WHAT YOU SHOULD KNOW ABOUT

ADMINISTRATIVE LAW

Presented by,

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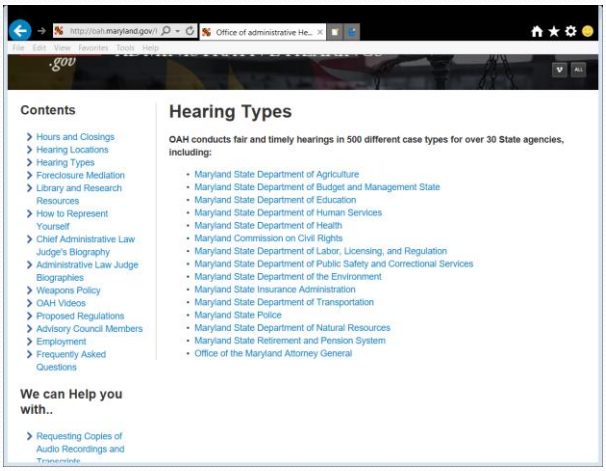
"It is impossible for a man to learn what he thinks he already knows."

Epictetus

2

YOU may be a HEARING OFFICIAL in a State's CENTRAL PANEL



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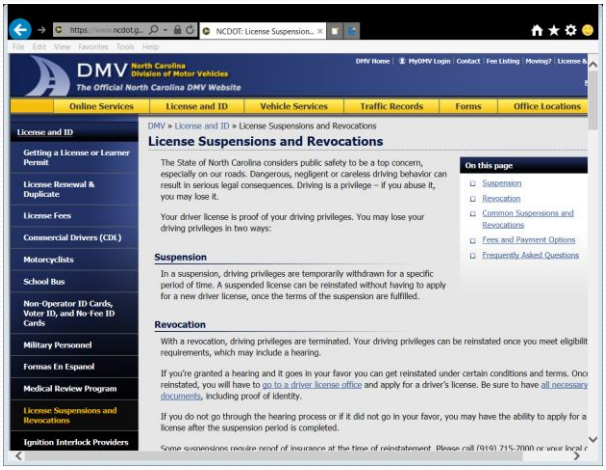
Or YOU may be in a STATE AGENCY



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Bureau of Hearings and Appeals

The Bureau of Hearings and Appeals (BHA) is the Department of Human Services (DHS) entity charged with conducting administrative hearings and timely adjudicating appeals filed in accordance with state and federal regulations. BHA's jurisdiction is vast. It covers nearly 280 different areas, including the denial, suspension, termination, or reduction of any DHS-issued benefit (cash assistance; Medical Assistance; Supplemental Nutrition Assistance Program (SNAP) benefits — formerly known as food stamps; social services; durable equipment; etc.).

BHA is also responsible for rendering legally sound adjudications for disputes regarding child abuse expunction, day care licensure, Medical Assistance provider enrollment, medical provider audit findings, injured DHS employees (Act 534 benefits), Department of Aging actions, Office of State Inspector General Administrative Disqualification Hearings, and nursing home intervention requests, among numerous other issues.

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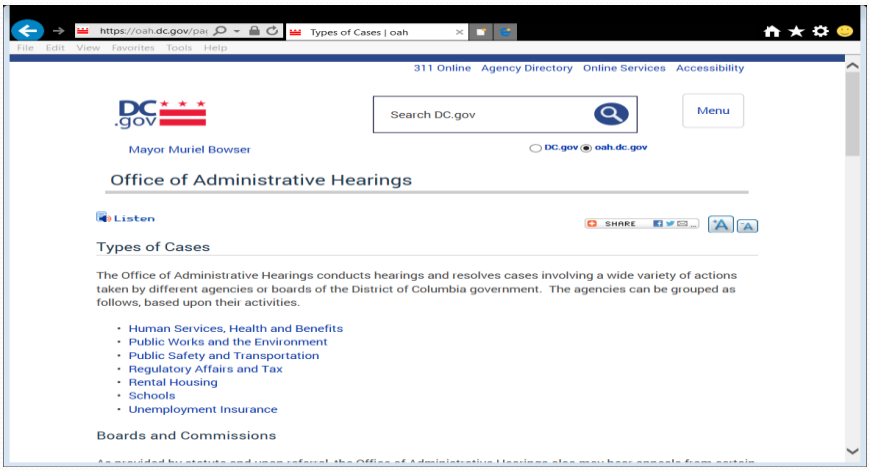
Or Federal ALJ attached to Agencies

6

Or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Office of Administrative Hearings
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Types of Cases
The Office of Administrative Hearings conducts hearings and resolves cases involving a wide variety of actions taken by different agencies or boards of the District of Columbia government. The agencies can be grouped as follows, based upon their activities.
Human Services, Health and Benefits
Public Works and the Environment
Public Safety and Transportation
Regulatory Affairs and Tax
Rental Housing
Schools
Unemployment Insurance
Boards and Commissions

