MINUTES
Approved by the Committee
Administrative Hearing Officer Committee
Monday, October 02, 2017
9:00 A.M. - TBD
State Capitol
Boise, Idaho

Co-chair Gary Collins called the meeting to order at 9:00 a.m.; a silent roll call was taken. Committee members in attendance: Co-chair Senator Steve Vick and Co-chair Representative Gary Collins; Senators Jim Rice, Mary Souza, Kelly Anthon and Grant Burgoyne; Representatives Lynn Luker, Stephen Hartgen and Lance Clow. Representative John Gannon participated via conference-phone. Legislative Services Office (LSO) staff present were: Katharine Gerrity, Keith Bybee and Ana Lara.

Other attendees: Lori Thomason, Idaho Outfitter and Guides; Michael Kane, Idaho Board of Dentistry and Idaho Board of Professional Engineers & Professional Land Surveyors; Tom Donovan, Dept. of Insurance; Doug Werth, Dept. of Labor; Teresa Baker, Idaho Association of Counties; Paul Arrington, Idaho Water Users Association; Darrell Early, Office of the Attorney General; Ammie Mabe, Idaho Dept. of Correction; Keith Simila, Idaho Board of Professional Engineers & Professional Land Surveyors; Susan Buxton, Division of Human Resources; Michael Henderson, Idaho Supreme Court; Lynn Tominaga, Idaho Ground Water Appropriators; Shasta Kilminster-Hadley, Idaho Board of Medicine; Angie Vitek, Idaho Lottery; Colter Shirley, Idaho Board of Pharmacy; and Sharon Duncan, Dept. of Human Resources.

Co-chair Collins called for the approval of the November 21, 2016 minutes. **Representative Luker made a motion to approve the November 21, 2016 minutes. Senator Burgoyne seconded the motion. The motion passed unanimously by voice vote.**

NOTE: presentations and handouts provided by the presenters/speakers are posted on the Idaho Legislature website: www.idaho.legislature.gov; and copies of those items are on file at the Legislative Services Office located in the State Capitol.

Co-chair Collins asked Ms. Gerrity, to brief the committee regarding the various documents in their folders. Co-chair Vick stated that he had received correspondence from counties and explained that the committee encouraged the public to attend and participate in the meetings. He added that the committee had held a few meetings in the 2016 interim and would probably meet one more time after the October 2, 2017 meeting.

Senator Burgoyne informed the committee that he had recently received Director Spackman's comments with respect to 2017 Senate Bill 1155. For the record, the motion that authorized the Administrative Hearing Officer Interim Committee specifically excluded the Department of Water Resources from its consideration. He appreciated the director's comments and found them beneficial for the potential application of other agencies.

Summary Related to Draft Legislation - 2018 Draft KAG003

Representative Luker explained that the 2018 Draft KAG003 was similar to the 2017 Senate Bill 1155 with a few exceptions. He explained that the prior meetings had focused on two areas:

1. Number of concerns or deficiencies in the current Administrative Procedures Act (APA); and
2. A broader basis for selecting administrative law judges (ALJs).

SB1155 addressed the first issue. He further explained that a subcommittee was established at the conclusion of the November 21, 2016 meeting to determine the details for draft legislation related to the APA; the subcommittee consisted of Senators Bart Davis and Grant Burgoyne and Representatives Lynn Luker and John Gannon. Some of the committee's concerns last year were:

- Qualifications for hearing officers; and
- Appearance of, and actual ability to have, impartial hearings, especially regarding fact-finding.

He said that when an agency enforces its own rules and performs fact-finding as well, there is cause for concern, regardless of whether it is an actual problem or a perceived problem. This issue was addressed in Draft KAG003 by creating a requirement that an independent hearing officer hear the case and determine the facts, and the agency would retain the appellate function to review the application of the facts to the law. Beyond this, there was a provision for judicial review that was also modified because the current process allowed very little discretion to the courts, given that, when an agency determines facts, they become binding. Secondly, there was a provision that modified the court review process and the standards involved to provide the courts some opportunity to examine scenarios where there may be some manifest injustice.

He noted the draft also included some modest discovery and subpoena authority with respect to litigants' inability to obtain adequate information about the case.

He stated that there is an issue in the current statute about the definition of a contested case. The rules would apply only to contested cases, and the draft provides a new definition for contested cases. It simplifies the process by eliminating the 'recommended order' and retaining the initial and final orders.

Representative Clow inquired about the difference between terms 'presiding officer' and 'independent hearing officer.' Representative Luker clarified that the draft had a new definition for 'presiding officer' found on page 3 of draft KAG003; in essence, the terms were one and the same. He noted that the draft still allowed the agency head to select hearing officers.

Senator Burgoyne stated his appreciation for the comments received by the committee. Senator Burgoyne had the impression that some agency heads make preliminary or fist-level decisions, and in some scenarios, end up reviewing their own decisions in contested cases; this is not true everywhere though. He opined that this further increases the risk of bias. In the case of a particular agency, he believed the agency to be quite amenable to making adjustments to the process to address this potential issue.

Senator Burgoyne explained that SB1155 and the draft would change depending on how the committee decided to achieve administrative hearing officer independence. Both items have particular provisions that may be adjusted depending on the comments from agencies and others.

Senator Burgoyne referred to Section 67-5201, Idaho Code, and opined that a contested case was meant to be a secondary proceeding in which a litigant appealed a lower-level decision, and from that appeal hearing, the litigant essentially received all the rights provided by the APA in an evidentiary hearing. He stated his and Representative Luker's joint efforts to make the definition of contested cases more clear, and to encompass only the hearing, which is the final administrative act subject to the provisions in SB1155. He said that the legislative members who drafted SB1155 believed that it was important that the agency head be able to review it on issues of law, but not on questions of facts; he said fact-finding should not occur outside of an administrative hearing. Senator Burgoyne referred to the document provided by LSO staff that delineated SB1155's proposed changes to the APA.

67-5242 (New Section):

Qualifications for a presiding officer would have to be amended to some degree, but in general, the presiding officer would have three years experience practicing law in Idaho and not be an agency head or member of an agency governing board.

67-5243 (New Section):

The idea behind the contested case procedure, found in Section 67-5243, is to 1) have a process that appears fair and objective and 2) is as fair and objective as possible.

He said the APA does not currently have a provision with respect to discovery, but individual agencies can make provisions for discovery in their respective rules. Senator Burgoyne explained that the premise of SB1155 is that discovery is a right; plaintiffs would have the right to know what the agencies are going to present against them and the plaintiffs would be required to disclose the same information to agencies. He continued:

67-5245 (New Section):

The notice requirements were enhanced.

67-5246 (New Section):

The hearing record requirements were enhanced.

67-5247 (New Section):

The emergency adjudication procedure was enhanced.

67-5248 (New Section):

The parameters around ex-parte communication were enhanced to ensure there was no appearance of impropriety or actual impropriety.

67-5249 (New Section):

Allows certain parties to intervene in a contested case if they have a legal basis or may be affected by the outcome, and if notice is given to all parties.

67-5252 (New Section):

A provision related to default orders; some adjustments may need to be made with respect to how defaults are completed, based on the feedback received from agencies.

