

NATIONAL ASSOCIATION OF HEARINGS OFFICIALS 2016 CONFERENCE

**Challenging the Hearings Official's Evidentiary Expertise:
Admissibility, Privilege and *Daubert***

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**"[C]ontested case hearings are not adversarial proceedings
but are part of a process to allow the agency
to make 'the best possible decision.'"**

Oregon State Bar, OREGON ADMINISTRATIVE
LAW, §4.62, at 4-73 (2010 Ed.), citing without
specification, OREGON ATTORNEY
GENERAL'S ADMINISTRATIVE LAW MANUAL

- I. THE STANDARDS. (As in Guidelines)
 - A. Statutory. (e.g., Oregon APA: ORS 183.450(1), (2))
 - 1. Principle of Exclusion: Irrelevant, immaterial or unduly repetitious evidence shall be excluded.
 - 2. Harmless Error: Erroneous rulings on evidence shall not preclude agency action on the record, unless shown to have substantially prejudiced the rights of a party.
 - 3. Reliability / Admissibility: All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible.
 - 4. Privileges: Agencies and hearings officers shall give effect to the rules of privilege recognized by law.
 - 5. Objections: Objections to evidentiary offers may be made and shall be noted in the record. (How about: and ruled upon?)

6. Preference (?) for Written Evidence: Any part of the evidence may be received in written form.
7. The Record: All factual information and evidence shall be offered and made part of the record, and shall be considered in the determination of the case; and no sanction shall be imposed, no order issued except upon consideration of the whole record.
8. Burden to Produce: The burden of presenting evidence to support a fact or position in a contested case rests on the proponent thereof.
9. Cross-Examination: Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence.
10. Judicial/Official Notice: Parties shall be notified at any time during the proceeding, but in any event prior to a final decision, of material officially noticed by the hearings officer and agency, *i.e.*, judicially cognizable facts and general technical or scientific facts within the specialized knowledge of the hearings officer or agency; and parties shall be afforded an opportunity to contest the facts so noticed. (Note: The hearings officer and agency may use their experience, technical competence and specialized knowledge in the evaluation of the evidence presented.)

B. Constitutional.

1. Fourteenth Amendment: "[N]or shall any State deprive any person of life, liberty, or property without due process of law * * *."
2. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):
 - a. "Due process" unlike some legal rules, is not a technical conception with a fixed concept unrelated to time, "place and circumstance."

- b. [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors:
 - i) First, the *private interest* that will be affected by the official action;
 - ii) Second, the *risk of an erroneous deprivation* of such interest through the procedures used, and the probable value, if any, of additional or substitute *procedural safeguards*;
 - iii) Finally, the *Government's interest*, including the function involved and the *fiscal and administrative burdens* that the additional or substitute procedural requirements would entail.

II. THE STANDARDS. (As in Goldie Oldies)

A. Hearsay.

1. *Reguro v. Teacher Standards & Practices Com.*, 312 Or 402, 418, 822 P2d 1171 (1991): the Reliability Factor Parsed.
 - a. Sounds a bit like *Matthews*: admissibility of hearsay in administrative, regulatory hearings depends upon:
 - i) The importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy;
 - ii) The alternative to relying on hearsay evidence;
 - iii) The state of the supporting or opposing evidence, if any;
 - iv) The degree of the lack of efficacy of cross-examination with respect to the particular hearsay statements;
 - v) The consequences of the decision either way.

2. *Cole/Dinsmore v. DMV*, 336 Or 569, 87 P3d 1120 (2004): The weight to be given each factor may vary depending on the circumstances of the case.
 - a. In implied consent hearing, DMV *may use* hearsay, i.e., police report, as evidence when petitioner fails to exercise right to subpoena police officer.
 - b. In another context, an APA hearing at which an agency-subpoenaed police officer fails to appear, hearsay police reports *may not* constitute substantial evidence to support administrative action.
 - c. "An underlying concern must always be fundamental fairness." *Cole*, 336 Or at 571, quoting *Raguero*, 312 Or at 418 n 23.
 - d. Due process forbids the use of unreliable evidence, such as an involuntary confession, even for impeachment. *Mincey v. Arizona*, 437 US 385, 402 (1978).

B. Privileges: Rules of evidence regarding privilege apply in administrative regulatory hearings, although the codified rules of evidence otherwise *do not* generally apply at administrative hearings.

