

**Testimony of Drake Hagner
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**Before the Committee on Government Operations
Council of the District of Columbia**

Performance Oversight Hearing Regarding the Office of Administrative Hearings

February 22, 2018

The Legal Aid Society of the District of Columbia¹ submits the following testimony regarding the performance of the Office of Administrative Hearings (OAH). As this committee knows, OAH plays a crucial role in the District of Columbia government by providing a neutral forum for reviewing certain agency decisions. Overall, we applaud OAH's efforts to ensure that its hearing process is fair and accessible to all participants, including *pro se* parties. However, there are a number of areas where OAH needs to improve. We will use our testimony today to highlight areas of greatest concern, along with steps OAH can take to become more effective. In particular, this year, we urge the Committee to use today's oversight hearing to:

1. Ask the agency for further details about the process for appointing and re-appointing Administrative Law Judges (ALJs), including effects of a recent breakdown in the re-appointment process that affected case-handling;
2. Determine how OAH can improve its internal processes and relationship with the District of Columbia Court of Appeals to continue to improve its handling of appeals cases; and,
3. Explore how OAH can continue to make the administrative hearing process more accessible to participants who do not have lawyers, particularly through reforms to OAH's Resource Center.

Further, we hope the Committee will use its oversight power to ensure that OAH follows through on any potential improvements in these two areas during the remainder of FY18. As part of our work, Legal Aid routinely assists clients who appeal erroneous denials or terminations from social safety net programs such as Medicaid, SNAP, TANF, and Unemployment Insurance, as well as low-income tenants facing illegal rent increases. Legal Aid's Barbara McDowell Appellate Advocacy Project also reviews relevant OAH decisions appealed to the Court of Appeals, providing advice and representation in certain cases affecting District residents living in poverty. For the clients we meet, OAH decisions often have a fundamental impact on their

¹ The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Over the last 85 years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers. Legal Aid currently works in the areas of housing, family law, public benefits, and consumer protection. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

health, safety, and well-being. Administrative Law Judges review crucial questions such as whether Medicaid will pay for a desperately needed service for a person with disabilities or whether SNAP benefits will be restored before a low-income family goes hungry. It is crucial that OAH function effectively, correcting errors by other administrative agencies while simultaneously avoiding unnecessary delays in handling the matters before it. Further, as many low-income hearing participants appear before OAH without legal representation, OAH must be accessible to *pro se* participants.

OAH'S FY17-18 HIGHLIGHTS

Legal Aid applauds OAH's performance in several areas that impact low-income residents. First, Administrative Law Judges hosted stakeholder meetings in at least two key areas – unemployment insurance matters and SNAP cases involving intentional program violations – showing its willingness to bring parties together to share information and improve case handling. Second, OAH continues to offer interpretation services for Limited English Proficient case participants in a manner that is easier to access than many other agencies and courts that Legal Aid works with.

Perhaps the best example of a recent OAH success story comes from a public benefits case where a food stamps recipient appeared without a lawyer after appealing a Department of Human Services determination that he or she had committed an intentional program violation by misusing his or her food stamps – a serious offense that would bar this individual from receiving SNAP benefits for a period of time. The presiding ALJ issued a decision finding that the Department of Human Services had not met its burden of proof to prove an intentional program violation and describing why the agency's evidence was insufficient. Significantly, since the Department of Human Services had been using similar evidence in dozens of other intentional program violation cases, the agency reconsidered these matters in light of the ALJ's decision. Eventually the agency dismissed these other cases as well.

This is the OAH hearing process operating at its finest. A *pro se* litigant received a fair determination when challenging an agency determination he or she knew to be unfair. OAH acted as a "check" on that agency, identifying serious flaws in the agency's reliance on certain evidence. That agency, in turn, reconsidered other cases in light of OAH's decision, dismissing other cases relying on the same evidence. Thus, one food stamp recipient was able to set off a chain reaction that led to the District Government rectifying its conduct.

