officers believe the hearings they participated in were fair.
- Charles Koch's survey, published in 1994, asked hearing officers about their ability to make independent judgments, outside pressure and job satisfaction.
- Michigan Courts' appellant survey concerning access to courts and fairness of hearing officers.

In addition to these resources, we used the Administrative Procedure Act (APA) and discussions with stakeholders to inform our development of survey questions.

Conduct surveys

We surveyed a sample of individuals and businesses that filed an appeal between January 2014 and December 2014 for the nine processes we evaluated except OAH. For OAH appeals, we surveyed appellants and other non-agency parties for ESD, DSHS and HCA appeals filing within a one-week period because the volume of appeals conducted through the OAH was considerably larger than the others and required a smaller sample of one week.

The agencies involved in the audit supplied contact information for appellants and their representatives; we conducted a telephone survey of appellants and an email survey of representatives, asking about their perceptions of the process related to impartiality and understandability. This information was used to gather perceptions of the process and to triangulate information learned through interviews with other stakeholders and our evaluation of appeals processes. We considered the survey information valuable because it provided us insights that we would have otherwise only obtained from our interviews with stakeholders.

Low response to appellant groups

We had either a low response rate (25 percent on average) or low total responses for most appellant groups, which limits the use of our results. The responses received, however, still hold value and add a human element to other analyses we conducted. The responses are used to support and highlight important concepts throughout the report.

BIIA conducted its own survey of appellants and representatives recently so we did not survey BIIA. For all of the other agencies, either the number of responses was low or the response rate was low. In both cases we do not know whether our results represent the experiences of the entire population of participants. If, for example, respondents are more likely to have had an adverse ruling than those who did not respond, our results may differ from the experiences of the population. We therefore limited our use of the survey results to providing additional support for our findings.

We also surveyed all hearing officers associated with the nine appeals processes by email. To allow hearing officers to remain anonymous, we aggregated their responses (see **Appendix D** for more information on survey results). The survey asked about their ability to understand the appeals process, how they make decisions, and their views on impartiality of the process.

Evaluate processes and policies

Evaluated appeals processes

As part of our analysis of hearings processes in Washington, we evaluated nine appeals processes handled by nine agencies in depth. We also evaluated agency-wide OAH processes. A full evaluation of each process is included in **Appendix E: Selected Agency Appeals Processes Summaries**. **Figure 1** (on the following page) lists the selected agencies, appeal processes and their operational model.

Figure 1 – The nine appeals processes and the agencies responsible for conducting them

Appeal process	Agencies involved	APA or other
Internal Model, where a regulating agency official makes final decisions		
Insurance-related appeals	Office of the Insurance Commissioner (OIC)	APA
Retirement benefits	Department of Retirement Systems (DRS)	APA
Excise taxes (pre-APA appeal)	Department of Revenue (DOR)	Rule 100
Mixed Model, where a central, independent agency issues an initial decision, and an official at the regulating agency can issue a final decision		
Office of Administrative Hearings (OAH) agency-wide appeals	Office of Administrative Hearings (OAH) <i>Note: In some appeals outside the scope of this audit, OAH holds final decision authority and would be considered in the External operational model.</i>	APA
Unemployment insurance benefits	Employment Security Dept (ESD) and OAH	APA
Medicaid benefits	Health Care Authority (HCA) and OAH	APA
Public assistance benefits	Department of Social & Health Services (DSHS) and OAH	APA
External Model, where external adjudication and final decision-making occur independent of a regulating agency		
Excise taxes (APA appeal)	Board of Tax Appeals (BTA)	APA
Workers' compensation	Board of Industrial Insurance Appeals (BIIA)	Title 51 RCW

Develop standards by which to measure processes

We used interviews with administrative law experts, reviews of scholarly literature, and discussions with Washington state agencies and stakeholders to identify practices most important for helping appeals be understandable and perceived as impartial. We used this information to develop criteria for the appeals processes we evaluated.

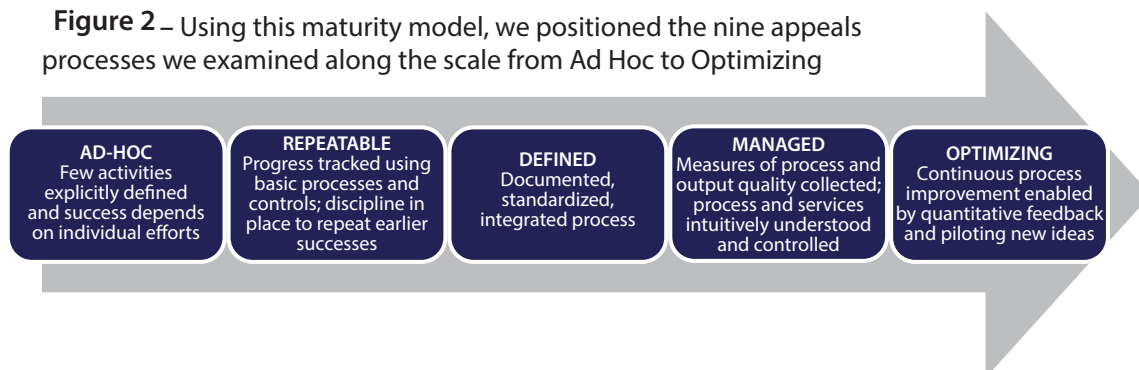
Compare process to criteria

We collected information about each appeal process by requesting information from agencies, reviewing web pages and interviewing agency officials. We rated each appeal process and its associated agencies based on criteria and a maturity model. The purpose of the maturity model was to demonstrate how each process ranks on a scale from ad-hoc, where few activities are explicitly defined, to optimizing, where continuous process improvement is enabled by quantitative feedback. The ratings we gave to agency appeal processes were based on documentation we received from the agencies and agency interviews. We did not consider stakeholder comments in determining ratings. Our evaluation against criteria and the application of the maturity model are discussed in detail below.

Maturity Model

Process maturity is an indication of how close a process is to being complete and capable of continuous improvement. We adapted a maturity model devised by Solitaire Consulting for our evaluation. The maturity model we used is illustrated in Figure 2.

Figure 2 – Using this maturity model, we positioned the nine appeals processes we examined along the scale from Ad Hoc to Optimizing



Criteria

The criteria used in this audit are presented in **Figure 3** by category and include the method of evaluation. We used a maturity model in cases where a criterion was best measured on a continuum, and a satisfactory/ unsatisfactory rating when a criterion is either met or unmet. Note that our criteria were limited to what could be measured.

Key to the Evaluation Scale used in this section:

Satisfactory / Unsatisfactory

-----> Maturity Model

Figure 3 Table of Criteria and Questions

Accessibility and Transparency Access to the appeals process helps ensure that people who disagree with an agency's decision have an opportunity to present their side of the story. Transparent policies and processes ensure an agency's decision is made in a reasonable matter that also avoids arbitrary and capricious government action as outlined in the APA. Both access and transparency help provide due process protections as required under the state Constitution.	
Criteria: Accessibility and Transparency	Evaluation mode
1. Outreach: <ul style="list-style-type: none"> Regulating agency informs potential appellants of opportunity to appeal, and indicates how they can access information on how to do so. Adjudicating agency outreach materials explain all major appeals steps it administers. For mixed-model appeals, outreach materials from each adjudicating agency also link or connect with appeals information offered by the other adjudicating agency. 	Satisfactory/ Unsatisfactory
2. Regulating agency makes policies used in adjudicative decision-making available to the public.	Satisfactory/ Unsatisfactory
3. Adjudicators at the initial adjudicating agency explain appeals process at beginning of formal proceedings or hearing	----->
4. Initial adjudicating agency provides parties with an option to participate in prehearing conferences and/or hearings remotely, by telephone or video conference	Satisfactory/ Unsatisfactory
5. Accommodations: Initial adjudicating agency offers accommodation for disabilities and for those with limited English proficiency	----->
Impartiality An impartial process means that decision-makers fairly and equally consider the evidence presented by all parties in the process and uniformly enforce policies and laws.	
Criteria: Impartiality	Evaluation mode
6. Adjudicating agency job expectations delineate the impartial nature of the hearing officer's role.	----->
7. When applicable to an agency, adjudicating agency practices help prevent prohibited ex parte communications.	----->
Performance Management Decision-maker expertise ensures appellants receive a decision where laws are applied and interpreted correctly. Timeliness helps ensure a fair proceeding, recognizing that "justice delayed is justice denied."	
Criteria: Performance management	Evaluation mode
8. Adjudicator performance: Adjudicating agency takes steps to ensure hearing officers have proper expertise and issue timely decisions.	----->
9. Process for timely decisions: Adjudicating agency takes steps to ensure that decisions are issued timely.	----->
10. Case outcomes: Adjudicating agency tracks data on case outcomes, including modifications and reversals of orders and decisions.	----->

Decisions

Consistent and well-reasoned decisions help ensure that appellants are receiving equal treatment under the law and that decisions are less likely to be overturned by the courts. Additionally, the APA encourages agencies to formalize principles that evolve from individual decisions by adopting rules.

Criteria: Decisions	Evaluation mode
11. Consistent decisions: Final adjudicating agency uses a review process to ensure orders are consistent – that is, given a similar set of facts, a similar decision is made each time and it is well-reasoned	●●●●●→

Review structures and processes in five other states

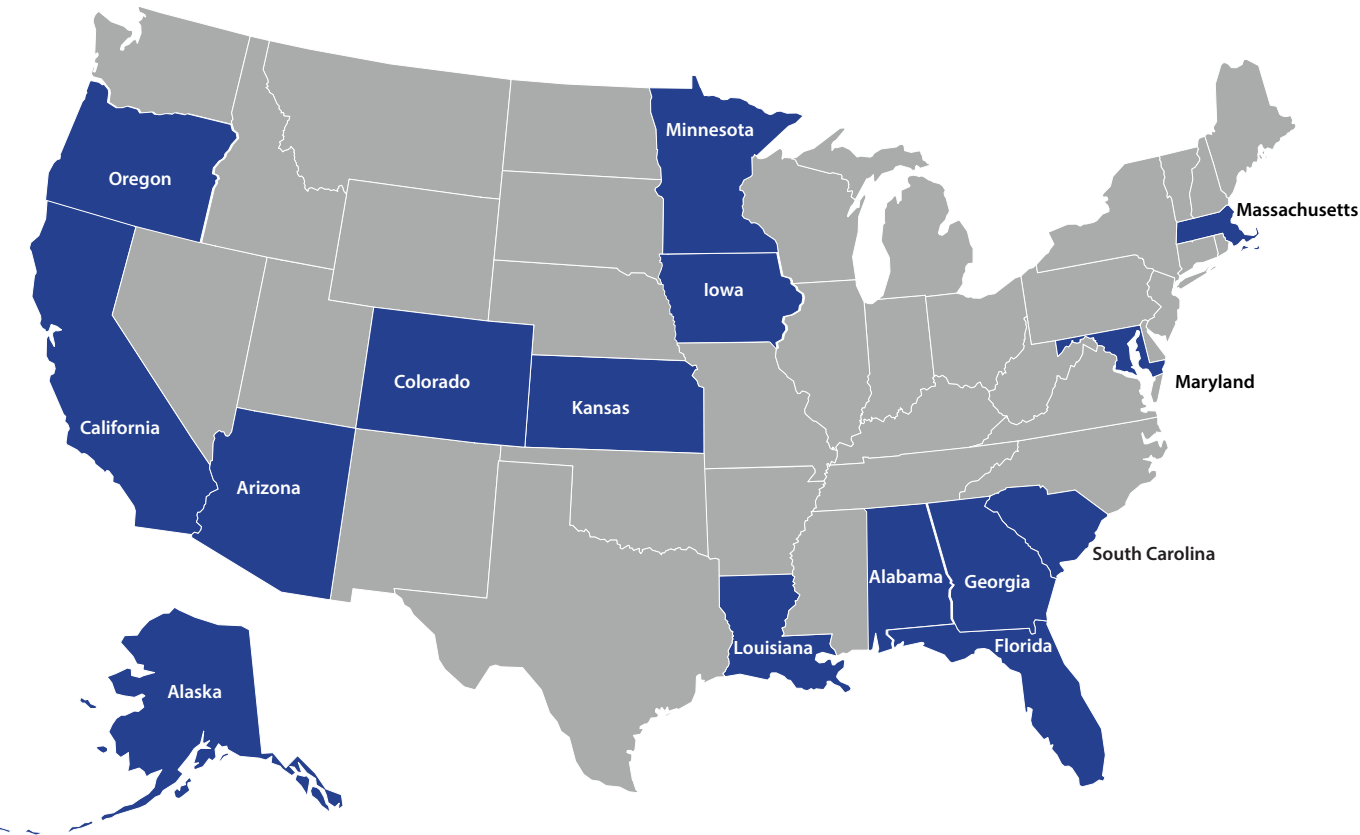
We examined the appeals process and policies in five other states, looking for similarities and differences in process and funding structures, to see if Washington could benefit from their practices. The states are:

- Arizona
- Maryland
- Minnesota
- Oregon
- South Carolina

For each state, we examined the appeals structure, identifying whether it has a central panel agency, the funding mechanism for the central panel, and the type and volume of caseloads sent to the central panel. The result of this research can be found in Appendix F: Appeals Processes in Other States.

In addition, we reviewed 15 other states for policies and practices that could be helpful to Washington’s agencies. It helped reveal the similarities and differences among states, including practices agencies can use to improve the understandability and impartiality of administrative appeals; they are shown in the map in Figure 4.

Figure 4 – Map of the 15 states reviewed for policies and statutes



Appendix C: Selected Agency Appeals Process Summaries

Appeals summary contents

In this appendix, for each agency we provide a description of the process, a discussion of its place on the maturity model (described in Appendix B), and stakeholder perspectives on the process, including those of administrative law specialists, appellants, representatives and hearing officers. Stakeholder perspectives are balanced with our analysis of the process itself. We identify noteworthy practices, and make recommendations that would help to elevate the process to a higher level of maturity, based upon our review of the process and participant perspectives.

The ratings we applied to agency appeals processes are based on our interviews with agency personnel and the documentation they gave us.

The figure at the beginning of each agency summary illustrates appeals volumes, as well as indicating:



Number of hearing officers



Type of model (internal, external, mixed)

APA Whether the process is subject to the Administrative Procedures Act



Whether decisions are published

Data on case outcomes is also provided.

Noteworthy practices

We identified noteworthy practices in appeals processes at each of the nine agencies. These are identified in the individual summaries that follow and are compiled in a table at the end of this appendix.

Appeals Process Summaries table of contents

Retirement system appeals – Department of Retirement Systems (DRS)	42
Insurance-related appeals – Office of the Insurance Commissioner (OIC)	45
Excise tax appeals – Department of Revenue (DOR)	48
Unemployment insurance benefit appeals – Employment Security Department (ESD) and Office of Administrative Hearings (OAH)	53
Medicaid benefit appeals – Health Care Authority (HCA) and Office of Administrative Hearings (OAH)	57
Public assistance benefit appeals – Department of Social and Health Services (DSHS) and Office of Administrative Hearings (OAH)	61
Office of Administrative Hearings (OAH)	65
Excise Tax Appeals – Board of Tax Appeals (BTA)	70
Workers' Compensation Claims – Board of Industrial Insurance Appeals (BIIA)	74
Noteworthy Practices by Washington State Agencies	78

Retirement system appeals – Department of Retirement Systems (DRS)

The Department of Retirement Systems (DRS) was created by the Legislature in 1976 and administers Washington's eight public retirement systems. In the 1980s and early 1990s, the OAH issued initial decisions for its appeals. In the mid-1990s, DRS opted to move the hearing function in-house.

DRS processed few appeals recently, resolving four cases in calendar year 2014. One judge, who reports to the Director, conducts hearings and enters final orders. DRS is supported by fees, rather than appropriations from the state general fund, and thus has had a stable level of funding in recent years.

2014 appeal volumes

Total appeals: 4



APA: Yes

1

Internal

Not published

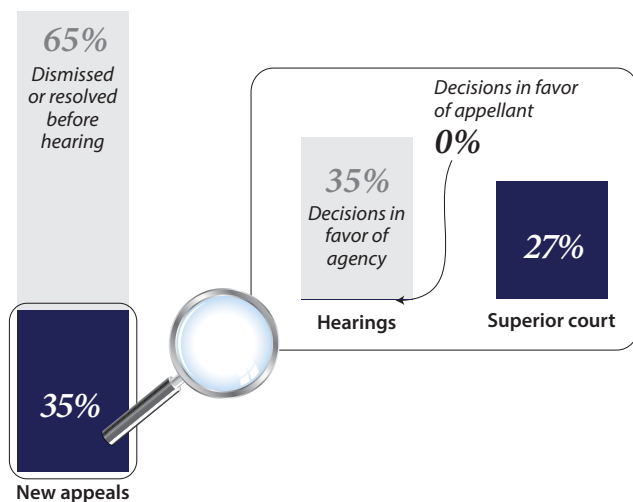
Source: DRS self-reported data.

Retirement system appeals process

Either an employer or an individual may request review of an action taken by DRS. DRS provides an early resolution process, working with appellants to help them better understand relevant law and regulations, and gathering information about the disputed action; this process results in fewer formal decisions, as illustrated at right. The DRS business unit issues an administrative decision, but if the matter is not resolved, either the employer or individual may request a formal appeal. In this case, a DRS judge conducts a hearing and issues a final decision and order. In response, a party may ask the judge to reconsider the decision. The appellant may finally continue to dispute the decision in superior court.

From 2009 through 2014, DRS received 26 retirement benefits appeals. Nine (35 percent) went to hearing and received a decision, as illustrated below. Of the nine appeals that received a decision, seven (27 percent of all appeals received during the time period) were appealed to superior court.

Case outcomes for retirement benefit appeals



Note: Percentages calculated as a proportion of all appeals resolved.

Source: Auditor calculation of outcomes provided by DRS.

Appeals process



Criteria evaluation

Overall, DRS is operating at the **defined** level of maturity. Due to the low number of appeals, it has not developed an extensive body of policies and procedures. Agency notices and final orders provide the basis for decisions and inform appellants of the opportunity to contest a decision. An index of final orders is maintained on all cases and their outcomes, which is available to the public upon request. Highlights of the process are provided in the following table, where we also identify noteworthy practices.

Evaluation of policies and practices

Noteworthy practices that other agencies may find beneficial are indicated with a star ()*

Accessibility and Transparency	
1. Outreach	Appellants are informed of their right to appeal through agency notices; website provides very little information on how to appeal.
2. Policies available to public	Employer Communication Notices, posted to the website, inform employers of policy changes. Appeals orders are available upon request, but not posted to the website.
3. Judges explain appeal process	*The judge uses a detailed checklist to guide an explanation of how the process works.
4. Option to participate remotely	Most prehearing conferences are by telephone, while most hearings are in person.
5. Accommodations	Accommodations are provided upon request.
Impartiality	
6. Job expectations delineate impartiality	Judge's position description describes the judge's independent role. The judge has received ongoing trainings on ethics and avoiding bias as an administrative judge.
7. Practices help prevent ex parte	Although there is no formal policy on it, DRS officials said DRS staff understand they cannot talk with the judge.
Performance management	
8. Adjudicator expertise	The judge's job description requires an advanced degree in law (J.D.) and at least three years' experience in administrative appeals.
9. Process for timely decisions	*The petition process has helped resolve many disputes before beginning a formal appeal, reducing the number of appeals to 30 percent of the former volume.
10. Outcome tracking	DRS maintains an index of appeals decisions, which is available upon request, but not posted on its website. Performance measures are not used.
Decisions	
11. Process for consistent decisions	Decision consistency is supported by having only one judge, and by reviewing court decisions on DRS cases. Designating all final orders as precedential helps support consistency among decisions.

What we learned about perspectives

We did not receive user feedback on retirement system appeals.

Is the process understandable?

We rated the DRS process as defined with regards to accessibility and transparency. In addition to distributing notices and handouts to inform appellants, and following a checklist, the DRS judge performs a check-in to make sure everyone understands the process. She believes most appellants are well-informed and committed to the appeal, since they have already gone through an administrative decision and petition. We did not survey appellants for DRS appeals.

DRS has an opportunity to improve user understanding of its appeals process, as well as applicable policies. Its website lists very little information about the appeals process. Providing information in a variety of formats, such as print materials and through the website, would increase accessibility and transparency. It also does not publish appeals decisions, although they are available to the public upon request.

Do practices appear impartial?

Impartiality is reinforced in the hearing officer's position description, which states the judge "has full authority to use independent judgment to determine the facts, conclusions, and the outcome of each appeal, free of direction or supervision." The expectation of impartiality is further reinforced through trainings.

Recommendations

We recommend that DRS:

- Post information about the appeals process, including a version of the appeals brochure, on the DRS website to make it easier for users to learn about the process.
- Post the index of decisions on the DRS website.

We discuss the need for more clarity regarding agency-level communications in the Audit Results section of the report. Whether or not statute is amended in response to our recommendations, DRS could benefit by developing internal guidance clarifying:

- What types of communication between management and hearing officers are allowed
- When and in what capacity managers may provide direction regarding a hearing officer's performance

Examples of internal guidance include but are not limited to a code of ethics, a memo or an administrative policy.

Insurance-related appeals – Office of the Insurance Commissioner (OIC)

The Office of the Insurance Commissioner (OIC) oversees Washington's insurance industry, to protect consumers and make sure that companies, agents and brokers follow applicable rules. It became a separate agency in 1907 with an elected Insurance Commissioner.

Any person or entity (business, organization or corporation) who is harmed by a decision, action or proposed action of the Insurance Commissioner can file a demand for a hearing to contest it. Hearings are also held for applications that are required by statute to go through a hearing before approval is given, such as a proposed acquisition or merger involving two insurance companies, or when a company seeks approval to change its headquarters to another state.

In calendar year 2014, the OIC heard 33 appeals, as shown in the table to the right. The OIC applies the internal appeals model for the bulk of its appeals. The OIC hearing officer, designated as presiding officer, reports directly to the Commissioner on all adjudicative matters and to the Deputy Commissioner for Operations on administrative matters. The OIC is supported by revenue from assessment on the insurers regulated, which has provided stable funding for agency operations.