67-5253 (New Section):

Findings of fact have to be based on evidence and matters officially noticed in the hearing. Hearsay evidence may be used to supplement or explain other evidence, but it is not sufficient by itself unless it would be admissible over objection in a civil action.

67-5258 (New Section):

Any guidance documents, agency precedents, or agency processes reflected in prior agency decisions, that hearing officers or agency heads refer to, must be indexed and available to the public.

67-5267 (New Section):

The committee received a comment that the requirement for a court to address every issue on which the agency decision was based may not be ideal. When parties appeal, they usually designate the issues they want considered on appeal, and those are the issues that the court should address. Senator Burgoyne opined that this area should probably be revisited. Regarding de novo review, if a court finds that the agency action was unwarranted and based upon a manifest injustice in the findings of fact, the court shall enter findings supporting its determination of such and conduct a trial de novo.

Discussion:

Senator Rice made reference to judges reviewing discovery during litigation due to their concerns for the parties and asked if the draft touched on that issue. Senator Burgoyne responded that the members who worked on the draft were very aware about the cost to litigants and that the draft attempted to provide sufficient information for litigants to decide whether they should spend money on the hearing process, and if so, that it be an investment into a fair process. In regards to the issue of discovery, he said, the draft designated it under the control of the hearing officer.

This allowed both parties to make their objections of unnecessary or disproportionate discovery to a hearing officer.

Representative Luker referred to Section 67-5251 and explained that it provided very limited and specific discovery; to proceed outside the limitations, an individual would have to receive an order for good cause from a hearing officer.

Representative Luker suggested changing the word 'in' to 'from' on page 3, line 2 of the draft. This potential change could provide clarification that the provision would apply only to cases from which a hearing would be needed and not during the initial course of applications for licenses, etc. He also suggested authorizing a reserve for administrative hearings since the cost of hearings fluctuated yearly among the agencies.

Another issue brought forth to the committee was the ambiguous time frames for appeals. Representative Luker referred to Professor Seaman's comments where he suggested a resolution to the issue.

He said excising the Idaho Department of Water Resources was another area for the committee to examine. He explained that the board's primary concerns were the ability to have technically-skilled hearing officers participate in hearings and to address some of the time frames. Addressing those concerns, while allowing the majority of the APA to apply to the department, was an issue the committee needed to address. Idaho Transportation Department (ITD) had both contested case hearings and administrative license suspension hearings, and suggested the committee examine this issue and decide whether to exempt the latter from the APA.

Representative Clow asked if the draft, which allowed for agency heads to appoint hearing officers, would be compatible with a centralized panel, if the committee decided to proceed with establishing one. Senator Burgoyne explained that the decision regarding hearing officer independence would affect the provisions in SB1155 with respect to presiding officer appointments. Representative Luker added that the draft allowed for an agency head to review and modify the decision with regard to the application of law, but it did not continue the practice of allowing the agency head to change the facts decided by the hearing officer.

Representative Hartgen voiced his concern that the draft would add a new layer of bureaucracy. Representative Luker commented that the draft actually would reduce a layer in that it would eliminate an order (final order). The focus of the draft was on the findings of fact that drive the final resolution. He explained the potential risk for bias in the current process, especially since courts were restricted in their review of facts.

Representative Gannon referred to page 19 and asked, in regards to appeals, whether the draft allowed for standing for persons who were not parties to the original proceedings. He also inquired who would pay for an appeal and the manner in which attorney fees would be addressed. Representative Luker explained that the standing provision was part of the model act and was adopted in the draft. The cost of appeals and attorney fees were not altered in the draft. Senator Burgoyne added that the expenses and fees remained governed by Section 12-117, Idaho Code.

Representative Clow requested a flow-chart depicting the time frames in the draft, as well as a list of agencies that would be exempt from this draft. Ms. Gerrity stated that LSO would provide a flow-chart of the time frames, but a list of exempted agencies would need to be determined by the committee. Representative Luker inquired whether the Office of the Attorney General (OAG) could provide a summary of agencies that have statutory authority for an alternate process other than the APA. Brian Kane, Assistant Chief Deputy for OAG, responded that he would research the question and provide the information to the committee.

The committee adjourned for a break at 10:12 a.m.

The committee reconvened from break at 10:25 a.m.

Agency/Board and Public Testimony

Idaho Outfitters and Guides Licensing Board - Director Lori Thomason

Co-chair Collins called upon Ms. Lori Thomason, Director for the Idaho Outfitters and Guides Licensing Board, to begin her testimony. Director Thomason began her testimony by providing background with respect to the board's duties and its makeup.

She reported that in the last three years, the Idaho Outfitters and Guides Licensing Board had held 45 hearings. In 2016, there were nine disciplinary investigations and seven uncontested administrative citations. All but one admitted to the violations at the hearing; the outfitter who contested the alleged violations was found not guilty. There was one contested administrative violation hearing, but the violations were dismissed prior to any board review by the board prosecutor. She clarified that hearing numbers can vary depending on the cases that are investigated each year.

At the 2016 Idaho Outfitters and Guides Association Meeting, Director Thomason inquired how many of the members would prefer to stay with the board's current hearing process; all but one expressed a desire to keep the current process. Director Thomason explained that the members felt that the board's knowledge and expertise with respect to the outfitters' responsibilities and obligations made it invaluable to the hearing process. She further explained that the board members could best understand the reasons behind an outfitter's particular action in question.

Director Thomason stated that requiring the use of a hearing officer would:

- Add additional costs for the hearing officer, court reporter, and transcriptionist;
- Delay the ability to license or process disciplinary violations in a timely manner; and
- Remove the ability for the board to personally address the applicants or licensees.

She informed the committee that the board had never been accused of bias by an outfitter.

She reminded the committee that the board was a dedicated fund agency and the cost to pay for a hearing officer, court reporter, transcriptionist, and the processing of subpoenas added an additional cost for each hearing. Adding this additional expense to the yearly budget could be challenging. She opined that the board's current process was the most cost-effective and efficient way to process hearings. The board also conducted hearings relative to whether an applicant should be licensed due to past convictions. The cost for all the hearings to be heard by a hearing officer would not be the best use of limited funds.

Director Thomason explained that if at any time the board required the use of a hearing officer, Section 36-2107(f), Idaho Code, allowed the board to acquire one.

Discussion:

Representative Luker clarified that it was not the committee's intent to include license issuance in the APA, unless a license was denied, appealed, and had become part of a contested case.

Senator Souza inquired whether contracting an independent hearing officer to hear only contested cases would provide a benefit to the agency. Director Thomason responded that the current process allowed an applicant to appeal the board's decision and proceed to a judicial review hearing through the courts. If a hearing officer was to perform a hearing for a contested case before it reached the courts, she would find no issue with it.

Representative Luker inquired how many of the 45 hearings were specific to issuance of licenses. Director Thomason responded that she would follow-up with the committee with the information.

