

Oregon Water Resources Commission Teleconference
July 22, 1996
Salem, Oregon

Members

Mike Jewett
John Frewing
Anita Johnson
Nancy Leonard
Ron Nelson

Others

Jerry Schmidt
Karen Russell

Staff

Martha Pagel
Geoff Huntington
Diane Reynolds
Melinda Bruce
Tom Byler
Steve Applegate
Weisha Mize

A staff report submitted at this meeting is part of the meeting record and is on file at the Oregon Water Resources Department, 158 12th Street NE, Salem, Oregon 97310. An audiotape of the meeting is on file at the same address.

Vice-chair Jewett chaired this teleconference. The purpose of the meeting was to request that the Commission adopt a proposed rule allowing staff to represent the Department and Commission in contested case hearings. The rules would be added to the existing OAR Chapter 690, Division 2, contested case procedural rules.

Weisha Mize, Hearings Officer, presented this report to the Commission. A public hearing was held in Salem July 11, 1996; Jerry Schmidt, representing the Oregon Association of Realtors, attended that hearing and commented on the proposed rule. Written comments were submitted by WaterWatch, Water for Life, Attorney Laura Schroeder, and Oregon Association of Realtors.

The comments focused primarily on the concern that the proposed rule, particularly subsection five, would allow lay staff to make legal argument and otherwise engage in the unauthorized practice of law. Mize explained that the statute allowing limited lay representation of agencies was passed in 1987. Under the law the staff representative is prohibited from making legal argument which is defined by rule and which the Commission previously adopted. Since 1988, at least eight other state agencies have successfully used staff representation in their hearings without legal challenge.

Another concern was that it was unfair for the staff representative to consult with the Assistant Attorney General (AAG) and allow the AAG to make legal argument after the hearing when the staff representative is prohibited from making such an argument during the hearing. Mize said that staff agree that a lay representative should not be allowed after the hearing to request legal consultation regarding an objection made and ruled on at the hearing, and staff do not believe that subsection five would lead to this result. The staff representative must either request a brief recess at the time of the objection and consult with counsel at that time, or it will be noted that the objection involves prohibited legal argument as defined by rule, and written legal argument directed. If the other party has not had an opportunity to make legal response at the hearing, or requests to submit written response, it would only be fair that they be given an opportunity to respond.

Mize said the Attorney General's office has reviewed the proposed rule and approved all the types of hearings in which the Commission would allow staff representation, with the exception of hearings before other agencies. Should the Attorney General, the Commission or Department determine that a particular case is of such factual or legal complexity to warrant representation by the AAG, such an arrangement can be made.

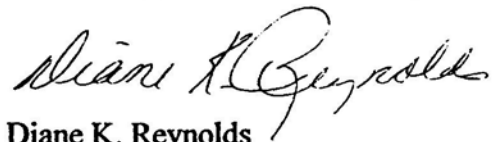
Huntington said if there are legal issues that need to be clarified in advance, the Attorney General's office will prepare a legal memorandum in advance of the hearing to submit on behalf of the Department so that the hearing can focus on facts rather than legal argument.

Mize explained that this proposed rule is directed at agency representation by an officer or employee. The Administrative Procedures Act lists information parties are required to be told prior to a hearing -- that list includes whether they have the opportunity to request legal counsel or not, or to ask if the hearing be continued in order to consult with an attorney.

Jewett expressed concern that the applying the law to facts is the essence of practicing law. Melinda Bruce responded that based on experience, a number of agencies have used authorized representatives since the late 1980s. To her knowledge there has not been an Oregon State Bar complaint. Legal issues are usually identified early and dealt with through legal briefs or an Assistant Attorney General appearing instead of an authorized representative. When legal issues do arise in the middle of a hearing, both parties are given the opportunity to brief the issue.

After discussion, Frewing moved to adopt the proposed rule as set out in Attachment 1; seconded by Leonard. All voted in favor.

There being no further business, the meeting was adjourned.



Diane K. Reynolds
Commission Assistant