2014 appeal volumes

Total appeals: 33

Revoking/Suspending Insurance Producer License	30%
Hearing to Impose a Fine	21%
Insurance Producer License Denial	12%
Redomestication	12%
Rate & Form Approval/Disapproval	6%
Certificate/Registration Suspension & Misc.	6%
Acquisition	3%
Merger	3%
Order to Cease and Desist	3%
Proposed Consent Order Levying a Fine	3%

Note: No appeals filed in 2014 for: Denial of Letter of Written Consent; Conditions for Probationary License; Financial/Market Conduct Examination Report; Disclaimer of Control; Order Rescinding Previous Order; or Health Benefit Plan/Contract/Agreement Rate.

APA: Yes  1  Internal, Mixed

 www.insurance.wa.gov/laws-rules/administrative-hearings/
www.insurance.wa.gov/orders/enforcement.asp

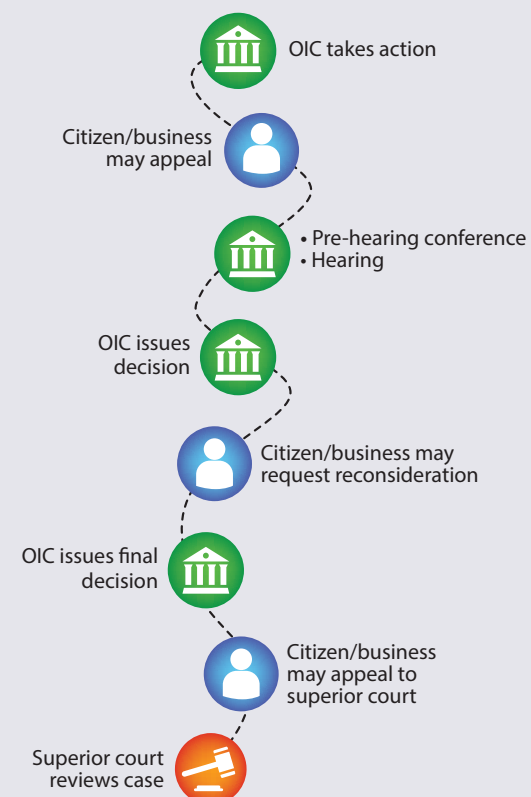
Source: OIC self-reported data.

Insurance-related appeals process

The appeals process, coordinated by one Hearing Unit paralegal, follows the APA and the Model Rules in addition to OIC-specific requirements. Once a hearing is requested, an acknowledgement is sent and arrangements are made for a prehearing conference. The prehearing conference is typically held by telephone and is used to set the date of the hearing and to discuss the hearing process, any issues or concerns, and potential accommodations needed. The hearing is similar to a court trial although less formal. A written decision is typically issued within 90 days after the hearing. If participants disagree with the decision issued by the OIC hearing officer, they can request that the hearing officer reconsider the decision. Once the presiding officer renders a final decision (with or without reconsideration), the party can appeal to superior court, where the record created during the appeal is reviewed.

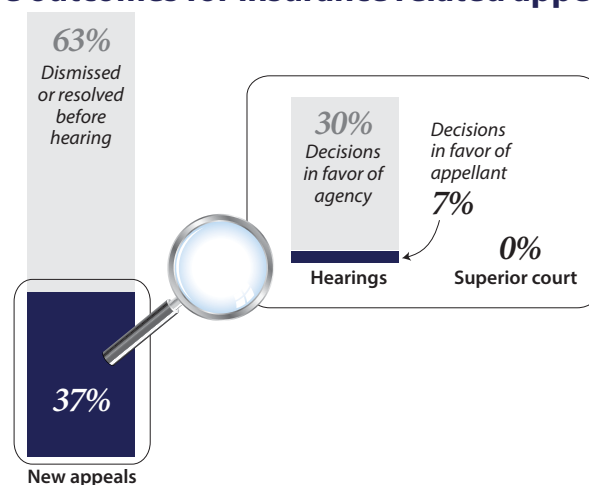
A small number of OIC appeals were heard by OAH in 2014. In January 2015, through the implementation of their new screening protocol, OIC began identifying certain cases (for example, licensee) as suited to a hearing at OAH. These cases are beyond the scope of our review. The protocol is discussed further on page 47.

Appeals process



In calendar year 2014, the OIC received 33 appeals. 37 percent went to hearing and received a decision, as illustrated at right. None were appealed to superior court.

Case outcomes for insurance related appeals



Note: Percentages calculated as a proportion of all appeals resolved.
Source: Auditor calculation of outcomes provided by OIC.

Criteria evaluation

The OIC is operating at a **defined** level of maturity. It has one hearing officer and has a relatively low number of appeals in a typical year. Law and rules are followed; the agency has not needed to add infrastructure. The website is clear and easy to navigate, and the documentation available to the public for cases is extensive. Agency action notices and final orders provide the basis for decisions made/outcomes. In early January 2015, the Commissioner issued a screening protocol designed to eliminate any potential or perceived conflict of interest or ex parte communications as defined under the APA. In mid-2015, the Hearing Unit implemented new tools to track and measure appeals with particular emphasis on timeliness. Highlights of the process are provided in the table below, where we also identify noteworthy practices.

Evaluation of policies and practices

Noteworthy practices that other agencies may find beneficial are indicated with a star ()*

Accessibility and Transparency

1. Outreach	*The link to the Administrative Hearings portion of the website is one click from the OIC homepage, and includes all the steps involved. Information is provided in notices and through the OIC website. OIC is in the process of updating their notices to include a link to their hearings webpage.
2. Policies available to public	*Documentation associated with all cases is available online and can be extensive depending on the case.
3. Judges explain appeal process	The process is discussed during the prehearing conference, which also provides an opportunity for appellants to ask questions.
4. Option to participate remotely	The majority of prehearing conferences are by telephone; most hearings are conducted in person.
5. Accommodations	Accommodation is provided; for example, OIC rearranged schedules to accommodate an appellant undergoing medical treatments. An accommodation form for disability is sent with the notice of hearing.

Impartiality

6. Job expectations delineate impartiality	The hearing officer's performance and development plan was recently updated, explicitly stating the need for fair and impartial reviews of OIC decisions.
7. Practices help prevent ex parte	*Implemented a screening protocol designed to eliminate any potential or perceived conflict of interest or ex parte communications. The protocol lays out those cases that will be routinely transmitted to OAH. A paralegal acts as a conduit between agency and appellant to communications with the hearing officer to prehearing conferences and the hearing.

Performance management

8. Adjudicator expertise	Education and experience expectations are specified in the hearing officer's position description.
9. Process for timely decisions	OIC follows the timeliness standards laid out in the APA. It recently implemented performance measures, a target timeline for hearings, and performance tracker.
10. Outcome tracking	Cases and their outcomes are documented and accessible via the <i>Administrative hearings cases with documents</i> portion of their website. However, a staff member must manually assemble information to provide number of cases and outcomes.

Decisions

11. Process for consistent decisions	Decision quality and consistency is controlled in great part by having only one hearing officer, who has the requisite expertise. In addition, the hearing officer reviews outcomes from cases that were appealed to superior court.
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What we learned about perspectives

A disputed matter of communication between a hearing officer and the agency drew media attention in 2014, and stakeholder feedback that we gathered largely focused on this issue. They were concerned that because the hearing officer was housed within the agency, there was greater potential for the hearing officer to favor the agency or be unduly influenced by the agency. Some of these stakeholders felt that if it was not possible to sequester the hearing officer, then he or she should be subject to the judicial code of conduct. The issue led some legislators to express broader concerns regarding the public perception of fairness and they wanted to know whether a code of conduct applied to hearing officers. Other legislators felt that the case did not actually relate to independence of hearing officers and that it was inappropriate to develop statewide policy based on one controversial case.

In response to these concerns, OIC developed and implemented a screening protocol designed to eliminate any potential or perceived conflict of interest or ex parte communications; it also designated cases that would be routinely shifted to the OAH or specially assigned to the Commissioner or a special appointment. The screening protocol provides administrative controls regarding access restrictions to the hearing officer and hearing-related information, and describes responsibilities for the various types of appeals. In addition, the OIC recently updated hearing officer expectations, incorporating management's stated expectation that "businesses and individuals regulated by the OIC have an opportunity to a fair hearing and impartial review of decisions made by the Insurance Commissioner and his staff."

Is the process understandable?

The process is understandable. The OIC promotes user understanding through notices, step-by-step guidance on the website, and during the prehearing conference and formal hearing. A paralegal appeal coordinator assists parties with the process.

Do practices appear impartial?

The appeals process at OIC includes elements that enhance impartiality. A paralegal serves as a conduit for communicating the process, which enables the agency to limit communications with the hearing officer to prehearing conferences and the hearing. The screening protocol documents controls on the process, including who will hear a particular case (the hearing officer, OAH or a special assignment). Impartiality is further emphasized in the revised performance and development plan for the hearing officer.

Recommendations

We do not have any recommendations specific to OIC.

Excise tax appeals – Department of Revenue (DOR)

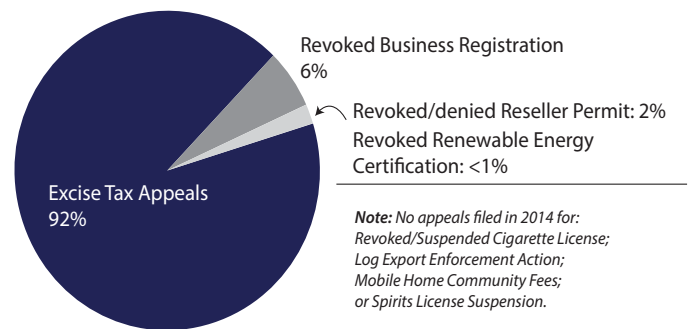
The Department of Revenue (DOR) is responsible for assessing and collecting taxes. It was established in 1967 along with the Board of Tax Appeals (BTA) when its precursor, the Tax Commission, was abolished.

We focused our review on excise tax appeals (also known as Rule 100 appeals), which represent 92 percent of DOR's caseload, as illustrated at right. It is important to note that the appeals process in an excise tax case is not subject to APA requirements. The excise tax appeal is considered part of the tax assessment process, and was designed to be more efficient and less formal, representing more a review of actions than an adjudicatory appeals process. Taxpayers desiring an APA appeal may take their dispute to the Board of Tax Appeals (BTA). Our review of BTA processes is on page 70.

Excise tax appeals are overseen by DOR's Tax Policy Senior Assistant Director, who reports directly to DOR's Director. In 2014, DOR resolved 895 excise tax appeals and employed 16 hearing officers. Appeals are mainly supported by the state general fund.

2014 appeal volumes

Total appeals: 973



APA: No, Yes 16 Internal

http://dor.wa.gov/Content/FindALawOrRule/WTD/WTDs_02a_2015.aspx

Source: DOR self-reported data.

Excise tax appeals process

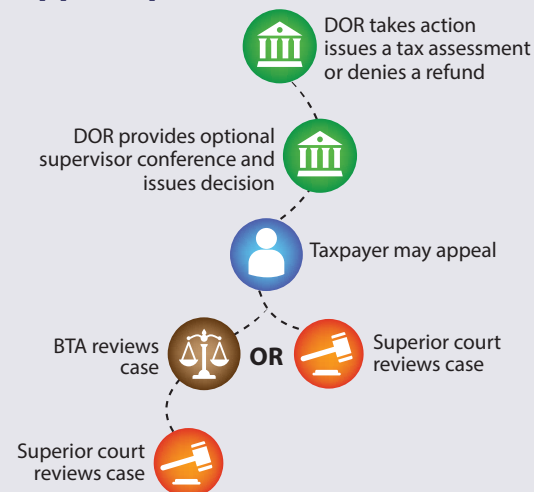
An appeal takes place in several steps, with an option to settle

An appeal consists of several stages, as illustrated in the appeals process graphic. Before filing the appeal, DOR encourages each taxpayer to take part in an optional supervisor's conference, which provides an informal opportunity for DOR to further explain the disputed decision. Once the taxpayer files an appeal, DOR may offer a prehearing conference to help prepare for the hearing. After the hearing, the hearing officer drafts a decision that is reviewed, revised if necessary, and issued. At this point, a taxpayer may file a Petition for Reconsideration to request further review.

Once a taxpayer has exhausted available appeals procedures at DOR, he or she has two options to continue contesting the decision. One option is to take the appeal to the BTA, where the taxpayer is liable for any tax, penalties and interest that accrue while the case is under way. Alternatively, the appeal can be taken directly to superior court. Under this option, the taxpayer must pay all tax liabilities immediately.

At any time during the appeal process, the taxpayer or the DOR may propose taking the settlement track, which was recently modified in an effort to help settle tax

Appeals process



disputes quickly. Taking this track does not postpone the scheduled hearing and the settlement offer is evaluated separately from the appeal.

During fiscal year 2015, 9 percent of all excise tax appeals were settled and another 16 percent granted relief, as illustrated at right.

Criteria evaluation

Appeals are operating in the **managed** level of maturity. We gave DOR this rating because it:

- Has established processes in place
- Uses multiple means to inform the public about appeals
- Developed and uses a variety of tools to support development of well-reasoned decisions
- Has performance expectations in place
- Provides training and development opportunities for the hearing officers
- Demonstrates a broadening performance-based culture where metrics and taxpayer/stakeholder feedback result in ongoing improvements to the process.

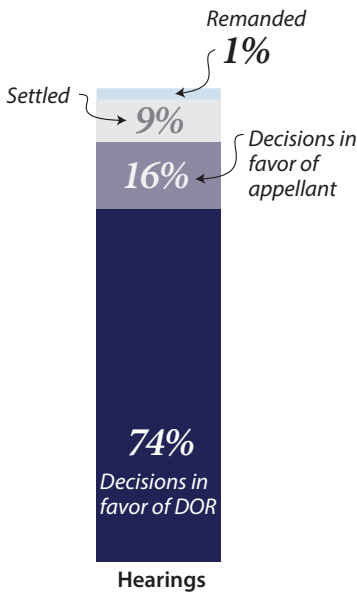
Highlights of the process are provided in the following table, where we also identify noteworthy practices.

Evaluation of policies and practices

Noteworthy practices that other agencies may find beneficial are indicated with a star ()*

Case outcomes for excise tax appeals

Fiscal year 2015



Note: Percentages calculated as a proportion of all appeals resolved.

Source: Auditor calculation of outcomes provided by DOR.

Accessibility and Transparency	
1. Outreach	A taxpayer may learn about the process in several ways: website, brochures, guidance documents, forms, acknowledgement notices, and by directing questions to DOR. Notices regarding tax liability indicate the taxpayer has a right to appeal. Some notices cite an agency rule or other information. DOR strives to continually improve communications, including the use of Plain Talk principles in its communications. A taxpayer advocate informs the taxpayer about options and procedures, facilitates communications between the taxpayer and the DOR, and communicates taxpayer rights and responsibilities.
2. Policies available to public	Tax-related information is posted to the website, including Excise Tax Advisories and Washington Tax Decisions (WTDs), which are precedential.
3. Hearing officers explain appeal process	The hearing officer uses a script explaining the process.
4. Option to participate remotely	Hearings may be conducted by telephone.
5. Accommodations	Accommodations are provided as necessary; DOR has a multilingual translator and offers mailings in multiple languages. All buildings are Americans with Disabilities Act (ADA) accessible.
Impartiality	
6. Job expectations delineate impartiality	Position descriptions require neutrality and lack of bias in the hearing and fact-finding process. DOR mission and goals reinforce a commitment to fairness and impartiality. A recent initiative emphasizes the importance of treating co-workers and customers with respect and dignity.

7. Ex parte	Not applicable to DOR, because the excise tax appeal process is not subject to APA restrictions on ex parte communications.
8. Practices reinforce impartiality	<p>*An appeals dispute resolution process is in place for those times when a hearing officer does not agree with an agency interpretation.</p> <p>*The script used by the hearing officer to explain the process also explains how the process differs from an APA appeal.</p>

Performance management

9. Hearing officer expertise	Position descriptions describe minimum performance expectations for hearing officers, and cases are assigned based on individual hearing officer experience. Supervisors review hearing officers' work and evaluate their performance.
10. Process for timely decisions	DOR sets deadlines for resolving cases and tracks timeliness with performance measures.
11. Outcome tracking	DOR tracks and posts case outcomes on its website.

Decisions

12. Process for consistent decisions	<p>*Hearing officers may draw from several guides, all designed to promote developing well-reasoned and well-written decisions, including an editing checklist, review conventions, decision templates and supporting guides, a decision style sheet, and case format guides.</p> <p>Decisions are subject to supervisory review before they are issued. When a case involves unsettled areas of the law, then the following steps are followed:</p> <ul style="list-style-type: none"> • Program managers meet. If they cannot resolve the matter, • Assistant Directors meet and review. If they cannot resolve the matter, the • Executive team considers the matter.
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Other noteworthy practices:

* A recent survey gathered feedback from taxpayers and representatives. DOR has begun stakeholder discussions and a rule amendment in an effort to clarify the appeals process.

* In an effort to simplify and streamline processes, DOR has separated the settlement function from the appeal process.

What we learned about perspectives

In the course of our review, we gathered input from stakeholders, including legislative staff, the business community and the Washington State Bar Association (WSBA) Tax Section. We also attended a Senate work session on the topic of proposed reforms to excise tax appeals. Several issues or concerns emerged from these discussions.

We surveyed DOR appellants and representatives, but because response rates were low, we concluded the results were not statistically valid and we do not review them here. We include quotes from the surveys when they help support a point. This section presents the results of our survey of DOR hearing officers and results from 2014 DOR survey of appellants and representatives.

How formal should the appeals process be?

Stakeholder views: One stakeholder viewed the excise tax appeal process as a technical review but believed agency staff present themselves as if conducting formal appeals, which might give appellants the impression they are undergoing an administrative appeal. This stakeholder suggested that if DOR made the nature of the review clearer, appellants would “respect the process more.” Another

Survey question: What is done to make the process clear?

We are required to give appellants an introduction to our process; in my opinion, the key parts of this are to explain that we are employed by the agency, we may talk with other agency employees after the hearing, and our decisions are reviewed prior to being issued. We give appellants an opportunity to ask about the process before addressing the substance of the appeal.

Hearing officer response

stakeholder group indicated they valued the process because it is efficient and cost-effective as well as transparent; DOR is able to solve and/or narrow disputes. They expressed concern that DOR's reform efforts would shorten processing times and eliminate the term "appeal," because they believe such changes would result in decisions made with less consideration. They also recommended that any revisions to agency rule should employ plain language and list example cases.

DOR views: DOR officials told us the process is intended to be a review, not a formal appeal. DOR uses a hearing officer script intended to clarify that the hearing is non-adversarial and informal. For instance, witnesses are not under oath, the hearing is not recorded, and the hearing officer may discuss the case further with the taxpayer and other personnel in order to develop the decision. Hearing officers' survey responses also emphasized the importance placed on clarifying the nature of the process. DOR officials believe the term "appeal" has created misconceptions among the public, and the agency is developing new language to describe the process.

Who should make the decision – the hearing officer or DOR?

Stakeholder views: A panel from the Association of Washington Business told us that the hearing officer is no longer the decision-maker in an appeal. Panelists also said that DOR's focus had shifted to generating revenue, rather than developing fair tax assessments.

DOR views: Each decision represents the DOR's interpretation of the law and its regulations. Officials emphasized their intent is to develop consistent decisions. For this reason, hearing officers work with other DOR officials to develop the agency interpretation when necessary. It is this decision that is subject to APA review at BTA to determine if the DOR's interpretation is correct and the tax assessment or refund action is consistent with the law.

Should DOR publish more tax decisions?

Stakeholder views: The Association of Washington Business panel expressed concern that DOR uses unpublished decisions as policy rather than publishing rules. The Washington State Bar Association representatives suggested DOR share guidance developed by its Interpretations and Technical Advice division.

DOR views: To develop each decision, a hearing officer consults with the Operating Division, using several databases to gather relevant information. The hearing officer also researches the law and identifies facts regarding the taxpayer and its industry, while requesting documents from the taxpayer. Hearing officers may use a library of precedential decisions including Washington Tax Decisions, unpublished non-precedential decisions, and other sources.

DOR officials acknowledged that not all policy information is available to taxpayers, and pointed out that publishing more decisions presents challenges. First, state law designates taxpayer information as confidential, so before publication, DOR staff must remove any information that could identify a taxpayer, which adds costs in staff time.

Second, many decisions resemble one another, so publishing each one would yield little value, in terms of sharing policy with the public. Since publishing a decision requires an effort to remove taxpayer information, DOR selects exemplar decisions and designates them as precedential.

DOR has committed to publishing more decisions. To support this effort, it has set goals for the number of published decisions, and has exceeded its goals for the last two fiscal years. DOR also gathers public comment as it develops Excise Tax Advisories published on its website.

Survey question – Impartial

Although hearing officers are encourage[d] to be impartial and keep an open mind, taxpayers are clearly [informed] that the decision is an agency decision. Although only a very small percentage of the agency decision differs from the [officer's] recommendation that is necessary because the agency does not have the ability to appeal the officer's decision.

Hearing officer response

Washington Tax Decisions

In some cases, DOR concludes that a particular decision provides useful guidance for a number of taxpayers and publishes them. These Washington Tax Decisions are published by the DOR on its website so they are available to the public.

Survey question – Understanding the Process

"[Regarding the appeal process] six months is a very long time in most business situations. 90 days would be far superior. The people have been knowledge[abl]e and good to work with."

Appellant response

Is the process understandable?

DOR hearing officers noted that the excise tax appeal process is designed so that communication within the organization occurs. They also pointed out a number of things the agency does to make the appeals process clear to appellants including website guidance, brochures, published rules and decisions, and hearing script notices. One respondent suggested that DOR consider sharing policy memos with the appellant so he or she could respond directly to issues or concerns stated.

The 2014 survey conducted by DOR showed that both appellants and representatives tended to agree they received clear and useful information from DOR, but they were largely unaware of the information available on the DOR website. To address this, DOR is updating its website and planning more outreach efforts.

Some of DOR's appeals notices do not contain a link to the appeals website. Including a direct link to the appeals section of the DOR website in all letters and notices could promote awareness and greater access while increasing the chance that taxpayers will use the website.

Do practices appear Impartial?

In our evaluation, we found that practices and policies related to DOR's Rule 100 appeals process generally appear impartial. That said, about half of respondents to DOR's survey want appeals to be independent from other divisions in DOR. Commenters also suggested that DOR publish more tax determinations, improve the settlement process and issue decisions more quickly.

DOR also gathered feedback from discussions with accounting organizations and WSBA. Their suggestions included amending agency rule to explain the appeal process better, sharing results of internal policy discussions with appellants, formalizing more policies in agency rule or Excise Tax Advisories, and raising hearing officer compensation to attract the best candidates.