Senator Burgoyne inquired whether the board's review to make its initial determination on issuance of licenses was conducted like the board's contested case proceedings. Director Thomason described the process of review for initial issuance of licenses. Senator Burgoyne noted the description and asked again if the process was different than a contested case proceeding. Director Thomason

responded that the processes were different. Senator Burgoyne asked if the licensee had the right to appeal the board's decision. Director Thomason responded in the affirmative. Senator Burgoyne asked if the licensee was required to appeal to the board. Director Thomason stated that she was unsure and could not recall an incident where that had occurred. Mr. Michael Kane, the board's prosecuting attorney, was called upon to testify and provide additional clarification to Director Thomason's testimony.

Idaho Board of Professional Engineers and Professional Land Surveyors and Idaho Board of Dentistry-Michael Kane

Mr. Kane stated that he was the prosecuting attorney for the Idaho Outfitters and Guides Licensing Board and had come to the meeting on behalf of his clients: Board of Professional Engineers and Professional Land Surveyors and the Board of Dentistry.

Mr. Kane stated that the draft did provide some direction where gaps in the law currently exist. He listed the issues of intervention, defaults, and discovery as examples. Mr. Kane also provided the committee with a document delineating his comments with respect to the draft.

Mr. Kane remarked that the draft required hearing officers for contested cases and the definition of a contested case could pose some issues. He explained that the current law's definition for contested cases included applications for initial licensing. If the applicant wished to appeal the board's decision, the appeal would be brought before the district court.

Senator Burgoyne inquired further about the Outfitters and Guides Licensing Board's hearing process. Mr. Kane described the process as a formal one:

- A notice of hearing is issued;
- APA and statutory rules are complied with;
- Evidence is taken;
- Applicant and witnesses are sworn in; and
- The board renders a decision.

He stated that it was a formal, recorded hearing and also was able to be appealed to the district court. Senator Burgoyne explained that his conception of a contested case was not one where there was not a predicate decision available to review. He added that, from his perspective, if there is no decision to review, there should not be a contested case, per the APA's definition.

Mr. Kane reminded the committee that the current statute stated that, under certain circumstances, the board must make the determination as to whether or not to revoke a license, allow it to continue with conditions, or leave it as is, and opined that these determinations were the primary source of contested hearings. He referred to page 3 of the handout 'Budget Implications for Creating a Central Panel for Administrative Hearings,' and noted the high-cost of a single case from the Board of Professional Engineers and Professional Land Surveyors (BPEPLS) at $35,841. He explained that the draft did not allow the board to sit as the hearing officer and he questioned whether, in some circumstances, it might not be best to allow the board do so. He added that the Board of Dentistry always hired hearing officers for its hearings; but the BPEPLS acted as the hearing body itself. He explained that this was due to the complexity of the subject matters and the BPEPLS are subject matter experts in their field.

Senator Souza commented that the field of dentistry was also a complex field and asked why the Board of Dentistry, as subject matter experts, choose to hire hearing officers as opposed to acting as its own hearing officer entity. Mr. Kane responded that it was the Board of Dentistry's preference; he noted the potential cost of travel and time for the Board of Dentistry's members across the state to meet for each hearing.

Senator Souza made note that, in a contested case, she would not want the same panel that made the initial determination to then also hear her appeal, regardless of expertise; she would

want an independent panel to make the secondary determination. Mr. Kane explained that staff bring complaints to the board and the board members act as independent judges when hearing the complaints; the board does not make a determination on a complaint that it has previously determined.

To make his final point, Mr. Kane referred to the draft and noted that agencies and boards would be bound to the hearing officer's findings of fact. He opined that the draft should allow agencies and boards the ability to request further fact-finding in the event an error was identified in the findings of fact for correction. Mr. Kane added that the process presented in the draft would encourage the board to obtain the services of a transcriber since it would be obligated to rely solely on the hearing officer's written determination when reviewing the case. This was in contrast to its current practice of being present at the time of the hearing to hear witnesses and examine evidence. Contracting the services of a transcriber obviously would increase the cost.

Representative Luker commented that court judges are general jurisdiction judges who deal with many technical issues (medical, engineering, etc.), and they are not required to have degrees in the subject matter areas. Furthermore, the state does not require juries, who also listen to a variety of technical material, to have degrees in the subject matter areas either. He stated that Mr. Kane's suggestion regarding additional fact-finding merited additional review.

Senator Rice suggested that, regardless of whether an agency board or hearing officer performed the fact-finding, the findings of fact would probably be identical in most cases. Mr. Kane responded that findings of fact are often contested. He added that findings of fact are usually simple to determine, but the topic of standard of care is a complex area of the law, and the process benefits from having subject matter experts perform fact-finding.

After some discussion, Mr. Kane commented that the draft did not allow for an agency head to be a presiding officer in a contested case as opposed to the current statute allowed. Representative Luker clarified that the current draft allows an agency head to appoint a presiding officer, but not act as a presiding officer.

Representative Luker asked whether, in the case of a citizen complaint, the proceeding was handled by the board and/or in the name of the board against the licensee. Mr. Kane responded that it depended on the statutory scheme. Representative Luker referred to page 15 of the draft in Section 67-5256, which allowed for reconsideration to be requested; the question is whether the board has the ability to request reconsideration as a party to the case. Mr. Kane commented that, in his experience, requests for reconsideration had always come from the party that lost, but it could be a potential recourse; he stated that he would examine it further.

Idaho Department of Insurance - Deputy Director Thomas Donovan

Co-chair Collins called upon Mr. Thomas Donovan, Deputy Director for the Dept. of Insurance (DOI), to testify. Deputy Director Donovan explained that he was tasked with detailing the nature of the department's process and to stress that the DOI strived to comply with the current APA provisions and statutory code while affording the public true, meaningful due process. The DOI does not hold many hearings a year - about seven. The department has about 100,000 licensed insurance producers and over 1,500 licensed insurance companies.

Mr. Donovan explained that typically, the Director appoints a hearing officer who will issue a preliminary order. At times, the Director has served as the presiding officer and handled the hearing at the outset. He stressed that the DOI and its staff understand the division in duties that currently exist in statute; the investigatory and prosecutorial function is separated among the staff and also between staff and the Director and any attorneys that could potentially advise him.

He reminded the committee that the Director didn't simply adopt the staff's position. Historically, there were situations in which the Director did not adopt the order or impose a sanction as recommended by DOI staff. Although the current system allowed an agency head to generally

supervise the agency, but also to serve in a quasi-adjudicatory role does not mean that the department staff always prevail - indeed, it doesn't.

Deputy Director Donovan noted the nature of contested cases and administrative cases. The DOI is a an agency funded through dedicated funds and is staffed with public servants who understand the role of public service. Comparing the administrative contested case system to the court system is not always an apt comparison – civil litigants act in their own self-interest. It's in the DOI's self-interest to protect consumers, as well as to also have a healthy insurance industry that serves the public interest.

He described a case that he handled in his former role as the deputy attorney general (DAG) assigned to the Dept. of Insurance. He had worked with opposing counsel who represented a licensee and had expressed an interest in obtaining discovery. At the time, DAG Donovan indicated he was willing to turn over all of the evidence and records in his possession. DAG Donovan told the opposing counsel that, if he could find evidence to show that no violations had occurred or that the sanctions sought were inappropriate, he would be interested in hearing it.