1. Constitutional, Statutory, Caselaw Based Privileges.
 - a. Self-incrimination — dependent on nature of statement and exposure to criminal sanction the statement would entail, not on type of proceeding; but no State Constitutional privilege to refuse to testify in an administrative proceeding because testimony may lead to non-criminal sanctions. *7455 Inc., v. OLCC*, 310 Or 427 (1990).
 - b. Attorney-Client Communications; health care provider-patient; husband-wife; clergy-penitent; public officer-exempt public record; identity of informant privilege.

- c. No adverse inference may be drawn from the claim of privilege. Oregon Evidence Code (OEC) 513(1); *John Deere Co. v. Epstein*, 307 Or 354, 769 P2d 766 (1989) (civil case).
 2. Procedural Check.
 - a. A hearings official's ruling on the admission or exclusion of evidence based on a claim of the existence or non-existence of a privilege may be immediately appealed to the agency;
 - b. Or, in those situations, in Oregon contested case proceedings conducted by the Office of Administrative Hearings, the agency or a party may seek immediate review by the Chief Administrative Law Judge.
- C. Scientific Evidence; Experts: Kevin Sali,
[https://libraryofdefense.ocdla.org/Blog:Main/Scientific Evidence:Does the State Have the Wrong Expert%3F](https://libraryofdefense.ocdla.org/Blog:Main/ScientificEvidence:Does%20the%20State%20Have%20the%20Wrong%20Expert%3F)
 1. Two levels of experts
 - a. "foundation level" - qualified as a scientist, rather than technician, to speak to the RELIABILITY of the relationship between a particular test and a physical condition;
 - b. "application level" - qualified to administer test and interpret test results;
 2. Contrast and Compare: *O'Key* and *Daubert*
 - a. *State v. O'Key*, 321 Or 285 (1995)
 - i) Role of Gatekeeper to ensure that decisionmaker does not attach undue aura of reliability to expert scientific testimony that is not scientifically valid;

- ii) Scientific "validity", the lynchpin of admissibility of scientific evidence, describes how well scientific method reasons to its conclusions;
 - iii) "reliability" describes the ability of scientific method to produce consistent results when replicated.
- b. *Daubert v. Morrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- i) Interpretation of Federal Rule of Evidence by U.S. Sup. Ct. adopted by State Supreme Court to interpret state rule of evidence.
 - ii) Role of Gatekeeper to apply factors to determine reliability of underlying scientific technique or of expert's conclusions:
 - (a) based on sufficient facts or data;
 - (b) product of reliable principles and methods;
 - (c) applied reliably to facts of case.
 - iii) Polygraph Evidence. "* * *many reasonable persons find polygraph evidence reliable enough to be considered in the conduct of their affairs. * * *because petitioner requested the polygraph examination and did not object when the polygraph results were received in evidence at the hearing, consideration of such evidence did not deny him a reasonable opportunity for a fair hearing. Accordingly, the hearings officer did not err in considering the polygraph evidence in reaching his conclusion." *Snow v. Oregon State Penitentiary, Corr. Div.*, 308 Or 259, 267-68, 780 P2d 215 (1989).

III. THE STANDARD COMPLAINTS.

- A. The Hearings Official who starts off witness testimony with leading, conclusory questions that seem designed to establish the elements that the agency must prove.
- B. The Hearings Official who allows agency to reopen its case to present additional evidence in the middle of defense counsel's closing argument.
- C. The Hearings Official who attempts to use judicial/official notice to justify an agency action or the interim orders of an ALJ.

IV. THE STANDARD TEXTS.

- A. *E.g.*, Oregon Attorney General's Administrative Law Manual and Uniform and Model Rules of Procedure under the Administrative Procedures Act (2014).
- B. *E.g.*, Oregon Administrative Procedures Act, ORS 183.411 through ORS 183.470 (Contested Cases).

V. THE STANDARD FRAME OF MIND OF ADMINISTRATIVE LAW PRACTITIONERS.

- A. *Marshall's Towing v. Department of State Police*, 339 Or 54, 58 n. 5, 116 P3d 873 (2005) ("[A] general admonition applicable to all administrative agencies[:] administrative rules, once made, must be followed, in order for the public to have a reliable road map as to the actions that its government claims to be entitled to take".)
- B. Question Authority!
 - 1. What's the Authority for the Agency Action?
 - a. Scope of statute;
 - b. Scope of agency rule;
 - c. Scope of agency interpretation of statute or rule.

2. What's the Authority of Agency Decision Maker?
 - a. Who has final order authority;
 - b. What is Hearing Official's authority at every stage of hearing process;
 - i) Hearings Officer's Role;
 - ii) Limitations on Hearings Officer's Authority.

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