Recommendations

We concluded that DOR cannot satisfy every stakeholder with its appeals process, because it must balance competing policy considerations as it implements a complex area of law. Some stakeholders valued the process as is, including the time it takes to reach a decision, but other stakeholders did not. Stakeholders want more published decisions while DOR must balance these demands with the requirement to protect confidential information. Even so, we believe DOR has opportunities to improve stakeholder access.

Based on our review, we recommend DOR:

- In notices and communications, add a link to the appeals website to facilitate access
- Review communications such as hearing officer script for opportunities to clarify aspects of the process that are in fact intended to be impartial. For example, the hearing officer position description specifies that the hearing officer "Demonstrate neutrality and lack of bias in the hearing and fact-finding process."

Survey question – What can be done to make the process clear?

"For the overwhelming majority of my appeals the process [is] both facially and substantively impartial and the appellants understand the process. However, on the limited number of appeals where there are broader policy concerns it would be helpful to share the policy memos with the appellant so they could respond to those concerns directly and specifically. While generally aware of policy interaction, it would be helpful if the specifics of that interaction were also disclosed."

Hearing officer response

Survey question – Impartial

Impartial to this agency means a solid second look at the decisions made lower in the agency without a preset expectation that we will affirm, reject, remand, modify or settle. Appeals are impartial. However, they also need to be consistent. This second look is subject to review for consistency in tax law and policy application. If professional opinions disagree, the executive clarifies and the decision reflects the agency's interpretation.

Hearing officer response

Unemployment insurance benefit appeals – Employment Security Department (ESD) and Office of Administrative Hearings (OAH)

The Washington State Employment Security Department (ESD) administers Washington's unemployment insurance system. It is an active partner in the WorkSource system, which helps employers with their hiring and training needs and helps residents look for work, and also collects, analyzes and disseminates job-related data for Washington's regions and communities.

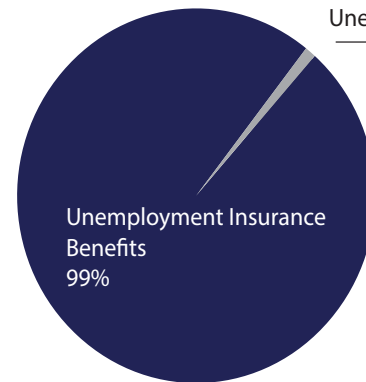
The Employment Security Department makes various decisions that can be appealed including:

- Unemployment insurance benefits
- Unemployment insurance tax assessments
- Unemployment fraud investigations
- Rule-making decisions

We decided to evaluate unemployment insurance benefit appeals in greater detail because they represent 99 percent of appeals for the agency and because decisions regarding benefits can significantly affect individuals.

2014 appeal volumes

Total appeals: 29,907



Unemployment Insurance Tax: 1%

Note: No appeals for Rule-Making Decisions were filed in 2014.

APA: Yes



7



Mixed



<https://govt.westlaw.com/wapcd/Index>

Source: ESD self-reported data.

Unemployment insurance benefit appeals process

The unemployment insurance benefit appeals process is administered by ESD, with OAH issuing the initial decision. Much of the process is guided by federal guidelines and primarily federally funded, based on caseload.

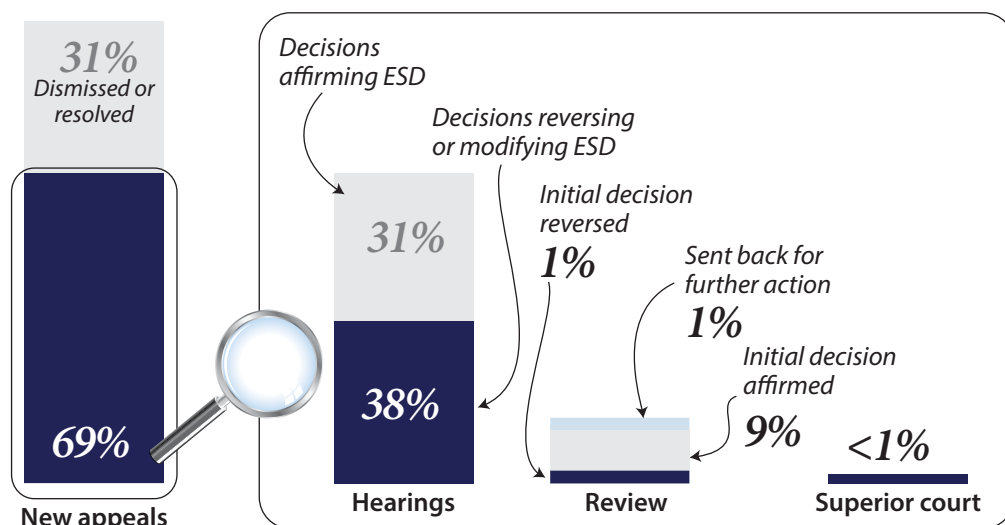
Those with the legal right to a hearing are typically employees and employers who disagree with decisions related to unemployment benefits. When an individual or employer contests a decision made by the agency, the request for an appeal is sent to OAH. After OAH issues an initial order, the individual or employer can appeal the decision to the ESD Commissioner's Review Office. The Commissioner's Review Office will review the record and enter a final order. A party dissatisfied with a final agency order can file an appeal with the courts.

Appeals process



In calendar year 2014, 69 percent of appeals went to hearing and received a decision, as illustrated below. Less than 1 percent of all cases went to superior court.

Case outcomes for unemployment insurance benefits appeals



Note: Percentages calculated as a proportion of all appeals resolved.

Source: Auditor calculation of outcomes provided by OAH and ESD. Data provided includes cases disposed from February 2014 through December 2014.

Criteria evaluation

We assessed the unemployment insurance benefit appeals process on measurable practices. We found it was **defined**, meaning that the process, implemented by both ESD and the OAH, is generally documented, standardized and integrated across the two organizations.

Highlights of the process are provided in the following table, where we also identify noteworthy practices.

Evaluation of policies and practices

Noteworthy practices that other agencies may find beneficial are indicated with a star ()*

Accessibility and Transparency	Employment Security	Administrative Hearings
1. Outreach	Agencies communicate each step in the process on websites and outreach publications – from an individual's right to an administrative appeal to proceedings in judicial courts.	
2. Policies available to public	Agencies provide laws and definitions related to the agency action in the letter informing clients of the agency action and in the hearing notice sent to appellants, and also publish precedential decisions on their websites. Precedential decisions issued by ESD's Commissioner's Review Office are binding upon ESD and OAH, and are available to the public, including through a link on the OAH website. * They can be searched in a variety of ways, including case name, docket/ review number, date or subject matter.	
3. Appeal process explained	Although ESD does not hold hearings, the agency communicates information about its Review Office review in a brochure and notices.	Unemployment insurance hearings are heard by OAH administrative law judges. OAH administrative law judges explain relevant issues and describe the hearing process.
4. Remote participation	Not applicable	OAH conducts hearings by phone with the option of in-person hearings.
5. Accommodations	The Review Office provides Spanish translations of all notices, employs staff that speak multiple languages, and provides the option to have the decision read through a translation service at ESD's expense.	OAH makes arrangements for special needs that must be accommodated and provides interpreters during hearing proceedings.

Impartiality	Employment Security	Administrative Hearings
6. Job expectations delineate impartiality	ESD helps ensure their reviewing officers are impartial by indicating in position descriptions that reviewing officers need to practice independent judgment and perform duties in an independent and impartial manner. Performance evaluations address impartiality; in addition, ESD uses annual and quarterly meetings to address general issues including those related to impartiality.	OAH judges are required to complete annual trainings on the OAH Code of Ethics.
7. Practices help prevent ex parte	*ESD's support staff and Chief Review Judge screen phone calls to help prevent prohibited communication. Collaboration on cases is done only after they have moved on to appellate courts.	The OAH Code of Ethics helps reinforce APA requirements and details proper and improper communication. Additionally, contact information for judges is not published.
Performance management		
8. Adjudicator expertise	ESD uses the following practices to ensure its reviewing officers have sufficient expertise: hiring practices, 6 to 12-month mentoring program, "ghostwriting," which allows new reviewing officers to practice writing decisions, draft decision reviews by the Chief Review Judge, annual evaluations and continuing legal education, including an annual forum with stakeholders to discuss emerging issues.	Judges must have at least five years of legal experience, undergo an annual performance review, and build expertise through trainings and mentoring.
9. Process for timely decisions	ESD uses case management strategies that track timeframes by providing monthly reports on timeliness statistics to the U.S. Department of Labor.	OAH has systematically reviewed ways to improve its efficiency and includes timeliness as a key performance expectation for its judges.
10. Outcome tracking	Both agencies track outcome data. ESD tracks case outcome data to identify any anomalies related to how often decisions are affirmed, reversed or remanded, and the percent of cases appealed to courts.	
Decisions		
11. Process for consistent decisions	To ensure consistent and well-reasoned decisions, ESD uses: *"ghostwriting" to allow new judges practice writing decisions, draft decision reviews by the Chief Review Judge; *quarterly meetings to discuss common issues that need additional explanation; *an annual forum with stakeholders to announce significant decisions and discuss recurring issues; and a quick review of all initial orders submitted by OAH administrative law judges. In addition, each review judge's draft decision goes through an internal review process for clarity and legal sufficiency prior to issuance.	OAH performs randomized checks on decision quality and supervisors review selected decisions. OAH is currently developing additional resources such as a decision library and templates for developing decisions.

What we learned about perspectives

We gathered feedback from stakeholders who provided their general perspectives on the entire unemployment insurance benefits appeals process, including interactions with ESD and OAH. Appellants that responded to our survey generally found the appeals process understandable. However, some said they did not have a clear understanding of the process from the start, and did not understand the hearing officer's rationale for decisions. One stakeholder also stated that appellants are unsure which agency they should send information to, and that appellants are often unaware that hearing officers are independent from ESD and actually employed by OAH.

When we asked appellants that participated in an unemployment benefits insurance appeal if they felt the process was impartial, they generally said yes, and were satisfied with the courtesy and respect shown them, and opportunities to be heard by hearing officers. Respondents did not specify whether their experience was with ESD, OAH, or both agencies.

One stakeholder told us he believes that most judges try to be fair, equally overturn and reaffirm decisions in favor of the employer and are willing to change decisions based on evidence provided. He also stated that OAH hearing officers can occasionally be abrupt during hearings and appear to lack sympathy or understanding of barriers that prevent people from fulfilling requirements for unemployment benefits or attending hearings. While one stakeholder feels that offering more opportunities for in-person hearings could help, ESD officials said that both ESD and OAH must balance providing parties more time during hearings with providing more appellants the chance for a hearing. This stakeholder also said that the existing model helps foster independence as OAH hears appeals independently from ESD.

Is the process understandable?

In our evaluation of the process, we found that practices and policies related to the appeals process are generally understandable, and that both agencies use various practices to make sure appellants understand the process. We found that both ESD and OAH communicate each step of the process. ESD makes its policies and precedential decisions available to the public, and publishes information about the right to appeal and the subsequent process. OAH helps arrange accommodations based on an individual's needs and provides interpreters during hearings.

“Forms need to be more self explanatory and easy to understand.”
~ Appellant

The Review Office translates notices and some outreach materials into Spanish, and employs staff that speak multiple languages. It also gives interpreters involved with hearings a copy of the final decision; appellants may choose to have decisions read through a translation service at ESD's expense.

We asked hearing officers about the understandability of the process. They indicated that they understand and have direction needed to make consistent decisions.

We found that ESD has several practices in place to help its judges better understand existing and emerging policies, including a mentoring program and regular meetings to discuss recurring issues and significant decisions.

Do practices appear impartial?

In our evaluation of the process, we found that practices and policies related to the appeals process generally appear impartial. ESD instructs its review officers that they must practice independent judgment, perform duties impartially, and help prevent prohibited communication.

Recommendation

We discuss the need for more clarity regarding agency-level communications in the Audit Results section of the report. Whether or not statute is amended in response to our recommendations, ESD could benefit by developing internal guidance clarifying:

- What types of communication between management and hearing officers are allowed.
- When and in what capacity managers may provide direction regarding a hearing officer's performance.

Examples of internal guidance include but are not limited to a code of ethics, a memo or an administrative policy.

Medicaid benefit appeals – Health Care Authority (HCA) and Office of Administrative Hearings (OAH)

The Health Care Authority purchases health care for Washington residents and oversees several health care programs, including:

- Washington Apple Health (Medicaid) and Medical Assistance Programs, funded by both federal and state general funds, which provide health care coverage to low-income residents
- Public Employees Benefits Board (PEBB) Program, which purchases and coordinates health insurance benefits for eligible public employees and retirees

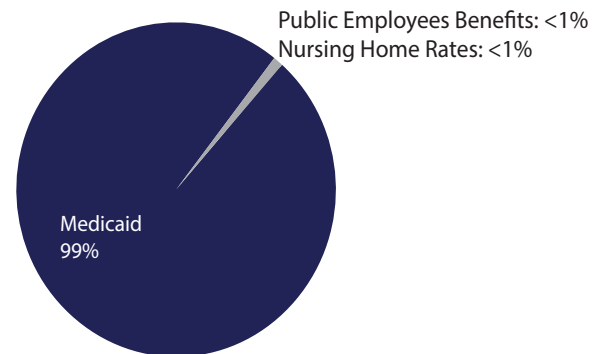
The Health Care Authority makes various decisions about a person's insurance coverage or benefits. If the person disagrees with the agency's decision, he or she can file an appeal. As illustrated at right, decisions made by HCA that can be appealed include but are not limited to:

- Medicaid benefits and eligibility determinations
- Public employee benefits eligibility determinations
- Nursing home rates
- Medical assistance provider overpayments

Previously under DSHS, the Medicaid appeals process transitioned to HCA in 2011. We decided to evaluate Medicaid appeals in greater detail because they represent roughly 99 percent of appeals for the agency.

2014 appeal volumes

Total appeals: 7,820



APA: Yes

2

Internal, Mixed



www.hca.wa.gov/Pages/appeals.aspx

Source: HCA self-reported data. Data reported is from January 2014 to mid-November 2014.

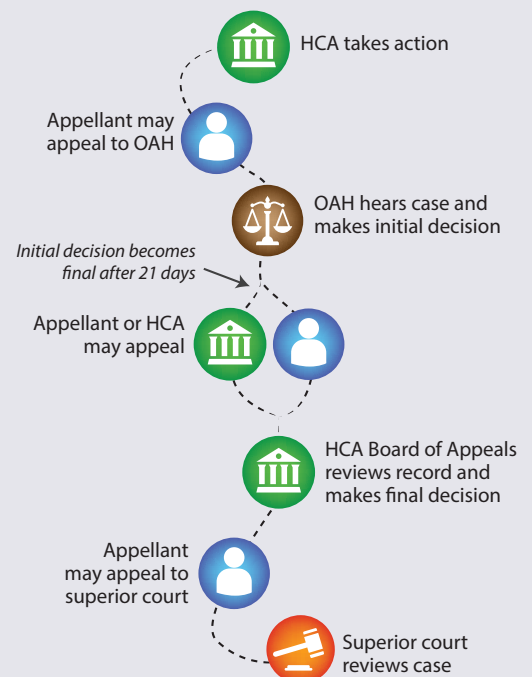
Medicaid appeals process

The Medicaid appeals process, illustrated in the appeals process graphic, is administered by HCA, with the initial hearing and decision conducted by OAH.

People who have the legal right to a hearing include applicants and recipients of Medicaid regarding eligibility or benefits, contracted Medicaid providers regarding assessed overpayments, and contracted nursing facilities that dispute rates. When an individual contests an HCA decision, the request for an appeal is sent to OAH.

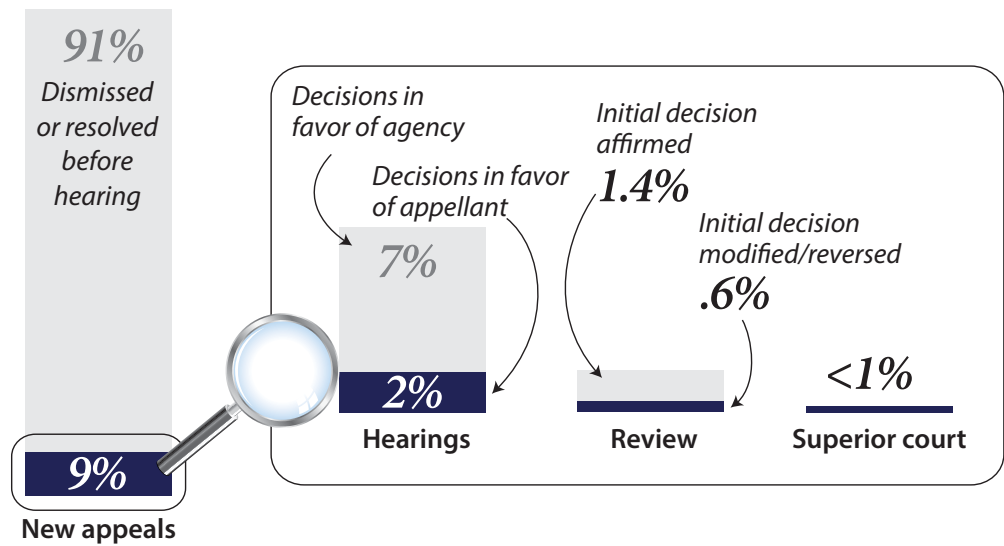
After OAH makes an initial decision, either HCA or an appellant can appeal the decision to HCA's Board of Appeals. The HCA Board of Appeals reviews the initial decision and will enter a final order. Any party can then ask the Board of Appeals to reconsider the decision; the appellant can appeal to judicial courts.

Appeals process



In fiscal year 2015, 9 percent of Medicaid benefit appeals went to hearing and received a decision, as illustrated below.

Case outcomes for medicaid benefit appeals



Note: Percentages calculated as a proportion of all appeals resolved.

Source: Auditor calculation of outcomes provided by OAH and HCA.

Criteria evaluation

We assessed the Medicaid appeals process, administered by HCA and OAH, on measurable practices. In general we found that the process was defined. It is repeatable and mostly documented, standardized, and integrated across the organizations that administer the process. As a relatively new function with new leadership, HCA continues to develop a stable and formal foundation for these appeals.

Highlights of the process are provided in the following table, where we also identify noteworthy practices.

Evaluation of policies and practices

Noteworthy practices that other agencies may find beneficial are indicated with a star (*)

Accessibility and Transparency	Health Care Authority	Administrative Hearings
1. Outreach	Agencies communicate most steps in the process on websites and outreach publications – from an individual’s right to appeal to how to appeal to judicial courts.	
2. Policies available to public	Agencies provide information on how hearing officers make their decisions (for example, a list of significant decisions).	
3. Appeal process explained	HCA hearing representatives provide explanations about the process during informal and voluntary prehearing meetings HCA is currently * developing a training academy that will train agency staff about the appeals process.	Hearing officers explain the hearing process.
4. Remote participation	Not Applicable	Conducts hearings by phone with the option of in-person hearings.
5. Accommodations	HCA’s Board of Appeals conducts a de novo review of the record and provides language access support to those requiring an accommodation, such as interpreter or translation services, if needed.	Makes arrangements to accommodate for special needs and provides interpreters during hearing proceedings, if needed.

Impartiality	Health Care Authority	Administrative Hearings
6. Job expectations delineate impartiality	HCA's Board of Appeals uses position description forms to help ensure that review judge applicants understand job expectations related to impartiality.	OAH judges are required to complete trainings on the OAH Code of Ethics.
7. Practices help prevent ex parte	Conversations are limited to procedural communication. Review judges are physically located away from other parts of the agency. The contact information for the Review Judges is not posted on the HCA website to reduce risk of the public reaching out to speak directly with a judge. HCA uses a toll free line for parties to contact the Board of Appeals, which is answered by support staff as required under WAC 182-526-0030.	The OAH Code of Ethics helps reinforce APA requirements and details proper and improper communication. Additionally, contact information for judges is not published.

Performance management

8. Adjudicator expertise	HCA's Board of Appeals provides training when available to ensure judges have proper expertise and is currently *developing a training academy. The Board also reviews work as a group, hires experienced judges, and conducts performance evaluations.	Judges must have at least five years of legal experience, undergo an annual performance review, and build expertise through trainings and mentoring.
9. Process for timely decisions	*HCA has improved processes for making timely decisions by identifying root causes of system deficiencies along with OAH. HCA's Board of Appeals tracks timeliness measures as guided by federal rules. HCA's Board of Appeals prepares weekly and quarterly reports for HCA's executive leadership accounting of caseload volume and backlog, if applicable.	OAH and HCA maintain a contract that outlines timeliness measures for appeals. OAH has systematically reviewed ways to improve its efficiency and includes timeliness as a key performance expectation for its judges.
10. Outcome tracking	Both HCA's Board of Appeals and OAH track outcome data. The agencies share outcome-related data with each other. To inform OAH judges about the rationale applied in deciding cases, HCA sends OAH judges a copy of each final order it issues.	

Decisions

11. Process for consistent decisions	<p>HCA's Board of Appeals reviews work as a group, discusses common issues, and uses policy outlined in rules to (1) ensure that ALJs and review judges apply program rules and best legal reasoning and (2) issue well-reasoned and well-written decisions. The Board of Appeals does not have formal policies to review decisions for consistency. Additionally, BOA:</p> <ul style="list-style-type: none"> • Reviews court decisions on final orders that advance to judicial review. • Uses decision templates and evidence checklists to ensure consistency. • Consults the comprehensive Review Judge desk guide to ensure quality and consistency. 	OAH performs random checks on decision quality and supervisors review selected decisions. OAH is currently developing additional resources, such as a decision library and templates for developing decisions.
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What we learned about perspectives

When we asked appellants who participated in a Medicaid appeal if they felt the process was understandable, some appellants responded that they felt they did not gain a clear understanding at the beginning of the process.

We gathered feedback from stakeholders who provided their general perspectives on the entire Medicaid appeals process including interactions with HCA and OAH. Appellants who responded to our survey generally believe that the appeals process is impartial.

Advocacy groups were concerned about HCA “making prehearing motions to dismiss” cases. Other stakeholders noted several things that could harm the appearance of impartiality, such as the potential for agencies to influence OAH decisions through the use of funding and requests to remove judges from a particular case. HCA clarified that any party can make a request to dismiss a judge. While this risk is inherent in any process using a central panel, HCA officials stated they are unaware of either funding or removal of judges affecting a Medicaid appeal.