Deputy Director Donovan noted that some of the benefits of a streamlined process were beneficial to the public and consumers as well. To the extent that the Legislature may revise the process and make it more complex, a revision may require licensees or others to retain counsel. While DOI encourage counsel, it also recognizes that some people choose not to or find it too expensive. The DOI desires to provide the public with a fair hearing - it's in the DOI's interest to do so. It's also in the DOI's interest in any case to avoid any potential issue in an appeal where the individual did not understand the process. The process should be simple enough where the individuals who are not represented, or cannot afford counsel, are still protected; if the process is too cumbersome or complicated, it may be self-defeating.

Deputy Director Donovan made a few remarks with respect to the draft:

- Noted Representative Luker's definition of 'contested case' and changing "in which" to "from which," potentially;
- Noted a reference to 'agency action' on page 3, line 2 of the draft; currently 'agency action' is defined as rule or order;
- Suggested time frames should be in multiples of seven instead of multiples of ten (easier to count by weeks and reduces the chances of a deadline occurring on a weekend); and
- Agreed on the comments regarding the standard of view.

In conclusion, he said, the DOI believes it provides a fair, meaningful due-process to licensees, whether it's a license issue or issues of misconduct, and Deputy Director Donovan knows of no issue in regard to bias in the DOI.

Representative Luker suggested that the DOI may have already met the requirements in Section 67-5251 of the draft regarding discovery. He inquired whether Deputy Director Donovan had any concerns regarding this section. Deputy Director Donovan took no issue with the section at this time. He explained that there have been times when parties have sought more formal discovery and the administrative rules allowed a hearing officer to direct or compel discovery. He said typically, the DOI attempts to accommodate requests in a mutually agreeable manner.

Representative Luker asked if the DOI viewed initial applications for licensing as an item that would require a hearing. Deputy Director Donovan responded in the negative. He explained that when a license is denied, an applicant would be made aware of the opportunity to request a hearing. Representative Luker suggested that the draft's definition of 'contested case' may potentially provide a 'savings clause' to the DOI. He explained that, to the extent that the DOI has another process outlined in statute, this may allow the DOI to continue its particular process. Deputy Director Donovan stated a provision in the current APA that sought to dovetail any additional laws 'except as otherwise provided' and suggested a similar provision be included in the draft. He

explained that the DOI's current process was predominately directed by the APA and the current administrative rules issued by the AGO, but there were a few sections of Chapter 2, Title 41, Idaho Code, to allow for exemptions. Representative Luker requested input from the DOI regarding the definition of 'contested case' and asked Deputy Director Donovan to submit at a later time whether modifications to the language were needed.

Office of the Attorney General - Darrell Early, Division Chief of the Natural Resources Division

Co-chair Collins called upon Mr. Darrell Early, Division Chief of the Natural Resources Division of the Office of the Attorney General, to testify. Mr. Early prefaced his testimony by stating that the Attorney General had not taken a position regarding the draft at this time. Attorney General Wasden asked Mr. Early to present general overarching concerns from OAG regarding the draft. He explained that the draft was reviewed by several deputies in the OAG, comments were compiled and reviewed, thus, his comments summarized those of other deputies as well. Mr. Early stated that his comments were focused on three significant areas:

1. The draft presented a structural paradigm shift in the manner the agencies would conduct business in the State of Idaho;
2. Concern regarding the burden of formalization of the process for contested cases; and
3. Concern regarding judicial review sections and how those implicated the separation of powers.

1. Structural Paradigm Shift

Mr. Early read the current APA's definition of a 'contested case' and 'order.' He explained that the definition of order, and the fact that a contested case results from an order, means that every permit, license, decision on benefits, and other types of specifically applicable determinations, were subject to the contested case provisions of the APA under the current draft. The current draft, in Section 67-5240, provided an exception that, if the underlying agency statute provided a different process, the agency could retain its current process. However, another section in the existing legislation stated that all agencies are required to produce uniform rules for the conduct of contested cases. As some of the agencies noted earlier, there are several different types of proceedings and different ways in which the contested case rules as they exist currently, would apply to those agencies.

He said that the contested case provisions in the existing APA were essentially a default mechanism; if an agency did not have a process outlined in the APA, then the agency would use the process outlined in the contested case rules. He added that almost all agency statutes direct agencies to follow the APA unless otherwise specified in its statute. He explained that some agencies use a form of the contested case process to issue permits (i.e., Department of Lands, Department of Water Resources, etc.). He said that while the process is specified in rules, it is in effect, under the APA, a contested case. These types of contested cases occur at the lower level of the agency, often by agency staff, and sometimes hearings are conducted, which may at times include collection of evidence, but the hearings are not a formal adjudicative proceeding.

Mr. Early explained that an appeal of an agency action, as opposed to the agency action itself, would be a paradigm shift from the current APA. He said that if the Legislature intends to create a formalized appeals process, it needs to consider how agencies that have traditionally used the contested case process will issue orders and licenses, and ensure that the statutes that govern those agencies provide them organic authority to do so.

Representative Luker explained that within the APA there was a list of actions, one of which was contested cases. He inquired whether the preliminary decisions were not covered under any of the other actions available to agencies in the APA. Mr. Early explained that there were three categories defined as agency actions: rules, orders, and other agency actions as specified by law. He expressed his concern that a court may view permits, licenses, etc. as an order - defined as a determination of legal rights, immunities, privileges, benefits, etc. - and require that they result from a contested case. He believed case law supported his concern.

Senator Burgoyne stated that he had accompanied clients to meet with agency officials in matters related to lower level permit determinations, etc. He explained that the process felt similar to an interview, but suggested that some things were missing from a typical contested case proceeding, such as: findings of fact, conclusions of law, the interview is not done under oath, affidavits are not filed, etc. He inquired whether the current definition in law for a contested case lacked clarification for the purpose of comparison and wondered if the draft presented the same issue. Mr. Early suggested that there appeared to be a differentiation of what a contested case is. He explained that the definition of a contested case in the current APA did not include the characteristics that Senator Burgoyne described (testimony under oath, etc.). He conceded that many individuals viewed a contested case as the process described by Senator Burgoyne, but that was not how a contested case was defined. He stated that if the Legislature proceeded with this new process, it would essentially create a layer of administrative appeal of the underlying actions of the agencies. The existing APA uses the contested case process in many agencies to issue the underlying permit decisions or orders and it provides additional processes to appeal the determination through the ranks of the agency or board.

Representative Luker discussed rulemaking and contested cases of the APA. He was unsure that the APA was designed to address initial determination decisions because they were not initially contested cases or rules, but agency ministerial duties. He conceded that his historical understanding might be faulty, but opined that including some of the initial determinations into the APA had been a convenient practice for some agencies. Mr. Early explained that the construct of the APA was to overlay and provide uniformity to all agencies so that there was consistency across agencies in carrying out their actions. He opined that the APA overlaid the construct of contested case onto those agency actions so that every agency action that resulted in an order was by APA's definition a contested case. He explained that agencies that do not have other statutory authority to issue orders via some process, other than a contested case, under the current law, were required to use a form of contested case. The APA directed the OAG to develop standardized rules for contested cases and further directed the agencies to follow those standardized practices unless they had reasons not to do so.