AREAS IN NEED OF IMPROVEMENT

While there is much to applaud about OAH's activities over the last fiscal year, we continue to observe areas of concern that we believe that agency leadership – and the Committee – should focus on over the remainder of FY18. Additionally, as the Committee moves from performance oversight to budget oversight, we urge the Committee to ensure that OAH has the resources necessary to fully address these challenges as we transition into FY19.

We will use this section of our testimony to outline what we think the agency needs to improve, but first we would like to address something that is of great concern: OAH's

problematic response to the District of Columbia Auditor and the Center for Court Excellence's report. In 2016, the Auditor and CCE released this report, which included several detailed recommendations for steps that OAH could take to improve (among other things) the processing of cases, as well as supports that the agency provides to *pro se* litigants.² This past December, the agency released a response to the report – one that failed to address several of the report's recommendations, dismissed others without much explanation, and expended significant energy attacking the report's methodology even while later acknowledging that many of the areas identified as needing improvement were accurate. We are disappointed in the agency's response, as it represented a missed opportunity to engage with stakeholders about ways to continue to improve the agency's operations. We have worked collaboratively with the agency over a number of years and believe the continued collaboration is key to continuing to build on the agency's strong foundation.

Re-Appointments of ALJs

One particularly concerning event from FY17 was the OAH Commission's mishandling of the reappointment process for several ALJs. In 2017, a handful of ALJs who were originally appointed in 2005 came up for reappointment at the same time. While these reappointments were known well in advance, the OAH Commission failed to reappoint the ALJs in a timely manner and, as a result, several ALJs were unable to adjudicate cases for a period of time, leading to significant case delays. Oddly, some ALJs continued to hear cases during the reappointment freeze while others did not, leading to confusion in the stakeholder community about their status and any effects on the timely and appropriate handling of cases. We urge the Committee to question OAH extensively about these events. While this particular set of circumstances may not reoccur, OAH's failure to anticipate and manage the reappointment process indicates that reforms may be needed at OAH or with the Commission. In particular, the Committee (and the public) needs to know:

- How did OAH and the Commission plan for the 2017 reappointment process involving a larger than usual number of reappointments for ALJs? How many ALJs were impacted?
- What communications did OAH leadership issue to the ALJs whose reappointments had lapsed about their duties to hear cases?
- What was the impact on active cases?
- What has OAH learned from this experience that will help it in future?

Reducing Delays Related to Cases Reviewed By the Court of Appeals

Perhaps one of the clearest examples of processing delays that have the potential to impact OAH participants is the agency's continued struggles handling matters that are reviewed by the Court of Appeals, then remanded back to OAH after the Court has issued a decision.

² As we noted in last year's performance oversight testimony, Legal Aid Supervising Attorney Beth Mellen Harrison served on the taskforce whose evaluation of OAH's performance informed the report's findings and recommendations.

During last year’s performance oversight hearing, we testified about extensive delays in OAH’s responses to Court of Appeals orders requiring OAH to assemble records of its hearings.³ Each time a participant seeks Court of Appeals review of an OAH decision, the Court orders OAH to produce the administrative record within 60 days. This record includes the transcript of hearings (if any), exhibits, and OAH orders, motions, and decisions. The case cannot move forward at the Court of Appeals without the record. Nonetheless, OAH’s practice has been to ignore the 60-day time limit contained in the Court rules and the Court’s orders. Anecdotally, it appears that OAH routinely submits records about four months after being ordered to do so, rather than within 60 days, as it is required to do. When OAH does not assemble a hearing record in a timely fashion, the case stalls and parties are forced to sit in limbo, waiting for OAH to act. Because many appeals with low-income parties involve time-sensitive issues – like the receipt of unemployment insurance or public benefits and services – stalled appeals can be deeply damaging.