“What your options are after [you file the appeal] wasn’t clear ... Some sort of direction would have been great.”
~ Appellant

“I feel like the judge did the best he could. I call it fair. I just like to be heard ... the judge was very polite and helpful.”
~ Appellant

Is the process understandable?

In our evaluation of the process, we found that practices and policies related to the appeals process are generally understandable. We found that both agencies use various practices to make the process understandable to appellants, including communicating most parts of the appeals process. OAH helps arrange accommodations based on an individual’s needs and provides interpreters during hearings. HCA’s Board of Appeals also translates decisions. Agencies provide information about applicable laws available to the public. HCA’s Board of Appeals has an online index of significant decisions, although it contains only one decision. A more extensive index can help promote consistent decision-making for hearing officers and inform participants of the rationale hearing officers have used to develop final decisions in the past.

In addition to making the process understandable to appellants, OAH has several methods in place to help judges better understand existing practices and policies, including annual trainings and mentorship opportunities. HCA’s Board of Appeals provides training to its review judges when funds for training are available.

Do practices appear impartial?

We determined that HCA’s practices and policies generally appear impartial. HCA has developed practices to support impartiality, including the use of position description forms to help ensure that applicants understand job expectations related to impartiality. The agency has also communicated expectations to its judges and hearing participants that they must limit conversations to procedural issues. In spite of these procedures, HCA review judges indicated that disagreements exist about proper versus improper communication. Judges also expressed their desire for a more stable, formal foundation for ensuring impartiality.

Recommendations

During our assessment of the Medicaid appeals process, we found that the relative newness of the process at HCA contributed to concerns from various stakeholder groups. However, HCA can take actions to improve the understandability and appearance of impartiality of Medicaid appeals including:

- Continuing to develop a process for updating significant decisions
- HCA’s Board of Appeals can improve transparency by updating its published list of significant decisions as they become available. To do so, the Board should continue to develop a process for indexing them.
- Formulating HCA policy to clarify allowable communication.

We discuss the need for more clarity regarding agency-level communications in the Audit Results section of the report. Whether or not statute is amended in response to our recommendations, HCA could benefit by developing internal guidance clarifying:

- What types of communication between management and hearing officers are allowed
- When and in what capacity managers may provide direction regarding a hearing officer’s performance

Examples of internal guidance include but are not limited to a code of ethics, a memo or an administrative policy.

Public assistance benefit appeals – Department of Social and Health Services (DSHS) and Office of Administrative Hearings (OAH)

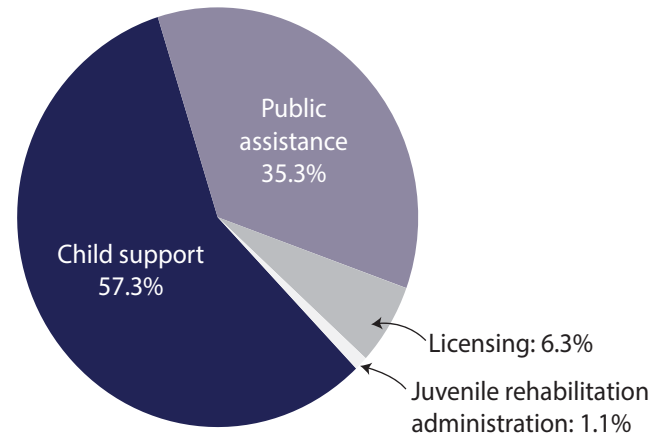
The Department of Social and Health Services (DSHS) provides and administers a wide array of services and programs including:

- Food, cash and medical assistance
- Housing assistance
- Child Protective Services
- Child support
- Youth services
- Adult care
- Mental health & addiction services
- Disability support

DSHS makes various decisions about a person's benefits which can include denying benefits or reducing a benefit amount. If a person disagrees with the agency's decision, he or she can file a request for a hearing. The types of decisions that can be appealed and their associated volumes are illustrated at right. We decided to evaluate public assistance appeals in greater detail because of the impact benefits or loss of benefits can have on recipients.

2014 appeal volumes

Total appeals: 15,960



APA: Yes 2 Internal, Mixed

<https://www.dshs.wa.gov/sesa/office-policy-and-external-relations/board-appeals/decision-list>

Source: Auditor calculations based on OAH data.

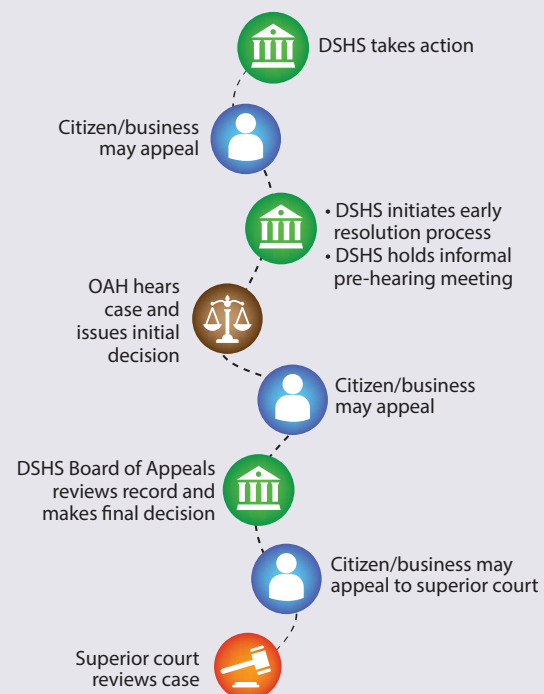
Public assistance appeals process

Appellants are usually recipients of public benefits, but vendors can also object to agency actions and request a hearing.

The request for an appeal is sent to the OAH. While the hearing request is being processed, DSHS representatives may initiate an early resolution process in which a DSHS representative may offer an informal prehearing meeting. This meeting is intended to correct errors, present rules, provide a withdrawal form if needed, attempt settlement, and inform the appellant about the hearing process.

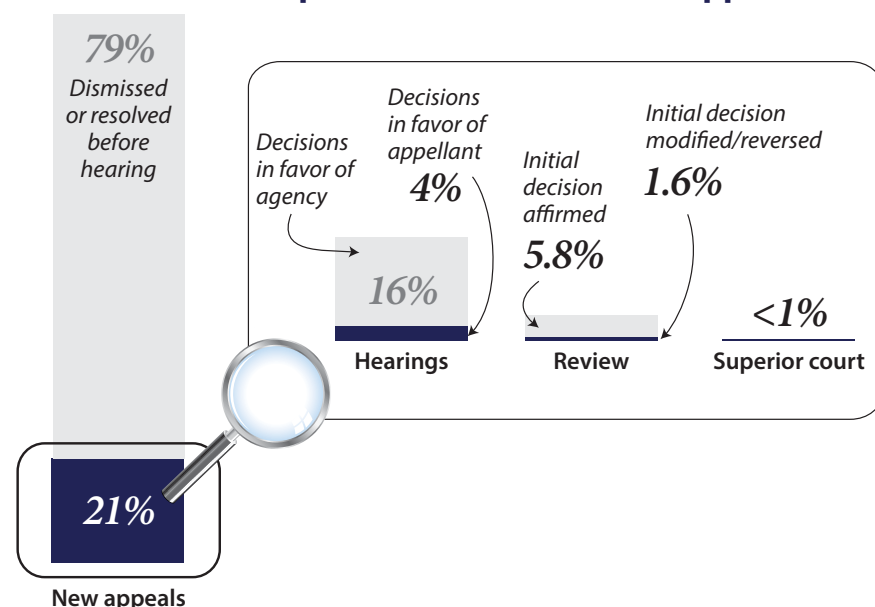
For each case continuing to a hearing, OAH issues a decision, which is either initial or final depending on case type. If the appellant chooses to appeal the OAH decision, the DSHS Board of Appeals will hear the appeal. If the appellant chooses to appeal the DSHS Board of Appeals decision, the appeal will go to superior court. The flow chart illustrates this process.

Appeals process



From June 2015 to August 2015, 21 percent of public assistance appeals received hearings, as illustrated below. Less than one percent were appealed to superior court.

Case outcomes for public assistance benefit appeals



Note: Percentages calculated as a proportion of all appeals resolved.

Source: DSHS public assistance cases resolved from June 1, 2015 to August 30, 2015 as provided by OAH; estimated percentage extracted from DSHS Board of Appeals cases resolved in 2014.

Criteria evaluation

We assessed public assistance appeals processes on measurable practices. We found that the process was **defined**; processes are repeatable and, in general, documented, standardized and integrated across organizations that administer the process. Highlights of the process are provided in the following table, where we also identify noteworthy practices.

Evaluation of policies and practices

Noteworthy practices that other agencies may find beneficial are indicated with a star ()*

Accessibility and Transparency	DSHS	Administrative Hearings
1. Outreach	Agencies communicate steps in the process on websites and outreach publications – from an individual’s right to appeal to how to appeal to superior courts.	
2. Policies available to public	During an informal prehearing meeting, DSHS hearing coordinators explain the hearing process to appellants. The DSHS Board of Appeals has an online index of significant decisions. Applicable laws are made available to the public, by request, on written decisions.	OAH may sometimes schedule a prehearing conference where DSHS hearing coordinators explain relevant facts to appellants.
3. Appeal process explained	Not applicable	Hearing officers explain the hearing process.
4. Remote participation	Not applicable	Conducts hearings by telephone with the option of in-person hearings.
5. Accommodations	DSHS Board of Appeals provides accommodations when needed.	Makes arrangements to accommodate special needs and provides interpreters during hearing proceedings, if needed.

Impartiality	DSHS	Administrative Hearings
6. Job expectations delineate impartiality	Review judges employed by DSHS Board of Appeals are subject to executive ethics board requirements and the Rules of Professional Conduct, as are all lawyers licensed in Washington. The Board of Appeals has an unwritten policy to outline expectations related to impartiality but does not have documented policies.	OAH hearing officers are required to complete annual trainings on the OAH Code of Ethics.
7. Practices help prevent ex parte	DSHS Board of Appeals review judges are physically isolated from program staff, support staff and directors. Judges also have limited contact with parties as the Board of Appeals reviews hearing records.	The OAH Code of Ethics helps reinforce APA requirements and details proper and improper communication. Additionally, contact information for judges is not published.
Performance management		
8. Adjudicator expertise	DSHS Board of Appeals ensures that judges have proper expertise by conducting performance evaluations and by developing performance improvement plans as needed.	Judges must have at least five years of legal experience, undergo an annual performance review, and build expertise through trainings and mentoring.
9. Process for timely decisions	DSHS Board of Appeals uses a case flow tracking process and has internal controls to make sure they track timeliness measures dealing with processing times.	OAH has systematically reviewed ways to improve its efficiency and includes timeliness as a key performance expectation for its judges.
10. Outcome tracking	Both the Board of Appeals and OAH track outcome data. DSHS Board of Appeals tracks outcome-related data and categorizes it by review judge as well.	
Decisions		
11. Process for consistent decisions	DSHS Board of Appeals uses quality control reviews to ensure the quality of its decisions. *The Chief Review Judge checks for 10 to 11 factors during a review of a random selection of decisions. DSHS uses OAH decisions to guide policy development/ improvement. The Board provides feedback to the program portion of the agency based on trends and decisions.	OAH performs randomized checks on decision quality and supervisors review selected decisions. OAH is currently developing additional resources such as a decision library and templates for developing decisions.

What we learned about perspectives

When we asked appellants who participated in a public assistance appeal if it was understandable, survey respondents indicated it was generally understandable, but some said they felt they did not gain a clear understanding at the beginning of the process.

“[The] process was very easy and painless.”
~ Appellant

Advocacy groups were most concerned about the appearance of impartiality when agency-employed judges make decisions favoring the agency. One stakeholder from an advocacy group was concerned about the comprehensiveness of the notices that inform clients about the agency’s action or initial determination, noting it lacked information about the consequences of not participating in a hearing (typically resulting in a default and final decision in favor of the agency).

Stakeholders identified issues that can affect the appearance of impartiality. One stakeholder expressed concern about the cases listed in the DSHS Board of Appeal’s index of significant decisions, stating that only those made in favor of the agency are listed, making the process appear biased toward the agency. When we discussed this with Board members, they told us that the agency does not generally consider the prevailing party when determining which decisions to include but rather methodically determines which decisions are included in the index using an established list of criteria.

“[I] was very upset because [my] caseworker was the prosecutor for the other side, and [...] felt that someone who was supposed to be helping [me] was working against [me].”
~ Appellant

Is the process understandable?

In our evaluation of the process, we found that practices and policies related to the appeals process are generally understandable. The Board of Appeals describes the appeals process at each step and the rules referenced when making decisions. For those in need of accommodations, the Board of Appeals offers telephone-based translations of notices and decisions at no cost. If a case is flagged as needing translation services, all materials sent to the client are translated. OAH also helps arrange accommodations based on an individual’s needs and provides interpreters during hearings.

“I felt the language regarding the right to an appeal was ambiguous.”
~ Appellant

Do practices appear impartial?

We found that practices and policies related to the appeals process are defined and in general appear impartial. Review judges do not undergo training that emphasizes impartiality, but DSHS officials said they have unwritten expectations of agency judges and houses them separately from the program offices that represent DSHS during appeals.

Recommendations

We discuss the need for more clarity regarding agency-level communications in the Audit Results section of the report. Whether or not statute is amended in response to our recommendations, DSHS could benefit by developing internal guidance clarifying:

- What types of communication between management and hearing officers are allowed
- When and in what capacity managers may provide direction regarding a hearing officer’s performance

Examples of internal guidance include but are not limited to a code of ethics, a memo or an administrative policy.

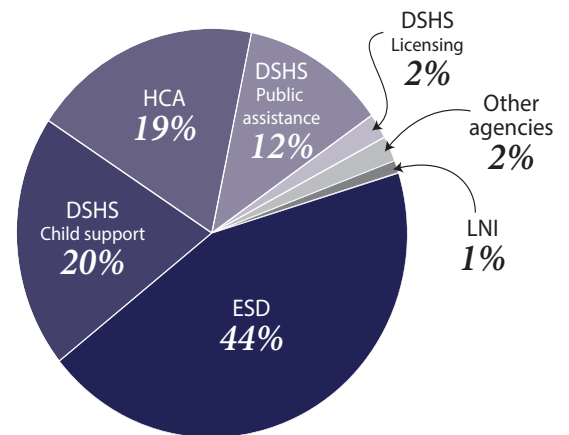
Office of Administrative Hearings (OAH)

The Office of Administrative Hearings (OAH) conducts administrative hearings on the behalf of other state agencies. Its staff of about 100 administrative law judges conduct administrative hearings according to APA requirements. Its largest caseloads relate to unemployment benefits for ESD, child support decisions for DSHS and Medicaid appeals for HCA (see pie chart), which we review in this appendix. In this section, we offer a closer review of OAH processes.

More than three decades ago, citizens raised concerns that Washington's administrative hearings were unfair. In response, a Washington State Bar Association (WSBA) task force proposed legislation to establish OAH. Task force members believed the new agency would make the hearings process more independent and impartial, and thus ensure administrative hearings were fair. They also expected the new agency to make appeals more accessible and transparent. Established in 1981, the OAH's mission is to independently resolve administrative disputes through accessible, fair and prompt processes and to issue sound decisions.

Fiscal year 2015 appeal volumes

Total appeals: 45,051



Source: Auditor calculations based on OAH data.

Criteria evaluation

With more than 30 years' experience conducting administrative appeals, OAH processes relating to understandability and impartiality are **defined**. Most processes are documented, standardized and integrated across the agency, and it has recently embarked on several improvement efforts. The agency does particularly well at providing information to the appellants, supporting a culture of impartiality among judges, and managing processes supporting efficiency and quality in its decisions.

OAH conducts outreach aimed at helping appellants understand the appeals process. Like most of the agencies we reviewed, its website explains what appellants should expect as they go through an appeal. We found several elements on the OAH website noteworthy. For instance, it provides video tutorials on how to prepare for a hearing, and offers links to legal services organizations that can further assist appellants. The website also lists applicable statutes, rules and precedential decisions for many types of appeals.

OAH offers telephone assistance in many languages, and interpreter services for those who need them. Hearing documents, including decisions, are provided in English only, but appellants can request an oral translation if needed. In contrast, DSHS and HCA provide written translations to all clients who need them. While providing such translations would increase the cost of appeals, it would improve access for populations with barriers to understanding.

A heavy workload may result in less courtesy toward parties

"I have seen several ALJs become callous towards either appellants or employers. I believe much of this is due to the number of cases we are required to do each week and the deadlines, mandated by our agency and by federal mandates. The undue pressure of 'Initial Order' deadlines has led to burn out and shortness with parties since time is ALWAYS of precious commodity to ALJs."

OAH judge

Highlights of the process are provided in the table below, where we also identify noteworthy practices.

Evaluation of policies and practices

Noteworthy practices that other agencies may find beneficial are indicated with a star ()*

Accessibility and Transparency	
1. Outreach	*OAH publishes extensive how-to information on its website, including video tutorials and links to organizations offering legal assistance. It also offers personalized assistance by telephone.
2. Policies available to public	*The agency website provides links to advocacy groups, legal resources and relevant statutes, rules and policies.
3. Judges explain appeals process	During each prehearing conference and hearing, judges describe the hearing process and review issues relevant to the case.
4. Option to participate remotely	Most hearings are held over the telephone, although the agency offers in-person hearings upon request for certain types of cases.
5. Accommodations	Agency rule and outreach materials all state that OAH must offer accommodation for disability as well as interpretation for individuals with limited English proficiency. Judges screen for individuals needing accommodation on an ad-hoc basis. Staff speak multiple languages, and a translation service is provided.
Impartiality	
6. Job expectations delineate impartiality	Judges receive annual trainings on OAH's *Code of Ethics, which requires judges to perform duties impartially and competently.
7. Practices help prevent ex parte	The Code of Ethics reinforces APA requirements that communications regarding cases be made during hearing. Judges' contact information is unpublished.
Performance Management	
8. Adjudicator expertise	With rare exceptions, judges must have at least five years' legal experience. The annual performance review includes elements aimed at maintaining quality. The agency builds judge expertise through mentoring and trainings.
9. Process for timely decisions	The agency maintains performance measures related to timely processing of appeals, and reports its results for unemployment insurance appeals to ESD. Timely processing is supported by *internal standards and job expectations. The agency is adopting a new case management system and *piloting process improvements, aiming to continually improve timeliness.
10. Outcome tracking	The agency records case resolutions, such as affirmed, reversed and dismissed in its databases. It also tracks review decisions for the ESD caseloads. OAH plans to track review decisions of other agencies with its new case management system.
Other practices	*OAH completed a telephone survey of appellants in 2015.
Decisions	
11. Process for consistent decisions	*The agency performs randomized quality checks on hearings and decisions, which inform federally mandated performance measures for unemployment insurance appeals, as well as quality control for other caseloads. Supervisors review selected decisions. The agency is now developing additional resources to support decision quality: *a decision library and templates for developing decisions.

What we learned about perspectives: Accessibility and transparency

While about one in three judges surveyed felt OAH is doing everything possible to make the appeals process clear to unrepresented parties, others offered suggestions to improve understanding. Providing translations was among the top suggestions from OAH judges on how the process could be made more clear. The most common suggestion was to improve print communications to promote clarity, such as improving the hearing rights brochure and simplifying the instructions for filing a petition for review. A few judges also suggested improvements to client agency communications. For instance, two suggested client agencies use more plain language in appeals notices. Another suggested the client agency could better explain its decision process to appellants.

Most survey respondents said they understood the judge and the decision.

Most appellants responding held positive views on their understanding of the process. One appellant commented that holding the hearing by telephone was convenient. A different unemployment claimant said the process was simple. However, another commented that having no attorney limited his chance of prevailing.

OAH has made efforts to simplify communications to appellants over the past few years. For each of its caseloads, it has convened workgroups to revise text in official communications, using Plain Talk principles. This effort is still in progress for certain caseloads, so appellants are likely to see simpler communications in the future.

What we learned about perspectives: Impartiality

Based on our conversations with OAH management and our survey of judges, we concluded that the organization is founded on a strong culture of impartiality. Both managers and line judges repeatedly emphasized their commitment to an impartial and fair process, and ongoing efforts to improve processes demonstrate an ongoing commitment to this goal.

One way OAH has formalized its culture of impartiality is by its Code of Ethics, which all its judges must follow (posted online at www.oah.wa.gov/Code%20of%20Ethics.pdf). Adopted in 2010, its requirements are intended to guide judges to be independent and impartial in both fact and appearance. Among other things, the Code of Ethics addresses ex parte communications, prohibiting a judge from communicating with participants about a case, except under certain circumstances regarding procedural matters. But while the Code of Ethics helps reinforce the expectation that ex parte communications are prohibited, it does not resolve certain questions about what sorts of communications with judges are allowed.

Some judges told us they feel pressured to favor client agencies, because the OAH budget relies on payments from these agencies. This perceived pressure stems from the fact that agencies may opt out of using OAH and hire internal judges instead. One scholar has commented that whether or not such pressure exists, public perception of favor toward customer agencies is stronger using this budget mechanism.

OAH leadership also expressed its view that the perception of impartiality would benefit from a more independent budget approach. Officials told us they are unaware of agencies seeking to improperly influence specific decisions, but they believe a non-appropriated OAH account could strengthen the public's perception of OAH's independence. Currently, OAH spending levels are subject to approval by the Legislature and the Governor; OAH must also obtain OFM approval for its hourly rate.

Judges' views on communications with appellants

"I think our agency does an excellent job of explaining the appeals process to appellants."
"Using simple words in short declarative sentences that can be understood by almost anyone would help."

Appellants' views on accessibility

"I loved that it was on the phone, that was really convenient. Also what was really nice, the ALJ called me personally to say it had been dismissed. I thought that was really nice, she didn't have to do that."

*Unemployment appellant
— claimant*

The budget mechanism may limit perceptions of independence

"Although I think we are good at making impartial decisions there is always a thought once in a while that the [regulating] agency might get upset. ... [An] appellant might wonder if they are getting a fair shake if the agency is paying our bills."

OAH judge

"We would like to strengthen the OAH budget mechanism so as to strengthen perceptions of what OAH does."