Representative Luker suggested that part of the issue might be the definition of an 'order'. He stated that an order is defined in broad terms, but it may vary from one agency to another. Mr. Early personally opined that there was not an issue with the definition of an 'order.' He suggested that the committee was struggling with the construct of a process for an administrative appeal of agency actions. He stated that there were ways to craft language within the current APA to clarify how to differentiate between the issuance of the underlying order and a potential administrative appeals process. The new process would be a paradigm shift and would change the manner in which contested cases are viewed and perceived. To accomplish this, the committee would need to think about what the objectives would be in terms of creating an administrative appeal process, as well as what guidance would need to be provided to agencies with respect to issuing licenses, permits, etc.

Mr. Early explained that the current administrative process and the notion of administrative agencies was that boards and directors were appointed based on specialized knowledge, experience and expertise in making agency decisions, including the agency head's evaluation of technical evidence, science and facts. One of the concerns with the draft was that by taking the fact-finding duty from the agency head, the Legislature would be diminishing the value of the expertise for which the agency head was chosen; this would be another paradigm shift.

2. Burden of Formalization

Mr. Early commented that several DAGs had concluded that the draft would over-judicialize the process and may impose significant burdens on the layperson to participate. Additionally, it would

probably place more power with the agencies and agency attorneys because of the specialized training, familiarity with rules of evidence and procedures. He explained that there was a concern within OAG that the formalization for the process of contested cases would become an impediment to the participation of ordinary citizens in the process.

3. Judicial Review Sections

Mr. Early described the existing APA's well-known standards of review and how the standards have been applied by courts in Idaho and across the country. He explained that the standards limit the power of the courts by limiting the basis on which the courts can reverse agency decisions. The standards maintain the separation of powers among the three branches of government. He stated that the OAG found the new versions of judicial review and standards of review to be problematic.

Division of Human Resources - Susan Buxton, Administrator

Co-chair Collins called upon Ms. Susan Buxton, Administrator for the Division of Human Resources, to testify. Ms. Buxton explained that part of the Division of Human Resources was the Idaho Personnel Commission, which was set forth in Chapter 53, Title 67, Idaho Code, and described the makeup of the commission. The commission hears contested cases and appeals of decisions made by agencies with regard to personnel action for unclassified employees (13,000 employees). Idaho Code sets forth the process for appeals and eligibility requirements for members of the commission. She referred to page 3, lines 6-7 of the draft, and presumed that the Idaho Personnel Commission procedures would fall under the alternative adjudication process provided in statute. She explained that the Division of Human Resources also had hearing officers who were skilled attorneys with contracts in place that required them to be unbiased and to have expertise with respect to personnel matters and the state's merit system; the commission was also held to the same requirements.

She suggested that, in some cases, the requirement for hearing officers to also be attorneys would be unnecessary. She did emphasize the need for subject-matter expertise. Ms. Buxton also suggested adding language in the draft with respect to recusal rights and the right for disqualification - particularly due to conflicts of interest.

The committee adjourned for lunch break at 12:20 p.m.

The committee reconvened at 1:35 p.m.

Central Panels: Perspectives from Various Central Panel States - Panel Presentation

Co-chair Collins welcomed the panel, who were presentative via conference-phone:

- Ms. Kathleen Frederick, Chief Administrative Law Judge, Alaska Office of Administrative Hearings;
- Judge Edwin Felter, Jr., Senior Administrative Law Judge, Colorado Office of Administrative Courts; and
- Ms. Sara Kerley, Deputy Director of the Bureau of Administrative Hearings, Illinois Department of Central Management Services.

Ms. Kathleen Frederick, Chief Administrative Law Judge, Alaska Office of Administrative Hearings

Ms. Frederick provided some historical background and makeup with respect to the Alaska Office of Administrative Hearings (OAH). She explained that OAH had been successful from its inception; statistics showed that OAH was more efficient and cost-effective in terms of litigation and case management than the process of using hearing officers who were either employed or contracted by agencies. Over time, additional types of cases have been transferred to OAH. It now heard over 66 subject-areas, with the largest volume consisting of public benefit cases including:

- Medicaid;
- Licensing;
- Retirement and benefit cases for state employees;

- Child support modifications; and
- Contract and procurement.

She suggested that central panels attract a high caliber of administrative law judges when compared to agency hearing officers. OAH also mediated cases and Ms. Frederick explained that 85%-90% of the cases were self-represented litigants, but more substantial cases (i.e., licensing, retirement benefits, etc.). In 2016, OAH implemented a fast-track mediation program for medicaid services cases, which were half of its docket at the time. The OAH now resolved 85% of those cases with an hour-long mediation conducted by a contract mediator. This program saved the state over $1 million each year by reducing litigation costs and adjusting benefits within two to three weeks of the filing of an appeal.

She said that the OAH surveys its litigants, as required by statute, and the results are included in its annual report; over 95% of litigants were satisfied with the process, even when the determinations were not in favor of the litigants. Most attorneys had 10-15 years of experience with litigations at the time they were hired by OAH.

Ms. Frederick stated that OAH would like to see a broader range of cases; some agencies still had hearing officers or contracted hiring officers. OAH charged less to agencies, provided a variety of hearing results, and there were more delays when agency hearing officers are used. OAH was in the process of making some minor statutory changes. One of the statutory changes OAH sought was to have broad, discretionary subpoena power. Initially, OAH was given subpoena power through agency statute, but over time, legislation was revised and subpoena power was removed. She voiced her desire for broader, final decision-making authority.

Ms. Frederick emphasized the need for ALJs to be protected in the event that they make an adverse decision against an agency or government official. In Alaska's statute, the ALJs have a one-year probationary period and can only be dismissed for cause after the probationary period. The OAH Chief was appointed by the governor and can only be removed for cause during the five-year term. She commented that simply transferring hearing officers from agencies to ALJ status may not be the best practice; they should still be placed on a one-year probationary period. Ms. Frederick explained that only one of the six administrative hearing officers that were transferred to ALJ status was successful due to a variety of reasons.

The other issue OAH had at its inception was that it did not have a case management system; she recommended obtaining one -- as well as good sound recording equipment.

Ms. Frederick emphasized the need to be informed regarding the hiring pool to ensure the hiring salary would be competitive. OAH charges agencies by the hour, but are less expensive than obtaining the services from the private sector.

Ms. Frederick emphasized the importance for OAH to have, and be perceived to have, independent status. OAH was considered a quasi-judicial independent agency, but was housed under the Dept. of Administration. The reason for transitioning to a central panel is to provide the public with due process so that they agency that makes a determination is not hearing the de novo appeal and an ALJ is not beholden to the agency for the outcome.

Representative Luker inquired about any objections to the proposal of a central panel before its inception and the outcome to those objections. Ms. Frederick explained that generally people were in favor of a central panel, but some agencies objected because they believed it represented a loss of control. Over time, possibly due to low appeal rates and timely decisions, the outlook is more positive.