Based on our review of records of recent appeals, the agency appears to be improving the timeliness of record submission.⁴ While there used to be dozens of pending cases with OAH record delays, current public records suggest that there are fewer than two dozen such cases now. However, delays remain, and can be extensive. For example, for the most egregious recent case, it took over two years for OAH to prepare a record that would allow the Court of Appeals case to go forward. And even now, there is one case that has been pending for more than 23 months and another for more than 16 months. We urge the Committee to ask the agency about its process for assembling hearing records, to push the agency to identify additional ways it can eliminate delays, and to ensure that the agency implements these reforms. At an absolute minimum, OAH should act like any other party that has received an order from the District’s highest court requiring it to act within a specified time – here 60 days. If some extraordinary circumstance prevents OAH from complying with that order, OAH should file a motion with the Court explaining the delay, providing a date by which it will comply, and asking the Court’s permission to comply by that later date.

Making OAH More Accessible to Pro Se Participants

As the 2016 Auditor/CCE Report notes, it is likely that the vast majority of individual participants who appear at OAH for hearings do so without legal representation.⁵ OAH can continue to improve its services to *pro se* participants. First, OAH should devote appropriate staff and resources to maintaining its Resource Center and look for ways to make the Resource Center more responsive to the needs of those who do not have legal representation. The agency’s oversight responses note a staff re-classification to effectively add a Customer Service Representative due to a high volume of calls to the Resource Center.⁶ The Committee should discuss the effects of this reclassification, as well as the more general staffing needs of the

³ Testimony of Drake Hagner, Senior Staff Attorney, Legal Aid Society of the District of Columbia, Before the DC Council Committee on Government Operations, February 23, 2017, p. 5. Available at: <https://www.legalaiddc.org/wp-content/uploads/2017/02/DHagner2-23-2017.pdf>

⁴ Legal Aid conducted a similar analysis for last year’s oversight testimony. *Id.*, at pp. 5-6

⁵ Office of the District of Columbia Auditor, *Administrative Justice in the District of Columbia: Recommendations to Improve DC’s Office of Administrative Hearings* (September 7, 2016), p. 50. Available at: <http://www.dcauditor.org/sites/default/files/OAH%20Final%20Report.pdf>.

⁶ OAH FY17-18 Oversight Responses, Q1

Resource Center, to ensure that there is adequate staff support to be fully responsive to the number of *pro se* participants seeking help.

Moreover, in figuring out how to further improve supports for unrepresented participants, it would be helpful for OAH to look to the multiple court-based resource centers here in the District that OAH could use as models for further reforms. These court-based programs serve similarly low-income participants who are looking to navigate equally-complex legal proceedings with similarly high stakes. The DC Landlord/Tenant Resource Center and the DC Small Claims Resource Center, for example, both serve high volumes of *pro se* participants, providing legal information (not legal advice), sample forms (and assistance in filling them out), and referrals to legal services providers for those who need more extensive assistance. OAH does not have to come up with a blueprint for reform all by itself – it can make use of lessons learned from similar programs. The Committee should ask OAH about:

- Its efforts over the last year to make the Resource Center more user-friendly and
- What steps it plans on taking over the remainder of FY18 to improve both the reach and effectiveness of the Resource Center?

Our clients frequently report that they are treated brusquely by OAH front desk staff, including strict rules about where they can sit in the reception area while waiting for assistance. Simple reforms, designed to create a more welcoming environment and encourage *pro se* participants to review referral flyers and written resource guides while they wait, would go a long way in improving outreach. The Committee should also urge OAH to reach out to entities such as the DC Bar Pro Bono Program (which coordinates the court-based resource centers discussed above) to identify best practices in working with and providing information to *pro se* participants. Finally, as OAH has previously identified its “budget and staffing limitations” as a potential constraint on reform,⁷ the Committee should clarify with OAH what resources OAH needs in order to improve the Resource Center and make identifying such resources a priority during the FY19 budget process.

CONCLUSION

We appreciate the opportunity to testify today regarding OAH’s performance. We would be happy to answer any questions and to work with the Committee and the agency following today’s hearing to identify further concrete steps OAH can take to address these pressing challenges.

⁷ Office of Administrative Hearings, *Agency Response to ODCA Report Entitled Administrative Justice in the District of Columbia: Recommendations to Improve DC’s Office of Administrative Hearings* (December 1, 2017), at p. 24.