*Larry Dzieza,
Chief Financial Officer, OAH*

OAH leadership believe existing financing mechanisms, such as the OAH dedicated account and non-appropriated Whistleblower Account, already work to enhance OAH's independence. They also recognize the need for budget oversight and suggested it might be provided through a nonpartisan citizens' commission and external audits. We discuss funding mechanisms for central panels more fully on page 23 in the report.

The OAH complaint procedure helps support judges' impartiality and accountability. The agency offers all participants the opportunity to express concerns about a judge's conduct by filing a complaint. Managers respond to such complaints by providing the judge an opportunity to respond, and investigating if appropriate. If a complaint is made regarding the substance of a decision, OAH staff instruct the complainant to file a petition for review. OAH officials told us that judges try to learn from complaints, in order to improve and refine their practice. A complaint procedure can provide valuable information to guide staff development and gather user feedback.

Judges surveyed reported that OAH processes supported impartial decision-making, and their comments demonstrate a commitment to a culture of impartiality and independence. Most judges responding said they are encouraged to make impartial judgements, and that OAH offers all parties an impartial review. When asked what more could be done to help appeals appear impartial, the most common suggestion was to ensure appellants understand that OAH is independent of the agency whose decision is disputed. The next most common suggestion was to give judges final order authority.

Most survey respondents rated judges positively. Some did not find the process fair.

We consider our survey of OAH appellants as anecdotal information, since response rates were low: 76 individuals responded, with a 10 percent response rate. Most survey respondents had disputed an unemployment insurance decision. We did not use these survey responses to inform our conclusions or recommendations. However, some respondents' comments offer insights into the experience of appeals participants.

Most respondents rated judges positively, as four in five reported the judge treated them with courtesy and respect, and a similar number felt the judge gave them an opportunity to be heard.

Many appellants found the process fair. One Medicaid appellant said the judge was polite and helpful, finding the process fair while finding the eligibility rules unfair. A Spanish-speaker found the process unfair, reporting that he had difficulty filling out forms in English and he did not think the judge listened to him.

While statistically valid conclusions cannot be drawn based on appellants' comments, they do highlight both the positive experiences some appellants have had as well as opportunities for OAH and client agencies to improve perceptions that appeals are impartial.

Judges' views on impartiality

Our judges are entirely unconnected to the parties or agencies involved in the disputes so it would be difficult to imagine how to be MORE impartial than this.... Overall it's not accurate that our agency has or appears to have any bias in my view.

OAH Judge

The fact that our initial orders are appealed back to the original agency for a final order is a blatant example of LACK of impartiality. In hearings, parties visibly relax when I explain my independence but [they] cannot understand that the agency they are fighting can overrule me.

OAH Judge

Appellant received an adverse ruling, but found the process fair

"The judge was very polite and helpful. I call it fair – I still feel it's not correct though because I can't afford medical. His hands were tied because he was only going off of my situation which didn't meet the criteria. People like me are spending all their money on the car, food, kids...but they don't take that into consideration. ... But I think it was fair."

Medicaid appellant

Limited English speaker found the process unfair

"The whole process was unfair. I learned about the chance to appeal through a friend. I had a very hard time understanding the forms I filled out, because they were in English. The only time I got any help from the agency was from the interpreter. The judge would not let me tell my side of the story – I only was able to answer "yes" or "no" to questions."

Appellant, unemployment appeal

What we learned about perspectives:

Performance Management and Decisions

OAH has engaged in a number of process improvements in recent years. The most far-reaching process improvement is the new case management system, which will allow for more effective data management and analysis. Other improvements are aimed at improving timeliness. For instance, the agency is piloting a process aimed at ensuring that case processing is postponed only for good cause, which could help quicken case resolution. To support judges' expertise, OAH has developed an in-house continuing legal education program, giving judges customized trainings.

OAH has standardized many processes, using performance measurement to track its progress. In support of timely case resolution, OAH tracks the time elapsed between hearing requests and resolution, and has set a goal to resolve 80 percent of appeals within 90 days. Tracking timeliness is federally required for ESD appeals.

A heavy workload for judges may reduce the quality of decisions or hinder appellants' understanding of the process. For instance, judges must typically resolve about 24 unemployment cases each week. Review judges who read OAH decisions told us a heavy workload leads to shorter decisions with less analysis; we heard similar comments from an external stakeholder. Four OAH judges we surveyed suggested that reducing the workload could allow judges adequate time to hold hearings and develop decisions, which in their view would support a greater perception of impartiality among appellants. OAH officials told us that the time available for developing each decision can vary from week to week depending on the number of incoming cases, because OAH is required to meet deadlines for issuing a decision for each case, despite any fluctuations in case volumes.

OAH's goal is to issue sound decisions, which it supports with several practices. For example, it performs random quality checks on hearings and decisions, which fulfills federal standards for one caseload but is voluntary for other appeals. It has created a decision library so judges can read past orders relevant to a case. For most caseloads, OAH sends each judge the review judge's decisions for their cases, to support development. While managers may discuss decision quality with a judge, they are expected to avoid discussions of substantive issues, even for closed cases.

To better understand user experiences, the OAH conducted a phone survey of appellants in 2015. OAH plans to continue gathering user feedback through its new website, scheduled to go online in December 2016.

Is the process understandable?

We found that practices and policies help support an understandable process. OAH informs appellants about the process through its website, brochures and direct mailings, and for cases going to hearing, its prehearing conferences and hearings. Telephone assistance in multiple languages, as well as how-to videos and resource lists, help make the process more accessible.

Do practices appear impartial?

Practices and policies supporting impartiality are defined. The agency's independence from client agencies helps support an appearance of impartiality. The agency also requires adherence to its Code of Ethics, which requires judges to perform duties impartially, while reinforcing APA requirements that substantive communications about a case be made during hearing.

Recommendations

We discuss the need for more clarity regarding agency-level communications in the Audit Results section of the report. Whether or not statute is amended in response to our recommendations, OAH could benefit by developing internal guidance clarifying:

- What types of communication between management and hearing officers are allowed
- When and in what capacity managers may provide direction regarding a hearing officer's performance

Examples of internal guidance include but are not limited to a code of ethics, a memo or an administrative policy.

Appellants' views on decisions

"I think if you don't have representation, that works against you and that's sort of unfair, compared to the other side who does have an attorney. I'm unemployed, so I can't afford an attorney. How I responded was the reason the judge decided what he did. That was the only thing that was really discouraging."

Unemployment appellant — claimant

"The process was fine. Everybody did a good job. The process was clean and simple – nobody lied. And I ended up paying back the money."

Unemployment appellant — claimant

Excise Tax Appeals – Board of Tax Appeals (BTA)

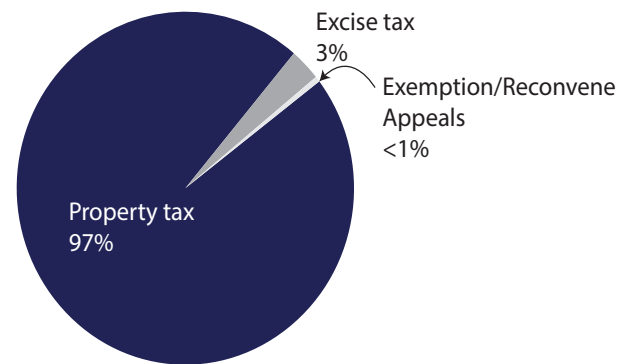
The Board of Tax Appeals (BTA) decides appeals of tax decisions made by counties and by the state Department of Revenue (DOR). Established in 1967, the BTA is governed by a three-member board appointed by the Governor. Its board members and three hearing officers resolve taxpayers' appeals, with the objective of maintaining public confidence in the state tax system.

As the only state-level independent forum for taxpayers to request review regarding the correctness of their tax liability, BTA has stated its commitment to fairly and impartially resolving appeals brought before it.

While the BTA primarily hears property tax cases, which made up about 97 percent of all cases resolved in 2014, it also processes appeals for about 40 excise tax cases annually. We focused our review on BTA excise tax decisions, since these are the next step in contesting an excise tax decision by DOR.

As the only state-level independent forum for taxpayers to request review regarding the correctness of their tax liability, it has stated its commitment to fairly and impartially resolving appeals brought before it.

2014 appeal volumes



APA: Yes, No 6 External

www.bta.state.wa.us/decisions/default.htm

Source: BTA self-reported data.

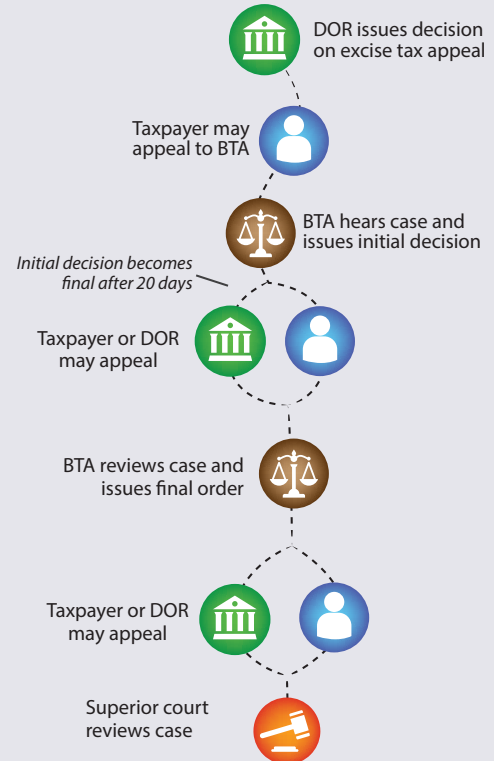
BTA excise tax appeals process

A taxpayer contesting an excise tax decision has two options. The taxpayer may pay the full amount owed and contest the decision in the courts. He or she may take the case to the BTA and may delay payment of the contested amount, although interest and penalties will accrue. At the BTA, taxpayers may choose between a formal appeal, which may later be appealed to the courts, and an informal appeal, which may not be further contested.

Most formal excise tax cases are heard by the full three-member Board, which issues a final decision. Either party may appeal this decision in the courts, with an option to request BTA's reconsideration prior to court review. This process is illustrated in the flow chart.

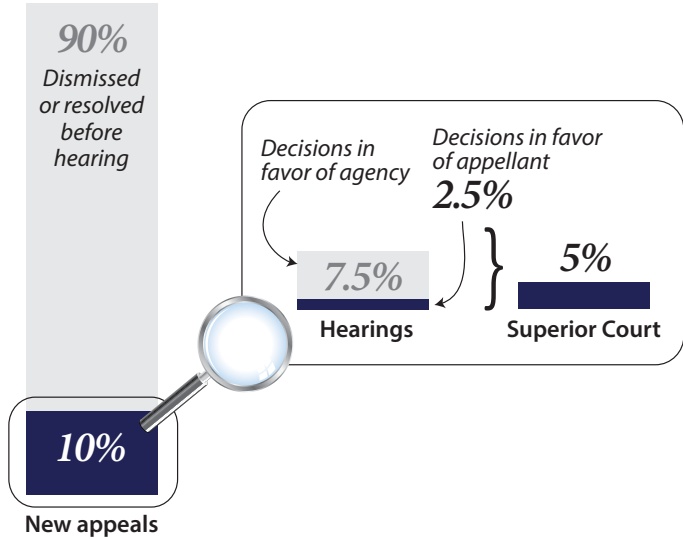
Informal cases differ from formal cases in their processing. For informal cases, the executive director typically reviews decisions for quality and consistency with other BTA decisions. Based on this review, the executive director may suggest changes before issuing the initial decision. Either party may petition for review of that decision by BTA, which reviews and issues its final decision. If the initial decision was not reviewed, either party may request reconsideration of a final decision. The BTA decision may not be appealed to the courts.

Appeals process



Excise tax cases filed at the BTA are usually resolved by the parties. In 2014, 90 percent of cases were resolved without hearing as illustrated to the right. Most of these cases were withdrawn. BTA officials suggested two possible reasons for the high number of withdrawals. First, unrepresented taxpayers may feel overwhelmed by DOR attorneys and withdraw. Second, taxpayers sometimes file an appeal before weighing the merits of the case against the costs of pursuing the appeal. If they later decide the case is not worth it, they withdraw the case.

Case outcomes for excise tax appeals



Note: Percentages calculated as a proportion of all appeals resolved.
Source: Auditor calculations based on outcomes provided by BTA.

Criteria evaluation

Despite its small size and limited resources, we found that BTA processes relating to understandability and impartiality are **defined**. Most processes are documented, standardized and integrated across the organization. It does particularly well at tracking performance measures relating to timeliness and has improved processes, aiming to resolve appeals more quickly. Highlights of the process are provided in table below, where we also identify noteworthy practices.

Evaluation of policies and practices

Noteworthy practices that other agencies may find beneficial are indicated with a star ()*

Accessibility and Transparency	
1. Outreach	BTA publishes step-by-step how-to information on its website, as well as frequently asked questions. It also offers personalized help by telephone. Agency policy emphasizes timeliness, clarity and courtesy in its communications.
2. Policies available to public	*All decisions are published in a searchable database on the website. The website lists applicable statutes and rules.
3. Hearing officers explain appeal process	During each prehearing conference and hearing, hearing officers describe the hearing process and review issues relevant to the case.
4. Option to participate remotely	Excise tax hearings are usually held in person, although agency rule allows hearings to be held by telephone under certain circumstances.
5. Accommodations	Agency policy, rule and outreach materials all state that BTA offers accommodation for disability as well as interpretation for individuals with limited English proficiency; it also offers telephone assistance in Spanish.

Impartiality

- | | |
|--|---|
| 6. Job expectations delineate impartiality | Job descriptions require an “impartial hearing officer” and emphasize the importance of equitable treatment of taxpayers and a fair review. |
| 7. Practices help prevent ex parte | Statute and rule restate APA requirements that communications regarding cases be made during hearing. Presiding officers’ contact details are unpublished. BTA has no internal guidance that could help resolve questions about allowable communications. |

Performance management

- | | |
|--|---|
| 8. Adjudicator expertise – Hearing officers must have at least five years of relevant experience and/or education. Desirable qualifications include subject matter expertise and a law degree. | Hearing officers must have at least five years of relevant experience and/or education. Desirable qualifications include subject matter expertise and a law degree. While the BTA does not have budgeted funds for trainings, it provides in-house training and hearing officers attend an annual statewide conference of adjudicators. |
| 9. Process for timely decisions | *BTA maintains performance measures relating to timeliness and appeals volumes, for internal use and reporting to OFM. It has also implemented an expedited appeal process to help reduce its backlog. |
| 10. Outcome tracking | BTA maintains a database recording case resolutions, such as ordered, dismissed or stipulated. |

Decisions

- | | |
|--------------------------------------|---|
| 11. Process for consistent decisions | To ensure consistent and well-reasoned decisions, each decision is reviewed by the technical editor and informal decisions are reviewed by the executive director before being issued. A writing style guide is used to ensure decisions adhere to standards. Hearing officers also discuss common issues in monthly meetings and review court decisions on cases decided by BTA. |
|--------------------------------------|---|

What we learned about perspectives

We gathered only limited information on external stakeholders’ perspectives on BTA appeals. This section relies on interviews with BTA staff and officials.

What we learned about accessibility and transparency

BTA officials emphasized their commitment to making appeals understandable and transparent. Noteworthy practices supporting these ends include publishing all decisions to a searchable database. BTA also publishes a web-based calendar for calculating significant dates in the process, and offers telephone assistance in English and Spanish.

What we learned about impartiality

The BTA’s structure as an entity separate from DOR helps support a perception that its decisions are independent and impartial. Its mission statement and hearing officer job descriptions reinforce the objective of providing a fair and impartial review of tax decisions. As BTA hearing officers are external to DOR, the risk of ex parte communications is lower than it could be for internal judges. BTA does not publish contact information for its hearing officers.

What we learned about performance management and decisions

The BTA maintains performance measures relating to timeliness and appeals volumes, for internal use and reporting to OFM. Performance measure data shows that about 18 months elapse between a request for appeal and a hearing date. Officials told us the delays have resulted from an increase in annual filings, and annual budget reductions beginning in 2008. A delayed decision can mean significant financial impact for a taxpayer, because until the decision is issued, penalties and interest accrue on the tax liability. To shorten appeal processing times and reduce its backlog, BTA has added an expedited hearing process. BTA officials say eliminating the backlog is their number one priority, but that additional staffing is needed for this effort.

Decision quality can be assured, in part, by hiring hearing officers with proper expertise. Both stakeholders and BTA officials voiced concerns that certain past board members, who also act as presiding officers and decide more complex cases, have lacked sufficient expertise. BTA officials said that the recruitments – which are directed by the Governor – have varied in the extent of stakeholder involvement. They also said that the limited term of service, along with pay levels lower than those for counterpart judges at other agencies, have kept the pool of applicants small. To address these challenges, the outgoing executive director suggested that a task force be convened to develop proposals to reform BTA's structure.

Is the process understandable?

We found that practices and policies help support an understandable process. BTA informs taxpayers about the process through its website, brochures, direct mailings, and for cases going to hearing, its prehearing conferences. Officials said they are committed to helping taxpayers navigate the appeals process: BTA provides telephone assistance in English and Spanish, as well as a searchable database of decisions.

Do practices appear impartial?

Practices and policies supporting impartiality are defined. BTA's independence from DOR helps support an appearance of impartiality. Other elements contributing to an appearance of impartiality include job descriptions that require impartial and equitable review, and not publishing the contact information for hearing officers.

Recommendations

We discuss the need for more clarity regarding agency-level communications in the Audit Results section of the report. Whether or not statute is amended in response to our recommendations, BTA could benefit by developing internal guidance clarifying:

- What types of communication between management and hearing officers are allowed
- When and in what capacity managers may provide direction regarding a hearing officer's performance

Examples of internal guidance include but are not limited to a code of ethics, a memo or an administrative policy.

Workers' Compensation Claims – Board of Industrial Insurance Appeals (BIIA)

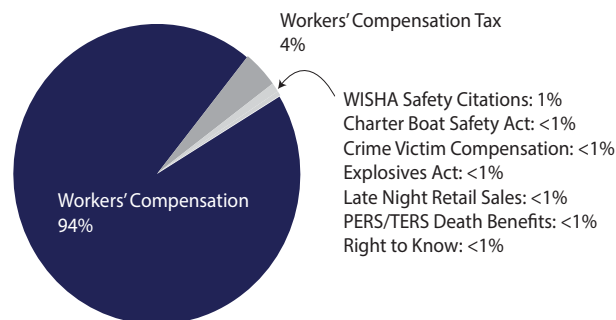
The Board of Industrial Insurance Appeals (BIIA) hears appeals by employers, injured workers and medical providers resulting from determinations made by the Department of Labor and Industries. Created as a result of legislative action, it has been in operation since 1949; the function was previously housed within Labor and Industries. BIIA appeals are exempt from the APA.

The BIIA is administered by a board with three members: one represents the public, one labor, and one business. The Chief Industrial Appeals Judge is responsible for the agency's legal division, which includes New Appeals, Mediation, Hearing, and Review sections. The agency is funded through a medical aid fund and an accident fund; budget levels have not affected appeals activities over the past five years and are not expected to in the next biennium.

In 2014, BIIA received 13,809 appeals and employed 66 hearing officers, titled Industrial Appeals Judges (IAJ). Workers' compensation claims account for about 94 percent of appeals as illustrated at right.

2014 appeal volumes

Total appeals: 13,809



APA: No 66 External

www.bia.wa.gov/SDSearch.aspx

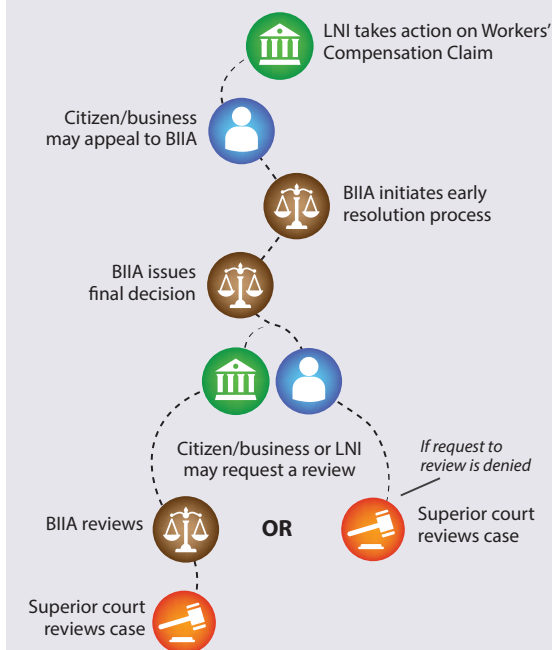
Source: BIIA self-reported data.

Workers' Compensation claims appeals process

The appeals process occurs in several stages. The New Appeals section receives and processes the Notice of Appeal filed and determines whether it fits within BIIA's jurisdiction or needs to be denied or returned to Labor and Industries. If jurisdiction is confirmed, most cases then enter the Mediation section. If mediation efforts are unsuccessful, then the appeal enters the Hearings section and a formal hearing is initiated. At the conclusion of the hearing, following evaluation of facts and applying the law to those facts, the Hearings IAJ issues a Proposed Decision and Order. If the decision is uncontested, it becomes the final Decision and Order of the Board.

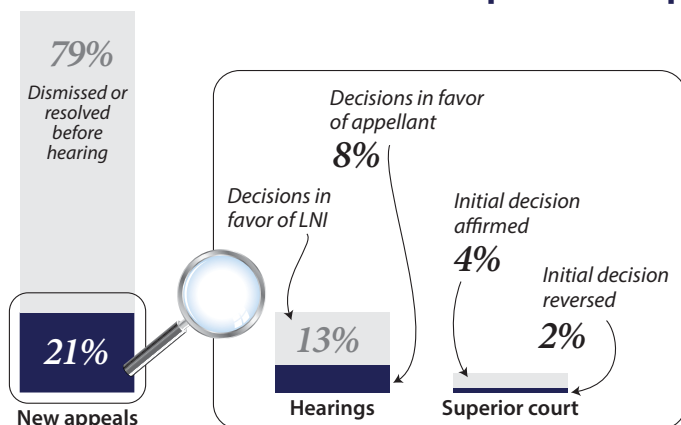
To contest the decision, a participant in the case may file a Petition for Review. The Board grants or denies the request. If it is denied, then the party may file an appeal to superior court. If it is granted, then a Review section judge reviews the record created during the formal hearing, advise the Board, and drafts the final Decision and Order at the Board's direction. If the party is still not satisfied, then an appeal can be filed in superior court.