Judge Edwin Felter, Jr., Senior Administrative Law Judge, Colorado Office of Administrative Courts

Judge Felter noted that there were 25 states with central panels across the country. He emphasized the reason for supporting a central panel is the public's perception of fairness. The panel was under the Dept. of Personnel and Administration and was created in the 1970s. The ALJs conduct business in courtrooms and wear robes; the robes project to the public fairness and impartiality. He explained that workers compensation was 50% of the panel's business and described some of the other areas the panel covered. The projection of fairness and the actuality of fairness was just as important.

Judge Felter emphasized the need to hire high-quality individuals; most of the employees the panel attracted were from the Attorney General's Office. The qualifications for the panel was the same for a judicial branch judge: law license and five years practice, although most ALJs had at least 10 years experience at the time each was hired.

Judge Felter explained that, at the inception, the panel billed agencies by the hour, but it was not an efficient model due to varying agency budgets and budgetary needs for each agency. The central panel now had a cost-allocation system; the state reviews the prior year's budget and allocates funds accordingly. The central panel consisted of 20 ALJs and it had many interesting initiatives, including a law clerk program and a judicial education program.

Judge Felter stated that, while the OAC had not conducted a survey recently, the feedback from the public had been very positive.

Senator Souza inquired whether the central panel was involved with solely contested cases or if it participated in lower-level, initial determinations for licenses and permits on behalf of agencies. Judge Felter explained that it varied; for example, with respect to workers compensation, if an individual was not satisfied with an agency's initial determination, he could request a hearing with OAC. In licensing board cases, the Dept. of Regulatory Agencies handled all state licenses. If it determined that an issue warranted minor disciplinary action, and a licensee was satisfied with that determination, then the issue would go no further. However, if it was egregious conduct, the Dept. of Regulatory Agencies would instruct the Attorney General to refer the case to the OAC.

He commented that there are pros and cons to considering final agency action authority. He added that 95% of the ALJs's determinations were affirmed.

Judge Felter explained that at the inception of the central panel, some hearing officers were grandfathered into the panel from other agencies. He explained that, in Maryland, it was found that the first two years of the central panel process was slightly more expensive than the previous process, but the third year and every year thereafter was less expensive. He opined that the central panel process was more efficient and provided less risk of bias or perceived risk of bias.

Ms. Sara Kerley, Bureau Chief of the Bureau of Administrative Hearings and Deputy Director of the Illinois Department of Central Management Services

Deputy Director Kerley explained that the concept of a central panel was not new and, in fact, in Illinois it passed the Legislature in the 1980s before being vetoed by the Governor. The objections to a central panel, both in the 1980s and the seven other times it had been legislatively proposed in Illinois, had been from the Executive Branch; one of those objections was a concern regarding maintaining expertise for hearing different cases. She explained that there had not been any scandal or political issue that lead to the creation of a central panel, rather, the administration perceived it as a customer service issue.

She described the previous process as an unpredictable due process; a private practitioner representing a litigant was obligated to learn an entirely different procedure for each hearing type, even if the hearings were within the same agency. Deputy Director Kerley stated that delays and backlogs were issues prior to the implementation of a central panel; it was difficult to effectively deploy staff across state agencies. This discouraged businesses from participating in regulatory

hearings and unnecessarily burdened citizens who had rights that they would have otherwise exercised if they could have understood the process. There were also large disparities in caseloads and backlogs between agencies.

Deputy Director Kerley explained that Illinois approached the question of a central panel differently than most states; it began with a one-year pilot period in early 2016 with an executive order for the purpose of eliminating backlogs and unreasonable delays. The executive order also referred to the appearance of impropriety when the ALJs were housed in the same place, both physically and organizationally, as every other link in the decision-making chain, and the patchwork of rules and regulations. The Bureau was charged with gathering information, testing consolidation, and implementing improvements when possible.

She said that in the information gathering period, the bureau found some stark training deficiencies; surveyed ALJs reported that 48% of them had not received any judicial training before hearing cases in their agencies, 52% reported having no ongoing training regarding their role as an adjudicator, and 36% had received no specialized training on the specific agency subject-matter that they were hearing. It also found that agencies had outdated or no technology available to its ALJs; some agencies had paper-based systems and an inability to track cases.

Deputy Director Kerley noted that a rules subcommittee was developed that surveyed and analyzed agency rules dealing with agency hearings. A model of hearing rules was drafted and was moving toward promulgation through the legislative process. The model rules are intended to provide clear instructions to parties and provide for efficient service. It also allows for electronic filing, email services, limits on discovery with discretion for the ALJs for when discovery is necessary, and time frames. They also drafted an amendment to its APA and now follow the APA with a central panel. The amendment also included a freestanding agency, but Deputy Director Kerley had no objection to the central panel remaining at CMS for the sole reason that Dept. of Central Management Services had no hearing component and the panel could remain independent and still be housed in an agency where it shared fiscal and timekeeping functions. The Chief ALJ would serve a six-year term and be appointed by the Governor with the advice and consent of the senate. It also included specific requirements for ALJs and further clarified ex parte communication. The central panel was working on building an electronic case management system; it expected to save $5 million a year once the system is implemented.

She stated that professional development was another area for focus due to the findings regarding the existing ALJ population. The bureau implemented a monthly continuing legal education program that focused on ALJ specific training directly related to adjudication. They also implemented the first ALJ code of professional conduct. The bureau also did an annual day-long conference focused on administrative law issues ranging from cultural competence in administrative hearings to evidence. Just last month, the bureau published a benchbook, which is a 65-page document intended to provide guidance and best practices for ALJs, as well as citations to Illinois case law and references to other parts of state government to provide resources to litigators.

Deputy Director Kerley added that during the pilot period, the bureau tested consolidation and case sharing. The bureau deployed the Dept. of Revenue and Dept. of Public Health ALJs to serve as a pilot case on sharing ALJs. ALJs received training on one aspect of Dept. of Labor cases and held two wage-and-hour claim hearings per week. Between October 2016 and June 2017, nearly 550 cases were heard that would not have otherwise been heard due to the caseload. Agencies that had hearing needs, but didn't employ any ALJs, were paired with agencies that had the staff available and willing to help. Beginning in May 2016, the bureau hired the first ALJ, in addition to Deputy Director Kerley, who heard cases for seven state agencies that had existing hearing needs and, in the past, had contracted with other attorneys or had existing legal staff switch roles, depending on where the case originated. These agencies entered into intergovernmental agreements with CMS

and the bureau's ALJs to hear cases for the agencies. The only cost to the agency were the costs associated with travel and transcripts; the agencies are not charged for the ALJs' time.

She said that in August 2017, the Governor issued a second executive order that made the bureau permanent until other legislative or executive action expanded the scope. The bureau can coordinate with up to 25 agencies in implementing administrative law reform, authorizing additional staff, and directing implementation of the model rules.

Deputy Director Kerley stated that in Illinois, the bureau is involved with the agency hearing process when a hearing request is made and the referral is submitted to the bureau by the agency. The bureau in the state of Illinois does not hear workers compensation or unemployment benefit hearings; the current process for these hearings works very well and the amount of hearings with respect to these two areas would be overwhelming given the state's large population.

Representative Luker inquired whether the bureau used a form of the APA as its procedural model for ALJs. Deputy Director Kerley responded in the affirmative and opined that its current APA procedural model was in need of updating.

Co-chair Collins thanked the panel presenters for their time and the input provided.

The committee adjourned for a break at 2:54 p.m.

The committee reconvened at 3:11 p.m.

Budget Implications for Creating a Central Panel for Administrative Hearings - Keith Bybee, Deputy Division Manager, Budget and Policy Analysis Division, LSO

Mr. Bybee stated that his presentation would cover three areas:

- Information compiled for the committee last year;
- Budget proposals; and
- Options for funding mechanisms.

Mr. Bybee explained that the first few slides were similar to last year's presentation and included the information requested from agencies, and while the information had not been updated, it served for the basis of a potential central panel budget for the State of Idaho.

He proceeded to slide 3 and highlighted a few items:

- Average total annual expenditures were $1,477,500;
- Average annual number of cases was 1,412;
- Spending per case averaged $1,046;
- Professional Engineers and Land Surveyors Board reported the highest spending per case at $35,841; and
- The median for all state agencies was $3,259 per case.

Mr. Bybee proceeded to slide 4 and explained that, in comparison with other central panel states, if Idaho was to have and spend an appropriation of $1.48 million, it would be the fourth lowest in terms of expenditures for any central panel in the country.

Mr. Bybee explained that he had created two separate budgets, and the Legislature, depending on the route it would prefer, had the option to alter either scenario. Both the state employee model and the contractor model had a budget of $1.5 million. The state employee model had a chief judge, an administrative assistant, a financial technician, six administrative law judges, and $491,200 for the equivalent of 2.04 full-time contract ALJs at $125 per hour. The contractor model had a chief judge, an administrative assistant, and the equivalent 4.84 full-time contract ALJs at $125 per hour. The fixed costs for rent, utilities, IT, travel and training were the same.

He said that the most significant difference between models is the administrative law judges and the financial technician that contribute to the difference of $667,100. The state employee model had

funds to contract out for additional legal work, if needed, or for technical expertise for a particular case. The contractor model would have $1,320,300 for contract work, which is equivalent to almost five full-time contract attorneys at $125 per hour. He added that the difference in the expenses for office equipment was due to calculating $2,000 for each state employee in both scenarios.

Representative Luker inquired why more ALJs were allowed for the state employee model than the contractor model. Mr. Bybee explained the dollar amount left after the fixed costs for the chief, an administrative assistant, rent and utilities, for the state employee model was $491,200 for contractors; the contractor model had $1.16 million available for contractors. The difference was that $491,200 at $125/hr. resulted in 3,900 hours worked in the state model versus $1.16 million at $125/hr. and resulted in 9,300 hours worked in a year for the contractor model.

Representative Luker inquired whether the cost for contractors were included in the operating column and whether the chief judge and administrative assistant were included in the personnel column in the contractor model. Mr. Bybee responded in the affirmative. Representative Luker asked whether an example such as the industrial commission referee pay scale, which included benefits, was less expensive than paying a contractor the hourly rate. Mr. Bybee responded in the affirmative.

Senator Burgoyne questioned whether office space rent was reduced for the contractor model given there would be less state employees needing space. Mr. Bybee responded that he had kept the rent cost about the same due to the assumption that the contractor model would still require office space, but the rent space could vary, especially depending on what agency the central panel was housed.

Senator Souza inquired why the contractor model allowed for less contracted ALJs if the rate of pay was the same in both the contractor model and state employee model. Mr. Bybee clarified that the hourly rate for a state employee ALJ was $36.41/hr. compared to the $125/hr. rate of a contract ALJ.

Representative Luker inquired whether it was Mr. Bybee's understanding that, presently, the industrial commission referees do their own administrative work and did not have additional support staff other than possibly an administrative assistant, similar to both potential model scenarios. Mr. Bybee responded in the affirmative. Representative Luker inquired how many additional state employee ALJs could be created from the $491,200 allocated for contract ALJs. Mr. Bybee responded that, if the central panel chose to hire only ALJs and no additional support staff, it would provide for about an additional five ALJs.

Mr. Bybee proceeded to slide 6 and explained that there were two manners to pay for the central panel: cost recovery and direct billing. He provided a brief description of both methodologies on slide 7.

Senator Souza asked which methodology would cost less. Mr. Bybee responded that administratively, someone would have to keep track of cost in both situations, and it would depend more on how cash was managed and how much cash was available at different points in the year.

Representative Clow asked if the highest spending per case amount of $35,841 was collectively in one year or an accumulative number beyond one year. Mr. Bybee explained that, in the case of the Professional Engineers and Professional Land Surveyors Board, it was a five-year average that brought the 2011 case of $50,645 down to an average of $35,841. Representative Clow inquired whether agencies, when they have cases with a substantial cost, feel compelled to request a supplemental. Mr. Bybee responded that oftentimes when an agency exhausts its budget, and has a substantial dollar amount case, it will request a supplemental.

Senator Rice inquired about requests made to agencies for the budget information provided in the presentation. Mr. Bybee explained that last year he had requested administrative hearing cost expenditures for the last five years from the agencies. He added that the numbers provided were self-reported and that, under the time frame last year, he had been unable to verify the numbers independently.

Representative Luker asked which billing model was used for the OAG's health and welfare hearing unit. Mr. Bybee responded that it was based on the statewide cost allocation or the cost recovery model.

Senator Burgoyne inquired whether Mr. Bybee examined the potential workloads for the ALJs in his calculations or whether he used the $1.5 million figure as a starting point to see how many ALJs positions could be created. Mr. Bybee responded that it was the latter. Senator Burgoyne estimated that the ALJs would handle an average of 4.7 cases a week and opined that it was a manageable caseload for either a state employee ALJ or contractor ALJ to handle.

Senator Souza inquired whether the 1,412 cases conducted annually was self-reported as well. Mr. Bybee answered that the number originated from the Office of Performance Evaluations Report.

Representative Luker inquired how many hearing officers the OAG's health and welfare hearing unit had and how many cases it handled annually. Mr. Bybee responded that the Dept. of Health and Welfare had 5,267 cases over the five-year time frame, but he was not aware of how many hearing officers the unit had.

Agency/Board and Public Testimony (additional)

Idaho Ground Water Appropriators - Mr. Lynn Tominaga

Co-chair Collins called upon Mr. Lynn Tominaga to testify. Mr. Tominaga introduced himself as the Executive Director for several organizations (Idaho Irrigation Pumpers and Idaho Ground Water Appropriators). He conceded that most of his initial concerns would not affect the organizations he represents. However, he had not seen any issues of concern that would warrant the creation of a new process for contested case hearings. He questioned whether this was a solution looking for a problem. He said that his other concern was that the technical expertise of a central panel would increase the cost to the state and to the public. He stated that state agencies should be reliable and consistent in how they rule and questioned whether independent hearing officers would provide that.