Appeals process



In fiscal year 2015, 21 percent of appeals went to hearing as illustrated below. Six percent of all cases were appealed to superior court.

Case outcomes for workers compensation appeals



Note: Percentages calculated as a proportion of all appeals resolved.

Source: Auditor calculations based on outcomes provided by BIIA.

Criteria evaluation

We reviewed BIIA's process to determine the overall level of maturity demonstrated across the dimensions of accessibility and transparency, impartiality, performance management, and decisions. Overall, BIIA is operating at an **optimizing** level of maturity. BIIA has procedures in place that are applied across the organization; it uses a variety of tools to support development of well-reasoned decisions; it has performance expectations and provides extensive training and developmental opportunities to staff; and the culture is performance-based, which means the agency routinely uses case statistics, timeliness metrics, and stakeholder and appellant/representative feedback to continuously improve. Highlights of the process are provided in the table below, where we also identify noteworthy practices.

Evaluation of policies and practices

Noteworthy practices that other agencies may find beneficial are indicated with a star ()*

Accessibility and Transparency	
1. Outreach	BIIA provides notices and website material. *The website material includes a video, frequently asked questions, a downloadable brochure and booklet, a process flow diagram, and all steps in the process, from submitting the notice through filing in superior court. *BIIA implemented a "Plain Talk" committee whose purpose is to explore ways to continually improve the clarity and understandability of their forms, brochures and other communications.
2. Policies available to public	*Significant decisions can be searched in a variety of ways, including by name and subject. Applicable laws, rules, significant decisions and decisions expected to become significant that have yet to be formally approved as such by BIIA are available on the web.
3. Hearing officers explain appeal process	*Mediation provides a less formal alternative dispute resolution process that can be less costly in terms of time and effort. The mediation process is also a forum for all parties to gain understanding of what to expect if the appeal proceeds to formal hearing.
4. Option to participate remotely	Both conferences and hearings can be in-person or by telephone.
5. Accommodations	Accommodations are provided as necessary and an appellant can appeal an accommodation denial.

Impartiality

- | | |
|--|--|
| 6. Job expectations delineate impartiality | Performance expectations communicate the need for impartial execution of responsibilities. *The BIIA has a Code of Ethics and an ethics committee to assist with interpretations and questions. |
| 7. Practices help prevent ex parte | *BIIA surveys appellants and their representatives regarding the integrity and impartiality of the process.
The BIIA operates under the basic external model of appeals; it is structurally separate from Labor and Industries and is funded through funds held by the state treasurer. |

Performance management

- | | |
|---------------------------------|---|
| 8. Adjudicator expertise | Education and experience requirements are specified in a judge's position description. Training and development opportunities are provided to staff. |
| 9. Process for timely decisions | The agency has expectations for timely case management; it tracks performance monthly and quarterly. |
| 10. Outcome tracking | Case outcomes are tracked and provided on their website monthly. |
| Other practices | *An overall assessment of performance and progress is reported across all sections in the annual Management Conference Report, which illustrates BIIA's use of metrics and efforts to continuously improve.

*BIIA periodically conducts surveys of appellants and their representatives. |

Decisions

- | | |
|--------------------------------------|---|
| 11. Process for consistent decisions | Proposed and final Decision and Orders identify the reason for a decision and the applicable law and facts.
*A number of tools have been developed to help judges prepare well-reasoned, consistent decisions, including findings of fact and conclusions of law guidance and supporting tools.
*Each Proposed Decision and Order that receives a petition for review is peer reviewed according to documented quality criteria and using a quality checklist to guide the review. BIIA's survey also solicits feedback regarding overall quality of a decision rendered. |
|--------------------------------------|---|

What we learned about perspectives

Very few stakeholders commented on BIIA. Those that did thought the BIIA “appeals processes work pretty well” or they supported the concept of a Board in general. A couple of stakeholders observed that BIIA hearings resemble a formal court proceeding more than most other agency appeals.

BIIA is the only agency in our review that conducts regular surveys of appellants and their representatives. The first survey results were reported in 2009, with the most current results issued in 2013; for this reason, we did not survey BIIA appellants/representatives directly, but instead reviewed the results of the agency's own survey. Appellants and representatives were asked to rate judge performance across the categories of integrity and impartiality, communication, professionalism, and administrative skills; representatives were also asked questions about legal ability. The survey instruments used by attorneys and appellants to evaluate hearings judges are included in Appendix G.

We conducted a survey of hearing officers where results were aggregated at the “model” level, not the specific agency level. The comments in the section below are drawn from instances where a hearing officer mentioned an affiliation with BIIA.

Is the process understandable?

The BIIA promotes user understanding through notices, a booklet and brochures, step-by-step instructions on the website and a video, and then during mediation and formal hearing. BIIA's survey of appellants and representatives did not directly ask if users understood the process. However, attributes that can promote understanding were addressed as part of the survey.

Representatives are responsible for helping their clients navigate this appeals process, so we expected that understanding the process would not be an issue; the generally positive responses across all survey statements by representatives confirmed this expectation. Most representatives rated judges highly on attributes that support clarity and confidence in the process, including demonstrating an understanding of the law, using clear communications, and writing clear and logical decisions. Similarly, most appellants rated the process positively.

Industrial Appeals Judges mentioned efforts intended to increase understanding, including the mediation process, the video offered and an extensive prehearing effort. Reflecting a challenging aspect of the process, one judge noted that, despite the explanations provided, self-represented appellants have difficulty navigating the process because it is so much like superior court and very formal.

Do practices appear impartial?

A review of BIIA's process indicates that it is intended to be impartial. BIIA's survey results, as well as our survey of hearing officers, suggest the process is largely working as intended.

The BIIA survey included two sections that tie directly to the question of impartiality: Integrity and Impartiality, and Professionalism. On average, around 80 percent of representatives rated hearing judges Very Good to Excellent for those attributes associated with impartial behavior. The majority of appellants (more than 60 percent) rated hearing judges Very Good to Excellent.

When hearing officers were asked what the agency does to foster impartiality, one said the agency takes many steps to promote the appearance of impartiality: the mediation function is separate from the hearing function; the hearing function applies procedural rules of superior court; managers do not pressure them on how to decide appeals. However, several hearing officers expressed concern with agency representatives entering hearings before the other parties have arrived and seeking updates from hearing officers when not all parties are present. While this is permissible, it can detract from efforts to maintain impartiality and its appearance. One way BIIA has formalized its culture of impartiality is through its Code of Ethics, which all its judges must follow. But while the Code of Ethics helps reinforce the expectation that ex parte communications are prohibited, it does not resolve certain questions about what sorts of communications with judges are allowed.

Recommendations

We discuss the need for more clarity regarding agency-level communications in the Audit Results section of the report. Whether or not statute is amended in response to our recommendations, BIIA could benefit by developing internal guidance clarifying:

- What types of communication between management and hearing officers are allowed
- When and in what capacity managers may provide direction regarding a hearing officer's performance

Examples of internal guidance include but are not limited to a code of ethics, a memo or an administrative policy.

Noteworthy Practices by Washington State Agencies

In assessing each agency against the criteria and establishing recommendations, we also identified a range of noteworthy practices that other agencies may find helpful and worth emulating.

We also identified noteworthy practices in other states, which are listed in **Appendix F**.

Topic area	Agency practices
Transparency and accessibility	<p>BIIA</p> <ul style="list-style-type: none"> ★ Video guidance provided on the website ★ “Plain Talk” committee whose purpose is to explore ways to improve clarity and understandability of forms, brochures, and other communications ★ Significant decisions can be searched in variety of ways including name and subject ★ Less formal alternative dispute resolution process through mediation <p>BTA</p> <ul style="list-style-type: none"> ★ All decisions are published to a searchable database on the agency website <p>DRS</p> <ul style="list-style-type: none"> ★ Hearing Officer uses a detailed checklist to guide the process <p>OAH</p> <ul style="list-style-type: none"> ★ Video tutorials ★ Links to organizations offering legal assistance, advocacy groups, and legal resources <p>OIC</p> <ul style="list-style-type: none"> ★ Link to the Administrative Hearings portion of the website is available directly off of the OIC homepage and all the steps involved ★ Documentation associated with all cases is available online and can be extensive depending on the case <p>ESD</p> <ul style="list-style-type: none"> ★ Precedential decisions issued by ESD’s Commissioner’s Review Office are binding on ESD and OAH, and are available to the public, including through links on the ESD and OAH websites. ★ They can be searched in a variety of ways, including case name, docket/review number, date or subject matter.
Impartiality	<p>BIIA</p> <ul style="list-style-type: none"> ★ Surveys appellants and their representatives regarding the integrity and impartiality of the process ★ Code of Ethics and an ethics committee to assist with interpretations and questions <p>DOR</p> <ul style="list-style-type: none"> ★ Appeals Dispute Resolution process is in place for those times when a hearing officer does not agree with an agency interpretation ★ The hearing officer uses a script to explain the process and how it is different from an APA hearing. <p>ESD</p> <ul style="list-style-type: none"> ★ Support Staff and Chief Review Judge screen phone calls to help prevent prohibited communication <p>OAH</p> <ul style="list-style-type: none"> ★ Code of Ethics, which requires judges to perform duties impartially and competently <p>OIC</p> <ul style="list-style-type: none"> ★ Screening Protocol implemented and designed to eliminate any potential or perceived conflict of interest or prohibited communications.

Topic area	Agency practices
Performance management	<p>BIIA</p> <ul style="list-style-type: none"> ★ Periodically conducts surveys of appellants and their representatives ★ Assessment of performance and progress is reported across all sections in the annual Management Conference Report, which illustrates BIIA's use of metrics and efforts to continuously improve. <p>BTA</p> <ul style="list-style-type: none"> ★ Maintains performance measures relating to timeliness and appeals volumes, for internal use and reporting to OFM <p>DOR</p> <ul style="list-style-type: none"> ★ Conducted a survey soliciting feedback from taxpayers and representatives ★ Implemented changes to separate the settlement function from the Rule 100 appeal process, to make the settlement process less complicated and reduce the time to reach resolution <p>DRS</p> <ul style="list-style-type: none"> ★ Implemented a Petition for Review process in an effort to resolve more issues prior to going to formal appeal <p>HCA</p> <ul style="list-style-type: none"> ★ Improved processes for making timely decisions by working with DSHS to identify root causes of system deficiencies ★ Currently developing a training academy <p>OAH</p> <ul style="list-style-type: none"> ★ Timely processing supported by internal standards ★ Piloting process improvements ★ Completed a phone survey of appellants in 2015
Decisions	<p>BIIA</p> <ul style="list-style-type: none"> ★ Each Proposed Decision and Order that receives a PFR is peer reviewed according to documented quality criteria and using a quality checklist to guide the review ★ Developed tools to help judges prepare well-reasoned, consistent decisions, including findings of fact and conclusions of law guidance <p>DOR</p> <ul style="list-style-type: none"> ★ Developed guides to promote developing well-reasoned and well-written decisions including an editing checklist, review conventions, decision templates and supporting guides, case format guides that explain what must be in a decision and the basis for inclusion, and an Office of the Reporter of Decisions Style Sheet that includes general principles for acceptable decision documents <p>DSHS Board of Appeals</p> <ul style="list-style-type: none"> ★ The Chief Review Judge checks for 10-11 factors during a review of a random selection of decisions. <p>ESD</p> <ul style="list-style-type: none"> ★ Ghostwriting where new judges are able to practice writing decisions ★ Quarterly meetings to discuss common issues that need additional explanation ★ Annual forum with stakeholders to release significant decisions and discuss recurring issues <p>OAH</p> <ul style="list-style-type: none"> ★ Developing additional resources to support decision quality, such as a decision library and templates for developing decisions ★ Performs randomized quality checks on hearings and decisions, which inform federally mandated performance measures for UI appeals, as well as quality control for other caseloads

Appendix D: Survey Results

We developed three surveys to gain insight into how hearing officers, appellants, and representatives perceived the appeals process. To help develop our survey, we reviewed surveys by Washington’s Board of Industrial Insurance Appeals (BIIA) and Minnesota. Survey Monkey® was used for data collection. Each agency provided email addresses for non-agency parties, their representatives, and hearing officers that took part in an appeal in calendar year 2014.

Survey of Hearing Officers

We solicited hearing officer feedback at the “model” level (that is, internal, mixed or external) as opposed to the individual agency to maintain anonymity. In addition to hearing officers, we received a small number of responses from people who are also employed in the appeals process (for example, as a paralegal or Chief Review Judge). In order to protect the anonymity of hearing officers, we pooled their responses in our analysis.

Results

The survey requested hearing officer opinions on 14 statements. We provide details in Figure 38. Overall, we found the majority of responses were positive. The statement which received the highest percentage of positive responses, at 98 percent, was “Efforts are made to treat all parties with courtesy and respect.”

The highest negative response, at 25 percent, was in answer to the statement “I am not unduly pressured to make quicker decisions by management.”

Differences of opinion among hearing officers may reflect the agency they work for. But we know from responses to open-ended questions that hearing officers have differences of opinion even within an agency. This is discussed further in Appendix C.

We had a high response rate to our survey:

84% 176 surveys sent
148 surveys returned

Respondents chose from one of five answers: Strongly agree, agree, neutral, disagree, and strongly disagree. For the purposes of presenting the results, we have aggregated the responses into three over-all categories of agree, neutral, and disagree.

Figure 38 – Hearing officer responses				
Question 3. What is your opinion on the following statements?	Disagree	Neutral	Agree	Number of responses
Overall, my agency offers all parties an impartial review.	6%	5%	88%	147
In the appeals process, efforts are made to treat all parties with courtesy and respect.	1%	1%	98%	148
There is sufficient policy direction for me to do my job.	3%	11%	86%	146
There is sufficient policy direction to promote consistent decision-making.	8%	18%	74%	147
Appeals are conducted in accordance with regulations.	2%	8%	90%	146
Appeals are conducted in accordance with written agency procedures.	3%	12%	84%	148
The basis for appeals decisions (e.g. prior appeals decisions, agency policy, laws and regulations) is available to the public.	11%	23%	66%	145
I am encouraged to make impartial judgments.	6%	8%	86%	148
I have not experienced pressure to do things against my better judgment	14%	10%	76%	147
The level of supervision I receive is appropriate.	3%	9%	88%	147
I am not unduly pressured to make quicker decisions by management.	25%	16%	59%	146
My agency supports my professional development.	14%	19%	67%	147
My agency carries out processes in compliance with ex parte prohibitions.	13%	12%	75%	148
My agency’s policies and procedures support my ability to make impartial decisions.	12%	11%	77%	148
Source: Auditor’s survey.				

Other surveys

We surveyed appellants and representatives in order to add context to stakeholder opinions; however, due to either a low response rate or a low number of responses, we cannot conclude that the results are representative. Although we were not able to draw conclusions about agency appeals processes based on survey responses alone, survey respondents submitted comments that helped us better understand perceptions, as well as some suggestions for process improvements. These comments are presented throughout the report.

BIIA periodically conducts surveys of parties and their representatives, and both the OAH and the Department of Revenue (DOR) have conducted surveys within the last two years; these are further discussed in the individual agency summaries in Appendix E.

Appendix E: Overview of Administrative Appeals in Washington

Several agencies in Washington conduct a wide array of administrative appeals. The following table illustrates the agencies we determined allowed users to appeal agency decisions, the type of decisions users appeal, the number of appeals during calendar year 2014, and the location of published decisions.

- Notes:
1. Some agencies administer appeals without a designated hearing officer. If the count of hearing officers for an agency is 0, this likely means that appeals are conducted through an external agency.
 2. Some agencies are external adjudicators for other agencies. For example, the Board of Industrial Insurance Appeals may separately and independently hear cases from the Department of Labor and Industries.
 3. Some agencies reported no appeals conducted during the time period requested.

Department of Archaeology and Historic Preservation

Appeals: 2 0 Internal, Mixed Not published

Types of Appeals: Permit Application Denial, Notice of Violation and Penalty Imposed, Registration Denial, Extinguishment of Right of First Refusal, Terms and Conditions of a Permit Issued, Suspension or Revocation of a Permit

Board of Accountancy

Appeals: 2 1 Internal, External <http://apps.cpaboard.wa.gov/>

Types of Appeals: Disciplinary Hearings, Licensing Decisions

Board of Industrial Insurance Appeals

Appeals: 13,665 66 External² <http://www.biia.wa.gov/SDSearch.aspx>

Types of Appeals: Workers' Compensation, Workers' Compensation Tax, Safety Citations, Charter Boat Safety Act, Crime Victim Compensation, Explosives Act, Late Night Retail Sales, PERS/TERS Death Benefits, Right to Know

Board of Tax Appeals

Appeals: 2,361 6 External² <http://bta.state.wa.us/decisions/default.htm>

Types of Appeals: Property Assessment Appeals, Excise Tax, Exemption/Reconvene Appeals

Department of Corrections

Appeals: 547 23 Internal Not published

Types of Appeals: Community Supervision Violations, In-Prison/Disciplinary Decisions, Release and Revocation Decisions

Department of Early Learning

Appeals: 2 0 External¹ Not published

Types of Appeals: Adverse Licensing Actions

Department of Ecology

Appeals: 91 0 Internal, External¹ <http://www.gmhb.wa.gov/CaseSearch.aspx>;
http://www.eluho.wa.gov/Decision/Search_Decisions

Types of Appeals: Orders (sets requirements for compliance, address non-compliance issues), Penalties Notice of violation (such as electronic products recycling), Permits (such as water quality, air emissions, solid or hazardous waste management, water rights, 401 certifications, shoreline management permits) License decisions (to accept gasoline at a gas station, well drilling, facility operator licenses), Lab accreditation, Grants and Loans, Land Use (Shoreline Management Plans and Coastal Zone Management)

Employment Security Department


Appeals: 29,907  7  Mixed

 Washington State Law Library and law schools; Westlaw at <https://govt.westlaw.com/wapcd/Index>

Types of Appeals: Unemployment Insurance Benefits, Unemployment Insurance tax



Environmental & Land Use Hearings Office

Appeals: 206  12  External²

 <http://www.gmhb.wa.gov/CaseSearch.aspx>;
http://www.eluho.wa.gov/Decision/Search_Decisions



Types of Appeals: Growth management, Pollution Control Shorelines

Department of Financial Institutions

Appeals: 57  0¹  Internal, Mixed  <http://www.dfi.wa.gov/enforcement-actions>

Types of Appeals: Banks/Trust Companies/Credit Unions, Securities, Consumer Services, All Divisions

Department of Fish and Wildlife

Appeals: 93  4  Internal  Not published



Types of Appeals: Seizure for Forfeiture, Fish/Hunt License Revocation, Wildlife Crop Damage Claims, Trapping Infraction, Master Hunter application, Issuance/denial/conditioning/modification of a Hydraulic Project Approval (HPA)

Gambling Commission

Appeals: 56  0¹  Mixed  <http://www.wsgc.wa.gov/admin-orders/orders/>

Types of Appeals: License Suspension/Revocation/Denial, Petitions for Declaratory Order, Seizure/Forfeiture

Health Care Authority

Appeals: 7,820  2  Internal, Mixed  <http://www.hca.wa.gov/Pages/appeals.aspx>

Types of Appeals: Medicaid, Public Employees Benefits Board (PEBB), Nursing Home Rates

Department of Health

Appeals: 429  8  Internal  <http://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings/SignificantDecisions>




Types of Appeals: Certificate of Need, Health Professional Discipline, Environmental Public Health Areas, Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)

Office of Insurance Commissioner

Appeals: 33  1  Internal, Mixed  <http://www.insurance.wa.gov/laws-rules/administrative-hearings/>
<http://www.insurance.wa.gov/orders/enforcement.asp>

Types of Appeals: Insurance Producer License Revocation or Suspension, Fine Imposition, Insurance Producer License Denial, Redomestication, Certificate of Exemption/Certificate of Authority/Registration Revocation of Suspension, Order Allowing Company to Write New Business, Solicitation Permit, Issuance of a Financial or Market Conduct Exam, Rates and Forms approval and disapprovals, Acquisition, Merger, Order to Cease and Desist, Proposed Consent Order Levying a Fine, Denial of Letter of Written Consent (1033), Proposed Consent Order Setting Conditions for Probationary License, Issuance of Financial Examination Report or Market Conduct, Examination Report, Disclaimer of Control, Order Rescinding Previous Order, Rates for Individual Health Benefit plans, contracts or agreements

Department of Licensing

Appeals: 11,656  22  Internal, Mixed  Not published

Types of Appeals: Driver License-Related, Fuel Tax, Board-delegated Business & Professions, Director-delegated Business & Professions

Liquor and Cannabis Board

Appeals: 154  1  Internal, Mixed  <http://www.liq.wa.gov/board/adjudicative-proceedings>

Types of Appeals: Enforcement Actions for Liquor, Licensing Actions for Marijuana, Licensing Actions for Liquor, Enforcement Actions for Tobacco, Licensing Actions for Tobacco, Enforcement Actions for Marijuana, Brief Adjudicative Proceedings

Lottery Commission

Appeals: 3  0¹  Mixed  Not published

Types of Appeals: Retail License Denial/Revocation

Public Disclosure Commission

Appeals: 13  1  Internal  <http://www.pdc.wa.gov/home/laws/enforcementandcompliance.aspx>


Types of Appeals: Law Violation

Public Employment Relations Commission

Appeals: 79  16  External  <http://www.perc.wa.gov/search.asp>

Types of Appeals: Unfair Labor Practices, Interest Arbitration, Unit Clarification, Declaratory Order, Representation, Fact-Finding, Non-Association, Mediation (includes grievance, collective bargaining, unfair labor), Arbitration, Training

Department of Retirement Systems

Appeals: 4  1  Internal  Not published



Types of Appeals: General Retirement Appeals

Department of Revenue

Appeals: 973  16  Internal, External  http://dor.wa.gov/Content/FindALawOrRule/WTD/WTDs_02a_2015.aspx

Types of Appeals: Excise Tax Appeals, Revoked Business Registration, Revoked/Suspended Cigarette License, Log Export Enforcement Action, Revoked/Denied Reseller Permit, Revoked Renewable Energy Certification, Mobile Home Community Fees, Spirits License suspension

Secretary of State

Appeals: 0³  0¹  Internal  Not published/No recent decisions

Types of Appeals: Complaints, Electronic Authentication

Department of Services for the Blind

Appeals: 0³  0¹  Internal  <https://rsa.ed.gov/view.cfm?rsaform=ARR&state=WA&fy=2013&grant=H126A130072>

Types of Appeals: Eligibility Determination for Services, Provision or Denial of Services for Vocational Rehabilitation Programs, Case Closure

Department of Social and Health Services

Appeals: 15,971  3  Mixed, External  <https://www.dshs.wa.gov/sesa/office-policy-and-external-relations/board-appeals/decision-list>

Types of Appeals: Child Support, Child Care, Child and Adult Protective Services, Licensing (Foster Care), Public Assistance (Temporary Assistance for Needy Families, Housing Essential Needs, Aged, Blind and Disabled, Adult Family Homes, Assisted Living Facilities, etc.), Compliance (Nursing Facility), Rate Assessments (Foster Care, Provider/Client Overpayments), Eligibility (DDA), and Others

Department of Transportation

Appeals: 21,010



External



Not published

Types of Appeals: Unpaid Tolls and Associated Fees and Civil Penalties

Utilities and Transportation Commission

Appeals: 6



Internal



<http://www.utc.wa.gov/docs/Pages/DocketLookup.aspx>

Types of Appeals: Rate Cases, Complaint Cases, Petitions Seeking Commission Action, Protested Applications for Authority, Penalty Assessment Challenges, Requests for Mitigation

Department of Veterans Affairs

Appeals: 2



External



Not published

Types of Appeals: Transfer/Discharge of Residents - State Veterans Homes

Source: Self-reported data from agencies.