Idaho Supreme Court - Mr. Michael Henderson, Legal Counsel for the Idaho Supreme Court

Mr. Henderson stated it was the court's intention to review and evaluate the draft. The sections that the court was most concerned about involved judicial review on pages 17-20 of the draft. He explained that the Court does not look at policy issues that are within the Legislature's purview when examining legislation, but rather, whether it understands the meaning of any changes so as to implement the intent of the Legislature. He stated that the draft proposed some changes, particularly with regard to standard of review. The court would also consider whether any of the proposed changes would have an impact on resources. He added that there were also some concerns regarding separation of powers, but in any case, the court would review and evaluate the draft. Mr. Henderson informed the committee that the court would be circulating the draft to its legislative review teams to obtain their input with respect to how the draft would affect the courts and provide feedback to the committee.

Final Committee Discussion:

Senator Rice relayed some negative feedback with respect to administrative hearings and said he has had multiple scenarios brought to his attention. He opined that it was not a solution looking for a problem; he said the issues are cyclical and do occur from time to time. He stated that while most agency hearings are fair, they are not always fair and uniform. The process does not appear fair to individuals who appear in front of agencies whose own employees, or contractors, serve as the hearing officers. He found the differentiation of the definition for contested cases among attorneys problematic and suggested the committee should clarify the difference between ministerial actions and contested cases with better definitions. Senator Rice emphasized the need for hearing officers both to be independent and appear to be independent from agencies. He voiced his preference for placing hearing officers under the courts, but would also be comfortable with placing hearing

officers in an independent agency. Senator Rice also suggested the committee review the standard of review provision and requested input from the courts. He suggested including in the draft an independent hearing officer methodology, and opined the state would receive far more benefit in a cost-saving manner if it employed state employee hearing officers.

Representative Luker emphasized that the reason the committee met for a second year was because it felt there were issues that needed to be addressed. In some cases, the issues were the high-risk of bias, and in other instances it was the perception of bias, but in either case, the citizens deserved to have an impartial process - both in fact and in appearance. There were two parts to addressing the issue: updating the APA and the potential creation of a central panel. He agreed that the definition of contested cases needed to be clarified since there was the perception that initial applications, etc. required invoking the contested case concept. He suggested that, if the Legislature chose to alter the definition for contested cases in a manner that would make the agencies' current process for initial applications, etc. void, the agencies could address a new process internally through rulemaking. Representative Luker reminded the committee of its commitment to the Dept. of Water Resources and suggested obtaining input from the department regarding what parts of the draft it needed to be excluded from and which ones it should be subject to.

Representative Luker stated that the committee needed more information regarding land use application of the APA and should receive feedback from counties with respect to this matter. In regards to judicial review and whether de novo review was needed, Representative Luker stated that the provisions would place more burden on the courts, but much of it would depend on the integrity of the initial fact-finding process. There were also some suggestions made to the committee regarding qualifications for hearing officers and conflicts of interest. Representative Luker suggested the committee adopt another subcommittee to look at these issues and develop recommendations.

The second issue was to address whether to create a central panel or some variation.

Senator Burgoyne stated that SB1155 was in need of modifications and voiced his appreciation for the comments and feedback regarding the bill. He explained that there might be an opportunity to limit a full APA rewrite and focus on the issue of a central panel and its potential makeup and process. He explained that he would be comfortable with limited review in the courts if the state had independent hearing officers. Rather than having trial courts actually conduct de novo evidentiary proceedings, there would be opportunities for the courts to remand cases to an independent hearing officers who would conduct the proceedings.

Senator Burgoyne quoted Judge Felter's words from the first paragraph on page 2 of the document, 'Reasons for A Central Panel of ALJs,' that he provided to the committee. He reminded the committee that conflicts of interest do not cease to exist because a hearing officer did not respond to his conflict and instead made a fair determination; hearing officers and litigants should not be placed in a position where a conflict of interest exists, as it undermines the credibility of decision-making. Senator Burgoyne reminded the committee that the Office of Performance Evaluations (OPE) did not study whether actual bias had occurred in decisions, but whether a risk of bias existed. The Legislature has the obligation to ensure that laws convey certain values.

Senator Burgoyne stated that he preferred the contractor independent hearing officer model more than the state employee independent hearing officer model. He emphasized that with financial independence comes the ability to think and act independently. He suggested that a contracted hearing officer from a private legal practice, where only 5%-10% of the business consisted of State of Idaho hearing officer work, would find it easier to make a difficult ruling.

In regards to requests about not making the system so complicated that litigants would require the use of an attorney, he suggested the need to ensure that the funds spent on legal assistance to be used in a proceeding that was fair, rather than wasting a litigant's time and money. He emphasized that he respected the good work hearing officers do, but when there is a process in place where the decision-maker works for the agency, and is selected by an agency, that administers, investigates,

and prosecutes, it's difficult to dispel the perception that the adjudicator is biased. Litigants need to have a system that is worth investing in and suggested that a central panel would afford that degree of credibility.

Representative Clow voiced his concern that the new process would potentially increase costs to litigants because of its complexity. He was concerned that an individual would not appeal, or that an individual would hire an attorney when they wouldn't have done so otherwise, due to the changes proposed in the draft.

Representative Hartgen explained that he had two substantive problems with the draft. He referred to page 3 of the draft and expressed his concern regarding the language in the provision allowing agencies to follow its own procedure - assuming it had an alternative adjudication process already provided in statute. He was concerned that it would allow other agencies to create their own alternative adjudication processes through rulemaking and opt-out of the process. His second concern was where presiding officers would reside. He suggested the presiding officers should be housed outside of the agencies and voiced his preference for presiding officers be housed under the courts.

Representative Gannon stated that an unbiased, impartial decision-maker was the corner stone of the legal system. He also thanked Senator Burgoyne and Representative Luker for their excellent work in creating the draft. He emphasized the need to ensure that the new process was simple and understandable so a litigant could participate in the process without necessarily requiring counsel. He suggested the committee should provide clarity in defining a 'contested case' and 'agency action.'

Senator Rice opined that, in regards to pro se litigants, the areas that the committee was deliberating would not change the complexity of the process for self-represented litigants.

Senator Souza stated her appreciation for the work that Senator Burgoyne and Representative Luker had accomplished, as well as the comments submitted by the agencies. She commented that members of the public may not have a high level of confidence in receiving a fair hearing if the hearing officers are associated with the agencies with which the dispute is lodged. She supported a generally cost-neutral solution for a central panel and emphasized the need for hearing officers to be selected randomly - not by the agency - and retain total independence.

Representative Luker made a motion that the co-chairs appoint a subcommittee to develop a modified draft with consideration to the comments provided to the committee and provide a report to the committee at the next meeting, which would include the comments presented to the committee. Secondly, that the committee proceed to the next meeting with the intent of having some form of independent central officer hearing selection process, whether that be a contract or state employee model, and that the committee continue its discussion with an objective of pursuing this end goal. Senator Rice seconded the motion.

Co-chair Collins inquired whether Representative Luker had proposed the central panel to be a separate issue from the draft. Representative Luker suggested that the focus of the next meeting should be whether a central panel would follow a contractor model or state employee model. Co-chair Collins explained that, the year prior, the committee had authorized a subcommittee and proposed that Senator Rice fill the subcommittee's vacant spot. The subcommittee would consist of: Senators Rice and Burgoyne; and Representatives Luker and Gannon. **The motion passed unanimously.**

After some discussion, the committee chose November 13 for its next meeting.

The committee adjourned at 4:47 p.m.