Appendix F: Appeals Processes in Other States

Structural Overview

Reviewing administrative appeals processes in other states has provided an insight into Washington's system that not only reflects the inherent differences and brings to light Washington's nuances, but also indicates that Washington's system is not unique. This appendix summarizes administrative appeals processes in five states, focusing on appeals analogous to those we review in this report.

Arizona

Arizona's Office of Administrative Hearings (OAH) hears contested cases for a large majority of agencies, but often after extensive filtration through internal review or adjudication within the agencies. Most final decisions for appeals going through OAH lie with the agencies.

- Arizona State Retirement System (ASRS) appeals are filtered through two internal reviews before a third level appeal to the ASRS Board of Trustees. The Trustees' decision may be appealed to the OAH as a fourth level of appeal.
- Arizona's Department of Insurance requires two internal reviews through the insurer (an informal reconsideration followed by an internal formal appeal) before an external review by an independent review organization or by the Insurance Department. This decision can be appealed to the OAH.
- The Department of Revenue first conducts an internal review, which can be appealed in a formal hearing held before an impartial hearing officer from another division within the Department. An appeal of this decision can be brought to the agency director or be filed with the Board of Tax Appeals.
- Unemployment insurance, Nutrition Assistance, and Medical Assistance appeals are heard by an administrative law judge in the Department of Economic Security's Office of Appeals, a statewide office that provides impartial due-process hearings to resolve disputed matters in programs administered by the Department of Economic Security. This decision, at least for unemployment insurance cases, is then further appealable to the Appeals Board.

In fiscal year 2014, about 6,000 cases were filed with OAH; \$1.9 million annual budget.

Maryland

While some agencies handle their appeals processes internally, many appeals are conducted through the OAH; the final decision is made by either the OAH or the regulating agency, depending on whether the regulating agency has delegated final decision authority to the OAH.

- Cases filed with the Comptroller of Maryland are heard informally before an administrative hearing officer from the Hearings and Appeals Section of the State Comptroller's Compliance Division. This decision can be appealed further to the Maryland Tax Court.
- Unemployment appeals at the Department of Labor, Licensing, and Regulation are first heard internally before a hearing examiner within the Appeals Division. This decision can then be appealed to the Board of Appeals.
- Disability retirement appeals at the Maryland State Retirement and Pension System are heard by the OAH before being further taken to the regulating agency's Board of Trustees.
- Medical assistance, food assistance, and child care assistance appeals at the Department of Human Resources are heard by the OAH.
- Some agencies such as the Maryland Insurance Administration and the Department of Labor, Licensing, and Regulation, will adjudicate both internally, and by delegating cases to the OAH.

In fiscal year 2014 about 49,000 cases were filed with OAH; \$15.8 million annual budget.

Minnesota

Minnesota's OAH hears a variety of individual licensing cases for state boards such as the Board of Dentistry or Board of Nursing. Licensing appeals for larger state agencies, such as the Department of Commerce, the Department of Human Services, and the Department of Labor and Industry, are also all sent to the OAH. Unlike Washington and the other states we reviewed, Minnesota's OAH hears all workers' compensation cases, which make up the majority of its caseload. While its jurisdiction is very different from Washington's, Minnesota's OAH may also issue both written recommendations and final orders.

- Minnesota State Retirement System appeals are heard internally by its Board of Directors.
- The Department of Revenue uses multiple models. Some appeals are handled informally and internally through a reconsideration or administrative review process, some are sent to the Minnesota Tax Court, and a few are sent to OAH.
- Unemployment insurance appeals are heard internally in the Department of Employment and Economic Development by an unemployment law judge. Appellants can request reconsideration with the same judge, and then further appeal to the Court of Appeals.
- Medical Assistance (Medicaid) and public assistance cases are sent to the Appeals and Regulations Division of the Department of Human Services and are conducted by a Human Services Judge. Appellants may ask for reconsideration of this decision before appealing to the state district court.

In fiscal year 2014 about 14,000 new cases were filed with OAH, about 13,000 of which were workers compensation cases; \$11 million annual budget.

Oregon

Oregon's OAH hears a wide range of cases and with a jurisdiction similar to Washington's. For example, Oregon's OAH hears unemployment insurance cases as well as various cases by the Department of Human Services such as appeals relating to child care, Medicaid, and food assistance. Final order authority is delegated dependent on program and case type.

- Workers compensation cases receive a reconsideration – an informal review by the Appellate Review Unit of the Workers Compensation Division – as the first level of appeal. Appellants can then ask for a hearing before an ALJ at the Workers Compensation Board; they can ask for this decision to be reviewed by the Board before appealing further to the Court of Appeals.
- The Department of Revenue (DOR) hears income tax and corporate excise tax cases internally, with the appellant either choosing a written objection to the agency action or a telephone conference. This decision may be appealed to the Magistrate Division of the Oregon Tax Court. Property tax cases are initially heard by the Board of Property Tax Appeals; the outcome of which may be further appealed to the Magistrate Division of the Oregon Tax Court. The only DOR cases heard by the OAH are garnishment proceedings.
- The Oregon Insurance Division has two levels of internal appeals before appellants can receive an external medical file review by an Independent Review Organization.

Oregon's OAH hears roughly 30,000 cases annually; \$14 million annual budget.

South Carolina

With limited exceptions, the Administrative Law Court (ALC) hears all appeals from final decisions made by state agencies, and holds final order authority for these cases. Many cases are filtered through progressive levels of internal agency adjudication before participants may ask for a central panel hearing. In this way, the ALC is an amalgam of an Office of Administrative Hearings and a Board of Appeals.

- Medicaid appeals are first heard internally by the Department of Health and Human Services' Division of Appeals and Hearings. This decision may be appealed to the ALC.
- Some cases, such as those arising under the Department of Employment and Workforce, will go through a hearing and subsequent external board review before an ALC hearing.
- Public assistance appeals are first heard internally by the Department of Social Services' Office of Administrative Hearings. The decision may then be appealed to the ALC.
- Appeals within the Department of Labor, Licensing, and Regulation are heard before a Board or Commission in the form of an administrative hearing before progressing to the ALC.
- Other agencies, such as the South Carolina Retirement System and the Department of Revenue, have an internal review process, often less formal, preceding the option for an ALC administrative hearing.

In fiscal year 2013, about 8,000 cases were filed with OAH; \$3.6 million annual budget

In researching and assessing other states' administrative appeals processes, we also came across a number of practices we found to be of note. We compiled an overview of these practices in the following section, and think them worthy of consideration.

We identified the following practices as noteworthy based on either:

- 1) the tendency of the practice to be used in more than one state
 - 2) the potential for the practice to be beneficial for consideration by Washington agencies based on our criteria.
- Practices are presented by criteria category, and unless otherwise noted, a state name refers to a state's OAH.

Accessibility and Transparency

Trending Noteworthy Practices (at least two states are doing it)

Video Guidance

4 out of 5 states researched provide video guidance explaining the hearing process

- Arizona and Minnesota provide a transcript along with the video
- Arizona offers the video guidance in sign language
- Oregon offers the video guidance in Spanish

Public Internet Access at OAH Office

- Maryland has an on-site library open to the public with internet access
- Arizona provides internet accessibility at a kiosk in the Phoenix office so those without internet can obtain the same information

Links to external websites for legal assistance

- South Carolina links to American Bar Association, South Carolina Legislature, University of South Carolina Law Library, etc.
- Arizona links to referrals for attorneys in multiple counties (Industrial Commission of AZ appeals)

E-Filing

- Minnesota's new case management practices coupled with an improved website will allow for e-filing, e-serving, and real time reporting and scheduling
- South Carolina is in the process of upgrading their Case Management System to pave the way for developing an electronic filing system
- Arizona offers e-filing

Public access to reports

4/5 states researched make reports publically available on the website

- Arizona posts annual reports to the OAH website, which evaluate responsibility, integrity, commitment, and efficiency. The Five-year Strategic Plan and most recent Sunset Review are also made available.
- Oregon posts its Strategic Plan to the OAH website, which lists performance objectives and the necessary actions to achieve them.
- South Carolina lists its annual reports under the title "Accountability Report" on a page entitled "Transparency."
- Minnesota's OAH makes its Biennial Budget Report available on the website, as well as its Judicial Development Program Office Wide Summary.

Other practices that might benefit Washington agencies

Oregon: Program/Agency specific outreach materials

Oregon's OAH offers a specific explanation of each hearing type, outlining nuances unique to each program-specific appeal. Information available on the website reflects this level of specificity, and each hearing type has its own unique brochure available in multiple languages.

Arizona: Atmosphere of hearing rooms

Arizona's OAH has made an intentional effort to provide a soothing and comfortable atmosphere for the appellants "in order to minimize the understandable discomfort that many may feel in being involved in the hearing process. Interesting artwork, comfortable chairs, arrangement of hearing furniture conducive to inclusiveness rather than confrontation, and adequate space all contribute to an environment conducive to resolution or at least the 'safe space' where conflict can be channeled to understanding." The OAH website also provides pictures of all its hearing rooms to give the appellant an idea of what to expect.

Arizona: Specific guidance through articles/literature

The OAH website provides a list of 27 articles on specific topics designed to better prepare the appellant for their hearing. Topics include "Top 10 Things NOT to Do at an Administrative Hearing," and "What to Pack for Your Administrative Hearing."

Maryland: Library

The OAH's main office houses a library which is open to the public. "The OAH responds to the informational needs of the State of Maryland's diverse communities by providing equal access to extensive and relevant resources that meet the educational, cultural, and business interests of the public. In addition to providing internet access, reference librarians are available to assist with research."

Impartiality

Trending Noteworthy Practices (at least two states are doing it)

Controls in place regarding ALJ contact information

- In South Carolina, only the Judicial Law Clerk's contact information is listed next to each ALJ
- Arizona limits the chance of ex parte communications by ensuring the Office email system prohibits judges from receiving e-mails at their official office email addresses from anyone besides office staff. Judges' office phone numbers are also not published
- Oregon does not publish any ALJ contact information on the OAH website

Other practices that might benefit Washington agencies

Oregon: APA allows for party to recuse the assigned ALJ without reason

Oregon's APA allows a party or agency to recuse the assigned ALJ for no reason. The request will be denied if the requester had reasonable opportunity but did not do so. Most requests are denied for this reason, often after an interlocutory order that dissatisfies a party, who now wants a different ALJ. Although recusal requests are unusual, the provision provides agencies and the public with some assurance of ALJ competence and impartiality – if they lack confidence in the assigned ALJ, they can request another.

Oregon: Authors of APA wrote ex parte communication in the permissive

The APA states that an ALJ may communicate ex parte, so long as the communication is disclosed to the other side. Several agencies were concerned that forcing them to communicate with ALJs through their AAG would significantly increase hearing costs. The Governor was even clearer: he believed that the true goal of an administrative hearing is to provide a forum for the development of good policy, not for the resolution of conflict. Prohibiting informal contacts between ALJs and agencies would result in delays and increased costs. As a practical matter, however, ALJs are as careful as judicial branch judges to avoid such contacts.

Performance management

Trending Noteworthy Practices (at least two states are doing it)

Structured Performance Management Program

3/5 states have a structured performance management program, usually implemented by contracting with an external performance management consulting group

- Arizona has a statewide Managing Accountability and Performance system for state employee evaluation and performance. There are two specific measures in place for OAH judges:
 - Quality of Decisions: No more than one documented incident of agency/board rejection or modification of findings of fact or conclusions of law attributable to substantive ALJ error within any six month period
 - Timeliness of Decisions: No more than one documented incident of late issuance of a decision within any six-month period
- Minnesota established a Judicial Development Program and contracted with Management Analysis and Development to administer and analyze an evaluative questionnaire about judge performance. The purpose is to identify for the judges the things they are doing well and identify aspects of their performance that could be improved
- Maryland OAH has a Managing for Results performance measurement and strategic planning program which sets goals and measures that center around efficiency and quality.

Survey results used for improved performance management

- Maryland uses survey results to identify and address issues that will lead to enhanced outcomes
- Arizona reports evaluations from surveys annually in the report to the Governor, President of the Senate, and Speaker of the House of Representatives. Responses are reported in aggregate form monthly.
- In addition to surveying appellants and representative as part of the Judicial Development Program, Minnesota sends a separate survey to all agencies, commissions, and boards asking for feedback on OAH's rulemaking, mediation, and adjudication services. Results are used to give agencies a more tailored approach to meet their needs. Results of the general evaluative questionnaire through the judicial development program are used to set goals for self-improvement.

Customer/User feedback mechanisms

5/5 states researched have some sort of feedback mechanism in place

- Arizona asks appellants to grade their ALJs, support staff, and all contacts at the conclusion of each hearing. Evaluation forms are provided at the beginning of the hearing, and the form is described in a video played before the start of the hearing. A post decision survey form is available on the OAH website.
- Maryland measures quality through the use of surveys which quantify satisfaction with elements such as preparation, organization, and fairness of the proceedings. Participants are also surveyed on their satisfaction with the outcome of the proceeding.

- South Carolina believes that “receiving input from affected customers is valuable and helps ensure a successful operation.” Typically, this is done by receiving and discussing informal feedback from the litigants.
- Minnesota provides pages for “Attorney Resources” and “Employee Resources” for their OAH Workers’ Compensation Division. These pages provide a place for customers to give the OAH feedback regarding additional information they would like to see on the website.
- Oregon lists a place on the website entitled “Comments,” which links to a “New Message” email window where feedback can be provided.

Performance Metrics

5/5 states researched utilize performance metrics, most of which are accessible to the public

- **Arizona measures:**
 - Percentage of ALJ decisions that were accepted without modification (around 88%)
 - Number of cases concluded vs. the number filed (104%)
 - Timeline of case management (meeting requirements)
 - Incidence of continuance (12.5%)
 - Incidence of rehearing and appeal (1.40%)
 - Results of public evaluation (rated “excellent” to “good” in around 95% of responses)

The OAH measures its performance in terms of five categories: efficiency, integrity, commitment, accessibility, and self-audit. “Daily, weekly, monthly, and annual audits of key measures, time limits, and completeness of all recordkeeping preclude cumulative errors or significant variance from best practices and policies and procedures.” Metrics are made available in every annual report, which are posted on the OAH website.

- **Maryland measures:**
 - Number of hearings (48,599)
 - Disposition time (One agency in the analysis saw improvement, while the Department of Labor, Licensing, and Regulation cases experienced a sharp increase in disposition time despite a decrease in workload.)
 - Satisfaction ratings (percentage of participants who rate the elements of preparation, organization, and fairness as satisfactory or excellent continues to improve and remains consistently above 85% since fiscal year 2012)
 - Metrics are not posted to the OAH website.
- **Minnesota measures the following and compares them to metrics from previous years:**
 - Average days for workers’ compensation judge to issue final decision after record close (36)
 - Average days for administrative law judge to issue written opinion after record close (37)
 - Number and percent of mediations resulting in settlement (95/64%)
 - Percent of hearings held outside metro area plus percent held by video conferencing (10%+4%)
 - Percent of turnover in staff positions (8.9%)
 - Historical spending (graph provided)
 - Number of languages utilized/accessible through its interpreter services (72)

The metrics are provided in the 2016-2017 Biennial Budget, although the one made available on the OAH website is the 2012-2013 Biennial Budget. This document also provides a chart of “OAH Cost and Quality Improvement Goals,” along with how they intend to measure these objectives. Goals include:

- Progress in reducing the time from an initial case filing to the date of an evidentiary hearing (measured in days)
- Progress in reducing the time from the closure of the hearing record to the issuance of a final decision (measured in days)
- Increasing the number of agencies and local units of government that utilize the agency’s services (measured by number of filings by agency/length of client-agency roster)
- Qualitative improvements in the clarity of written decisions (measured by enrollment in agency approved judicial writing courses and the reduction in number of hours spent on peer review of judicial opinions).
- Improving access to information on municipal boundary adjustments (measured by range of case related data that is accessible to the public through the internet).
- **South Carolina gathers and shares data** through informal meetings and conferences, as well as information shared through the Standing Rules Committee. Metrics reported in the annual accountability report include:
 - Caseload: FY 2013-2014 (the most recent report listed) saw 8,553 cases heard (6,777 of which were Office of Motor Vehicle hearings)
 - Timeliness: FY 2013-2014 saw 58% of all case types meeting the timeliness objectives.

Timetables and goals for the timely disposition of assigned cases were initially set when the Court was first created. Periodically, these timetables are reviewed by the ALJs, Chief Judge and Clerk, and adjusted by the Clerk at the direction of the Chief Judge. Interestingly, there is no centralized oversight of case disposition time. The Court’s current structure consists of six autonomous judges’ offices and “does not lend itself to centralized oversight.” Neither the South Carolina Administrative Procedures Act nor the

ALC Rules of Procedure stipulate a timeframe for disposition. “In order for the General Assembly and the public to continue to hold the ALC accountable, legislative changes are necessary to provide such oversight.”

- **Oregon’s metrics** are made available in the Oregon Bar Newsletter in a 2014 article reporting on the OAH Oversight Committee updates. For the 2011-13 biennium, the Office was “operating within its budget and met or exceeded each of the following four key performance measures:
 - Unemployment Insurance Appeals – The target is to resolve at least 60% of all unemployment insurance appeals within 30 days after the hearing request. The office achieved 85%
 - Non-Unemployment Insurance Appeals—The target is to resolve at least 90% of all non-unemployment insurance appeals within the standards established by user agencies. The office achieved 93.4%.
 - Average days to issue an order—The target is to issue all orders within 6.5 days following the close of record. The office achieved an average of 4.38 days
 - Cost per referral for hearing—The target is an average cost per referral of \$425 or less. The office achieved \$371.
 - Outcome of proposed orders spanning July 2012-January 2014—ALJ Affirmed the agency action, 76.42%; Modified agency action, 10.38%; Reversed agency action, 12.03%
 - Disposition—as of April 2014, the date of the report, agencies had informed the OAH of the final disposition in 291 cases. The dispositions were as follows: Agency adopted proposed order, 73.73%; Affirmed proposed order, 7.90%; Modified proposed order, 6.53%; Rejected proposed order, 2.06%.

Agencies informed OAH that they will not issue final orders in cases primarily due to post-hearing settlements (3.78%). The above outcomes show that agencies do not routinely reject ALJ proposed orders.

Other practices that might benefit Washington agencies

Oregon: OAH Oversight Committee

Oregon’s OAH has implemented an Oversight Committee, whose duty is to study OAH operations and, consequentially, make any recommendations to the Governor and the Legislative Assembly that the committee deems necessary to increase the effectiveness, fairness, and efficiencies of the operations.

Oregon: APA mandated training

ORS Chapter 183.680 stipulates that regular training for the administrative law judges is a requirement. “The program established by the chief administrative law judge under this section may include:

- (a) The conducting of courses on administrative law, evidence, hearing procedures and other issues that arise in presiding over administrative hearings, including courses designed to provide any training required by the chief administrative law judge for administrative law judges employed by the office.
- (b) The certification of courses offered by other persons for the purpose of any training required by the chief administrative law judge for administrative law judges employed by the office.
- (c) The provision of specialized training for administrative law judges in subject matter areas affecting particular agencies required to use administrative law judges assigned from the office.”

Arizona: Stakeholder survey

In June 2014, the OAH held two educational sessions on its electronic case management procedures for stakeholders, including agency staff and their assistant attorneys general, independent attorneys, and the general public. “At these sessions, the Office asked attendees to complete a survey that included questions about judge conduct during hearings, the appropriateness and completeness of judges’ decisions, and the customer service the Office’s staff provided. The Office reported that 75 attendees completed the surveys, and less than 2 percent of respondents indicated any dissatisfaction with the Office’s performance.”

South Carolina: Customers represented on advisory committee

“Customers (representatives of litigant groups) have been represented on the initial advisory committee created to draft proposed rules of procedure for the Court, and the permanent Standing Rules Committee (which consists primarily of attorneys from across the state). Most often, the input from customers is translated into a new rule or amendment to an existing rule or procedure.”

Minnesota: Quality metrics

Qualitative improvements in the clarity of written decisions is a Quality Improvement Goal and is measured by enrollment in agency-approved judicial writing courses and the reduction in number of hours spent on peer review of judicial opinions.

Decisions

Trending Noteworthy Practices (at least two states are doing it)

Statutes, rules of procedure, and policy are publically available

4/5 states researched publish some sort of policies or rules of procedure online

- Arizona makes procedural rules and policies available on the OAH website
- Oregon makes statutes and rules available as they apply to each agency and each specific program for which it handles appeals
- South Carolina posts its Rules of Procedure on the Administrative Law Court (ALC) website
- In Minnesota, policies and other information governing the decisions process are made available on the website as part of the Contested Case Proceeding Guide

Searchable database or index of decisions publically available

4/5 states researched have a publically searchable database of decisions

- In Arizona, appellants can search for an entire case file through the OAH portal. Here, there is access to a timeline of every step in the process for the case, including PDFs of all documents for each step
- In South Carolina, previous decisions are searchable in a database on the ALC website
- For unemployment appeals through Maryland's Department of Labor, Licensing, and Regulation, an electronic Decisions Digest is available on the website
- In Minnesota, ALJ opinions/written recommendations are made publically available on the OAH website, both in the form of a searchable database and an index where recommendations can be browsed by year and month.

Other practices that might benefit Washington agencies

Oregon: Clarity on final order authority

Oregon's OAH website provides information on which agency/program-specific cases the ALJ has final order authority

Arizona: Review of modified or rejected decisions

ALJs are required to review all decisions that have been modified or rejected by an agency to identify any possible incorrect citations or other areas where quality can be improved. This commitment is in furtherance of the duty of OAH to provide continuing education to its ALJs. In 2014, if viewed from the acceptance of Findings of Fact and Conclusions of Law, 91.33% of all decisions were accepted without modification.

Arizona: Sharing of information

OAH judges share information with each other from their reviews of decision modifications or rejections that they believe may be relevant to other cases, such as court decisions that the other judges may not have been aware of.

Arizona: Revision of policies and procedures based on decision reviews

The OAH revises policies and procedures in response to information learned through the reviews to help ensure consistency

South Carolina: In-house directory of decisions

South Carolina's Administrative Law Court maintains an in-house directory of all its issued decisions. This database provides the best method of collection and maintenance of organizational knowledge

Maryland: Decisions Digest organized by law and case type

The Department of Labor, Licensing, and Regulation has a Decisions Digest for their unemployment appeals organized by law and case type. This is made available electronically and contains summaries of Board of Appeals precedent decisions on those sections of the law most used by the hearing examiners. Each section contains its own table of contents in which the issues that most often arise are set out analytically. Specific examples of previous cases and outcomes are then provided.

Appendix G: Resources

We identified sources in this report that may provide useful information to readers. Below are links to these sources.

Washington State Agencies

Office of Administrative Hearings. (2010). Code of Ethics for Administrative Law Judges. *View on OAH's website at:* [www.oah.wa.gov/Code%20of%20Ethics.pdf]

Included in this appendix:

Board of Industrial Insurance Appeals. (2011). Code of Ethics for Industrial Insurance Judges.

Brody, D. C. (2013). Judicial Performance Evaluation of the Hearing and Mediation Judges of the Washington Board of Industrial Insurance Appeals. Washington State University & the Board of Industrial Insurance Appeals.

Office of the Insurance Commissioner. (2015). Screening Protocol: All Matters Subject to Hearing.

Other states

Communications with judges

Alaska Office of Administrative Hearings. (2011). Code of Hearing Officer Conduct: Opinion No. 2011-01. [aws.state.ak.us/officeofadminhearings/Documents/COD/COD%20Opinion%202011-01.pdf]

Iowa Administrative Code. 481—10.23 (17A) Ex parte communication. [www.legis.iowa.gov/docs/ACO/IAC/LINC/07-13-2011.Rule.481.10.23.pdf]

Iowa Code 17A.17: Ex parte communication and separation of functions. [coolice.legis.iowa.gov/Cool-ICE/default.asp?category=billinfo&service=iowaCode&input=17A.17]

Oregon Revised Statute 183.685: Ex parte communications. [www.oregonlaws.org/ors/183.685]

South Carolina Code of Laws. Section 1-23-360. Communication by members or employees of agency assigned to decide contested case. [www.scstatehouse.gov/code/t01c023.php]

Informal guidance

Arizona Revised Statutes. 41-1001.01 Regulatory bill of rights; small businesses. [www.azleg.gov/FormatDocument.asp?inDoc=/ars/41/01001-01.htm&Title=41&DocType=ARS]

Florida Statutes. 120.53 Maintenance of agency final orders. [www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0100-0199/0120/Sections/0120.53.html]

Georgia Administrative Code. Rule 616-1-2-.18. Evidence; Official Notice. [rules.sos.state.ga.us/gac/616-1-2-.18]

General resources

Washington State Bar Association. (2011). Ensuring Equal Access for People with Disabilities: A Guide for Washington Administrative Proceedings. [www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/ATJBLC/~media/73292065DB15413D865E7AB3426806F4.ashx]

Board of Industrial Insurance Appeals. (2011). Code of Ethics for Industrial Insurance Judges.



STATE OF WASHINGTON

BOARD OF INDUSTRIAL INSURANCE APPEALS

2430 Chandler Ct SW PO Box 42401 • Olympia, WA 98504-2401 • (360) 753-6823 • www.biia.wa.gov

BOARD OF INDUSTRIAL INSURANCE APPEALS

CODE OF ETHICS FOR INDUSTRIAL APPEALS JUDGES

PREAMBLE: Inasmuch as all Industrial Appeals Judges are required to be members of the Washington State Bar they are required to follow both the Rules of Professional Conduct and the Rules for Lawyer Discipline. To the extent that provisions of this code are in accord with the Code of Judicial Conduct, the provisions shall be similarly construed.

In addition to these considerations, the Board of Industrial Insurance Appeals and its judicial staff agree that the following Code of Ethics will assist the agency in conducting its legislative duties and, as such, all Industrial Appeals Judges shall comply with the following Code:

1. **Industrial Appeals Judge.** The assumption of the duties of Industrial Appeals Judge vests the individual with certain duties and responsibilities with respect to both private and public conduct.
2. **The Public Interest.** The process over which Industrial Appeals Judges preside exists to promote justice and thus to serve the public interest. Proceedings should be conducted with care and expedition. Industrial Appeals Judges should be fair in their rulings and should conduct the proceedings in a manner which promotes public confidence in the integrity and impartiality of the industrial appeals system. An Industrial Appeals Judge, without being arbitrary and keeping in mind due process and the right of a party to have adequate time to prepare, should endeavor to hold counsel and parties to their duty to cooperate in prompt resolution of the dispute.
3. **Constitutional Obligations.** An Industrial Appeals Judge is obligated to support the federal and state constitutions and the laws and regulations under which the judge functions.
4. **Avoidance of Impropriety.** An Industrial Appeals Judge's conduct should be free from even the appearance of impropriety. The judge should avoid violations of the law.
5. **Essential Conduct.** An Industrial Appeals Judge should be honest, temperate, attentive, patient, impartial, and industrious. An Industrial Appeals Judge should conduct hearings and conferences expeditiously and maintain order and decorum. The judge should be faithful to the law and maintain a professional competency in it.
6. **Promptness.** An Industrial Appeals Judge should be punctual in the performance of official duties, recognizing that the time of parties, participants, counsel and others is valuable.

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7. **Courtesy and Civility.** An Industrial Appeals Judge should be patient, dignified and courteous to counsel and others with whom the judge deals. The judge should require, so far as possible, similar conduct of all participants and others who are subject to the judge's direction and control.

8. **Unprofessional Conduct of Attorneys and Representatives.** An Industrial Appeals Judge should not countenance unprofessional conduct of attorneys and other representatives during the course of proceedings. If unprofessional conduct occurs, the judge should take such action as may be necessary and appropriate.

9. **Influence.** An Industrial Appeals Judge should not allow his or her family, social, or other relationships to influence judicial conduct or judgement. The judge should not lend the prestige of his or her office to advance the private interests of others; nor shall the judge convey or permit others to convey the impression that they are in a special position to influence the judge.

10. **Independence.** An Industrial Appeals Judge should not be influenced by partisan demands, public clamor, or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

11. **Conducting Proceedings.** An Industrial Appeals Judge should accord to every person who is legally interested in a proceeding a full right to be heard according to the law. During a hearing or conference, an Industrial Appeals Judge may act to prevent unnecessary waste of time, or to clarify the record. However, undue interference, impatience, or an unprofessional attitude toward witnesses may prevent the proper presentation of a party's case, or the ascertainment of the truth. In addressing counsel, litigants, or witnesses, an Industrial Appeals Judge should avoid any controversial manner or tone.

12. **Ex Parte Communications.** An Industrial Appeals Judge should not permit improper ex parte communications. However, ex parte communications may be appropriate in relation to purely procedural matters or in relations to settlement negotiations. An Industrial Appeals Judge should ensure that the contents of briefs or other communications are not concealed from opposing counsel or other parties. All communications by parties to an Industrial Appeals Judge intended or calculated to influence his or her decision should be made known to all parties.

13. **Public Comment.** An Industrial Appeals Judge and agency employees should abstain from making any public comment regarding any matter pending before the Industrial Appeals Judge.

14. **Decisions.** An Industrial Appeals Judge should set forth the reasons supporting his or her decisions, and analyze the relevant facts and applicable law.

15. **Idiosyncrasies and Inconsistencies.** An Industrial Appeals Judge should adhere to the usual and expected method of resolving appeals and not seek to be extreme or peculiar in his or her decisions, or spectacular or sensational in the conduct of hearings.

16. Inconsistent Obligations. An Industrial Appeals Judge should not accept duties, nor incur obligations, pecuniary or otherwise, which are inconsistent with or will in any way interfere or appear to interfere with the expeditious and proper administration of his or her official functions.

17. Civic and Charitable Activities. An Industrial Appeals Judge may participate in civic and charitable activities that do not reflect adversely upon his or her impartiality or interfere with the performance of his or her duties.

18. Personal Investments and Relations. An Industrial Appeals Judge should refrain from financial and business dealings which tend to reflect adversely on his or her impartiality or interfere with the proper performance of judicial duties. An Industrial Appeals Judge should, to the extent possible, refrain from all relations which might create the impression that his or her judgement is affected.

19. Disqualification. An Industrial Appeals Judge should disqualify himself or herself from presiding over a matter in which the judge's impartiality might reasonably be questioned, including situations in which:

- A. The judge has a personal bias or prejudice against a party, or personal knowledge concerning disputed evidence.
- B. The judge served as a lawyer, or a lawyer with whom the judge practiced, participated in the matter to be determined or in which he or she has been a material witness. Lawyers in a government agency do not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection.
- C. The judge or the judge's close relative has a financial or other interest in the subject matter which could be substantially affected by the decision.
- D. The judge or the judge's close relative is a party to the proceedings or an officer, director or trustee or a party, or such relative is acting as a lawyer in the proceedings.
- E. For the purposes of this section, "close relative" shall include, but not be limited to: spouse, domestic partner, grandparent, parent, child, grandchild, sibling, parent's sibling, or sibling's child.

20. Remittal of Disqualification. A judge disqualified by the terms of Section 19 may, instead of withdrawing from the proceedings, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independent of the judge's participation, all agree in writing that the judge's relationship is immaterial the judge is no longer disqualified and may participate in the proceedings. The agreement signed by all parties and the lawyer, shall be incorporated in the record of the proceeding.

21. Gifts and Favors. An Industrial Appeals Judge should not accept or solicit anything of value from anyone under circumstances which create the impression of impropriety. A judge should not accept a gift, bequest, favor, or loan from anyone except as follows:

- A. A judge may accept a gift incidental to a public testimonial;
- B. A judge may accept ordinary social hospitality, a wedding or engagement gift, or a loan, scholarship or fellowship awarded on the same terms applied to other applicants.

22. Violations of any terms of this code may be the basis of corrective and/or disciplinary action.

Adopted this 30th day of December, 1992.

BOARD OF INDUSTRIAL INSURANCE
APPEALS

/s/
S. FREDERICK FELLER, CHAIRPERSON

/s/
FRANK E. FENNERTY, JR., MEMBER

/s/
PHILLIP T.BORK, MEMBER

Brody, D. C. (2013). Excerpts from: Judicial Performance Evaluation of the Hearing and Mediation Judges of the Washington Board of Industrial Insurance Appeals.

**JUDICIAL PERFORMANCE EVALUATION OF THE
HEARING AND MEDIATION JUDGES OF THE
WASHINGTON BOARD OF INDUSTRIAL INSURANCE APPEALS**

FINAL REPORT

PREPARED FOR:

Washington Board of Industrial Insurance Appeals

Submitted by:

**David C Brody, JD, PhD
Associate Professor and Chair
Department of Criminal Justice and Criminology
Washington State University**

September, 2013



Attorney Evaluation of Hearings Judge _____

Please answer the following questions about your **personal experience** with Judge _____ at the **Washington Board of Industrial Insurance Appeals**.

Please rate the judge's performance, based on your own personal experience, using the following scale:

A Excellent B Very Good C Acceptable D Poor F Unacceptable

Please answer **Don't Know/Does not Apply ("DK/DNA")** for any items in which you lack sufficient information from your own observation to fairly and accurately rate the judge's performance or items which do not apply to your interactions with the judge.

	A	B	C	D	F	DK/DNA
<u>Section 1: Legal Ability</u>						
a. Exercised necessary legal reasoning ability.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Understood the relevant substantive law.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Understood the relevant rules of procedure and evidence.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<u>Section 2: Integrity and Impartiality</u>						
a. Avoided impropriety and the appearance of impropriety.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Maintained a neutral presence.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Permitted all parties to be heard and present their case.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Conducted proceedings in a manner that promotes public confidence in the integrity and impartiality of the industrial appeals system.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Refrained from inappropriate <i>ex parte</i> communication.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Based decisions on the law and facts without regard to the identity of the parties or counsel.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Acted without favor or disfavor toward anyone based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Acted without favor or disfavor toward anyone, based on their representation of an employer, a worker, the state, or any other interest.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you believe the judge favored or disfavored a party as described above, please explain the nature of the bias in the space below.

	A	B	C	D	F	DK/DNA
<u>Section 3: Communication</u>						
a. Used clear and logical oral communication during proceedings.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Acted decisively throughout proceedings.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Prepared clear and logical written decisions and orders.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Returned messages and correspondence in a reasonably prompt manner.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<u>Section 4: Professionalism and Temperament</u>						
a. Treated people with courtesy and respect.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Was attentive to proceedings.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Acted with patience and self-control.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Promoted a sense of fairness.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<u>Section 5: Administrative Capacity</u>						
a. Displayed common sense.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Started proceedings on time.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Was prepared for hearings and conferences.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Maintained control over the proceedings.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Appropriately enforced rules and orders.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Appropriately enforced deadlines.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Prepared orders in a timely manner.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g. Managed the proceedings efficiently.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h. Ensured that the record of the proceedings was clear and complete.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section 6: Background and Demographic Information

- a. Which of the following best describes your client in this appeal(s)?
- ☐ INJURED WORKER
 - ☐ EMPLOYER
 - ☐ LABOR AND INDUSTRIES
 - ☐ OTHER _____
- b. Which of the following best describes your work setting?
- ☐ ATTORNEY GENERAL'S OFFICE
 - ☐ IN-HOUSE CORPORATE COUNSEL
 - ☐ PRIVATE PRACTICE
 - ☐ OTHER (PLEASE SPECIFY) _____

c. Which of the following best describes your position in appearing before the judge?

- ☐ ATTORNEY
- ☐ PARALEGAL
- ☐ LAY REPRESENTATIVE
- ☐ OTHER (PLEASE SPECIFY) _____

d. How would you rate the level of success you have had before this judge during previous two years?

- ☐ VERY UNSUCCESSFUL
- ☐ SOMEWHAT UNSUCCESSFUL
- ☐ NEITHER SUCCESSFUL NOR UNSUCCESSFUL
- ☐ SOMEWHAT SUCCESSFUL
- ☐ VERY SUCCESSFUL

Comments

Please provide any additional comments or details related to either the items raised in this questionnaire or the judge's performance in the space below. Additionally, feel free to describe the strengths and weaknesses of the judge. (You may write on the back of this page or add additional pages if needed.)

Thank you very much for your time and effort.

Performance Evaluation of Hearings Judge _____

This survey asks questions about different aspects of your **personal experience** with Judge _____ at the **Washington Board of Industrial Insurance Appeals**. The questionnaire will take about 5-10 minutes to complete. The survey allows you to express your opinions and provide information about your experiences anonymously, and allows you to make comments and observations in your own words which will be held in confidence.

Please rate the judge's performance, based on your own personal experience, using the following scale:

A Excellent B Very Good C Acceptable D Poor F Unacceptable

Please answer **Don't Know/Does not Apply ("DK/DNA")** for any items in which you lack sufficient information from your own observation to fairly and accurately rate the judge's performance or items which do not apply to your interactions with the judge.

	A	B	C	D	F	DK/DNA
<u>Section 1: Integrity and Impartiality</u>						
a. Avoided impropriety and the appearance of impropriety.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Maintained a neutral presence.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Permitted all parties to be heard and present their case.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Conducted proceedings in a manner that promotes public confidence in the integrity and impartiality of the industrial insurance appeals system.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e. Acted without favor or disfavor toward anyone based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f. Acted without favor or disfavor toward anyone, based on their status as an employer, a worker, the state, or any other interest.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<u>Section 2: Communication</u>						
a. Used clear and logical oral communication during proceeding.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Acted decisively throughout proceedings.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c. Prepared clear and logical written decisions and orders.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d. Returned messages and correspondence in a reasonably prompt manner.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section 3: Professionalism and Temperament

- | | | | | | | |
|--|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| a. Treated people with courtesy and respect. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| b. Was attentive to proceedings. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| c. Acted with patience and self-control. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| d. Promoted a sense of fairness. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

Section 4: Administrative Capacity

- | | | | | | | |
|---|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| a. Displayed common sense. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| b. Started proceedings on time. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| c. Was prepared for hearings and conferences. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| d. Maintained control over the proceedings. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| e. Appropriately enforced rules and orders. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| f. Appropriately enforced deadlines. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| g. Prepared orders in a timely manner. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| h. Managed the proceedings efficiently. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

How satisfied are you with the outcome of the hearing?

- ☐ VERY SATISFIED
- ☐ SOMEWHAT SATISFIED
- ☐ NEITHER SATISFIED NOR DISSATISFIED
- ☐ SOMEWHAT DISSATISFIED
- ☐ VERY DISSATISFIED

Section 5: Background and Demographic Information

a. Which of the following best describes your position in this appeal?

- ☐ INJURED PARTY
- ☐ BUSINESS/INDUSTRY
- ☐ GOVERNMENTAL AGENCY
- ☐ OTHER _____

Comments

Please provide any additional comments, clarifications, or details related to either the items raised in this questionnaire or the judge's performance on the bench in the space below. Additionally, feel free to describe the strengths and weaknesses of the judge. (You may write on the back of this page or add additional pages if needed).

Thank you very much for your time and effort.

To return evaluation, please place it in the enclosed postage paid envelope and place it in the US mail.

Office of the Insurance Commissioner. Screening Protocol: All Matters Subject to Hearing.

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON

Phone: (360) 725-7000



OFFICE OF
INSURANCE COMMISSIONER

January 26, 2015

To: All Office of Insurance Commissioner Staff

From: Insurance Commissioner Mike Kreidler

mk

Subject: Screening Protocol – All Matters Subject to Hearing at the Office of Insurance Commissioner

This is to advise you that I am implementing a general screening with respect to any matter involving any Office of Insurance Commissioner (OIC) adjudicative proceeding whether heard internally, referred to the Office of Administrative Hearings (OAH), or by special appointment (Commissioner delegation). This memorandum confirms the screening procedures designed to eliminate any potential or perceived conflict of interest or *ex parte* communications as defined under the Administrative Procedure Act. The following procedures will be used to screen OIC adjudicative proceedings whenever heard at the OIC or OAH:

1. a) The Commissioner's designated Presiding Officer will report directly to the Commissioner on all adjudicative proceedings. For all personnel and administrative matters such as job expectations, performance evaluations, leave reporting, travel and training requests, and other matters of a strictly administrative nature, the Presiding Officer will report to the Deputy Commissioner for Operations.

b) A person specially appointed to hear any matter will report directly to the Commissioner on all matters, including administrative matters, involved in an adjudicative proceeding.
2. The Commissioner, Presiding Officer (including any person specially appointed to hear an adjudicative proceeding), Deputy Commissioner of Operations, and Paralegal in the Hearings Unit will be screened from all other OIC employees involved in the investigative, charging, or prosecutorial functions of OIC-related to adjudicative proceedings, and in all other OIC matters as soon as it appears that the matter has or is likely to result in an adjudicative proceeding before the OIC or OAH, including any appeal or other litigated matter. In matters in which the Commissioner is screened from OIC staff, the Commissioner is screened from all communication on matter-specific facts, except communication from the Presiding Officer.
3. The Commissioner, Presiding Officer, Deputy Commissioner for Operations, and Paralegal in the Hearings Unit are not screened from other OIC employees for purposes of discussions that may generally, and without case-specific facts, touch upon matters of process, enforcement, or penalties.
4. For all matters in which screening may be appropriate, the Presiding Officer shall maintain a separate record that cannot be accessed by the originating division or Legal Affairs division.

Mailing Address: P.O. Box 40258 • Olympia, WA 98504-0258
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OFFICE OF INSURANCE COMMISSIONER

Screening Protocol – All Matters Subject to Hearing at the Office of Insurance Commissioner

January 26, 2015

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5. All steps shall be taken to ensure that all confidential communications and documents regarding a screened matter are not available to screened persons. Communications among staff regarding such matter shall be limited to those allowed under confidentiality rules and rules regarding *ex parte* contacts in adjudicative proceedings.
6. In all matters in which a hearing is requested or required, the Commissioner will only have access to the OIC file available to the Presiding Officer. The Commissioner should be identified on each OIC file as having access to only the Presiding Officer's file. Care should be taken to ensure that the Commissioner is not privy to any other conversations or communications related to the adjudicative proceeding.
7. The Commissioner and Presiding Officer will meet at least weekly to consider assignment of all matters in which a hearing is required or requested.

*This table presents the decision making flow following this protocol.

Charging: Legal Affairs, Deputies, Chief Deputy				
Screen				
Adjudication of Appeals: Commissioner, Presiding Officer, Paralegal				
Hearings that may potentially impact the status of licenses authorized by chapters 48.15, 48.17, 48.56, 48.102, 48.115, 48.120, and/or 48.170 RCW or chapters 284-15, 284-17 and/or 284-17B WAC.	OAH	Initial Order by OAH	Review by OIC Presiding Officer	Final Order; Commissioner Assisted by OIC Presiding Officer
Other OIC Hearings – other than matters specifically assigned	OIC Presiding Officer	Initial Order by OIC Presiding Officer		Final OIC Order; Commissioner assisted by Presiding Officer
Specially assigned hearings heard by Commissioner or by special appointment	Commissioner or Special Appointment	Unless otherwise provided in delegation, Special Appointee will provide initial decision for the Commissioner's consideration		Final OIC Decision; Commissioner assisted by assigned AAG

This screening protocol is effective as of the date above.

cc: James Odiorne, Chief Deputy Insurance Commissioner