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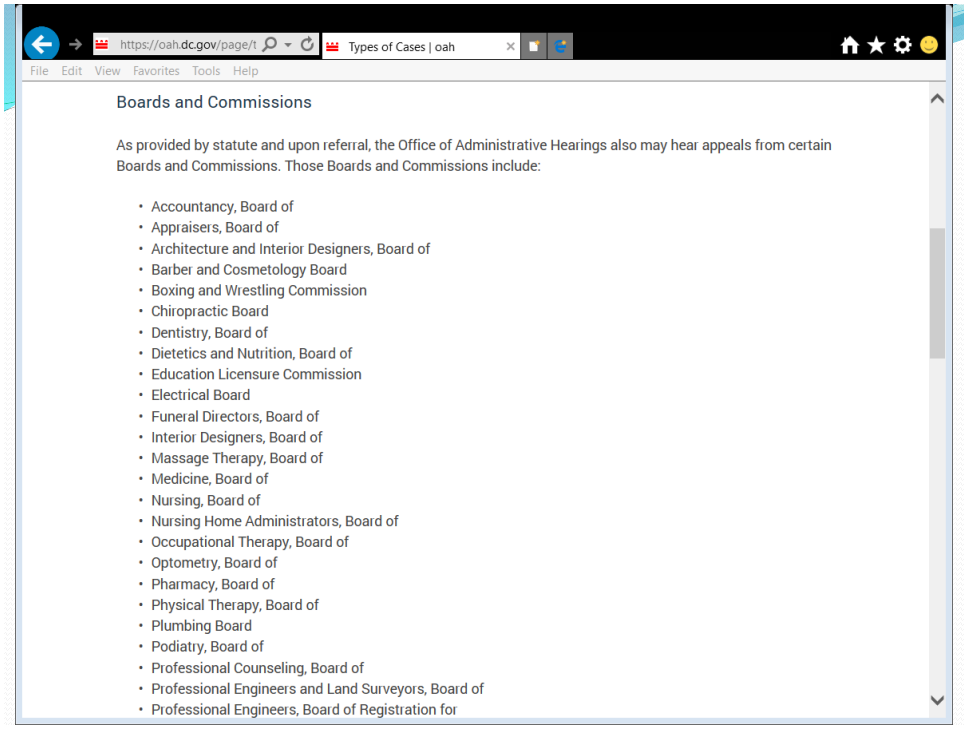
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Types of Cases | oah
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Boards and Commissions
As provided by statute and upon referral, the Office of Administrative Hearings also may hear appeals from certain Boards and Commissions. Those Boards and Commissions include:
Accountancy, Board of
Appraisers, Board of
Architecture and Interior Designers, Board of
Barber and Cosmetology Board
Boxing and Wrestling Commission
Chiropractic Board
Dentistry, Board of
Dietetics and Nutrition, Board of
Education Licensure Commission
Electrical Board
Funeral Directors, Board of
Interior Designers, Board of
Massage Therapy, Board of
Medicine, Board of
Nursing, Board of
Nursing Home Administrators, Board of
Occupational Therapy, Board of
Optometry, Board of
Pharmacy, Board of
Physical Therapy, Board of
Plumbing Board
Podiatry, Board of
Professional Counseling, Board of
Professional Engineers and Land Surveyors, Board of
Professional Engineers, Board of Registration for

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What do YOU do as a Hearing Official:

- Conduct hearings and resolve cases.
- Determine facts based on evidence and argument presented at a hearing, review relevant law and rules, and render a decision on the issue(s) in question. (NAHO Bylaws, Article IX, Definitions.)

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Impacts

- Benefits
- Licenses
- Permits
- Discipline

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What YOU do matters

"The rights enshrined in the corpus of administrative law amount to a right to be taken seriously by the government, which in a democratic state is the most important civil right of all."

Dean Ian Holloway

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AMERICAN GOVERNMENT: CONSTITUTIONAL OR POLITICAL THEORY

- Separation of Powers
- Checks and Balances
- Rights and Protections

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AGENCIES have BROAD POWERS

- Legislative power
- Executive power
- Judicial power

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Review of Agency Actions

- Appeals from an administrative agency involve issues of separation of powers of the three branches of government

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LIMITATIONS AND CONTROLS

- Legislative Branch
- Executive Branch
- Judicial Branch

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Adjudicative Function

- Agency Statutes, Rules, Regs.
- Administrative Procedure Act
- Constitutional Requirements

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Procedural Due Process

- As to federal agencies,
  the Fifth Amendment
- Similarly, as to states,
  the Fourteenth Amendment

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Fifth Amendment

No person shall … be deprived of life, liberty, or property, without due process of law.

18

Fourteenth Amendment

Section 1: …

nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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"Minimal due process required in an administrative agency proceeding is <u>not synonymous</u> with the due process requirements in judicial proceedings."

Administrative proceedings are civil in nature, separate and distinct from criminal proceedings.

Beylund v. Levi, Wojan v. Levi, 2017 ND 30, at ¶17, 889 N.W.2d 907, upon remand by United States Supreme Court for further proceedings under Birchfield v. North Dakota, 136 S.Ct. 2160 (2016).

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Goldberg v. Kelly, 397 U.S. 254 (1970)

- Due Process requires an AFDC recipient be afforded an evidentiary hearing before the termination of benefits
- What procedures Due Process may require depending on the circumstances, considering the nature of the government function and the private interest

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Mathews v. Eldridge, 424 U.S. 319 (1976)

- Determining what process is due:
  1. The private interest affected;
  2. The risk of erroneous deprivation;
  3. Value of additional or substitute procedures;
  4. The government interest, including the function and burdens other procedures would entail.

Federal disability benefits could be terminated without a prior hearing.

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"The fundamental requirement of due process is the opportunity to be heard 'at a **meaningful time** and in a **meaningful manner**.'"

In re N.A., 2016 ND 91, ¶ 10, 879 N.W.2d 82 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

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Growth of Administrative Agencies

- Interstate Commerce Commission (ICC) 1887
- Federal Trade Commission (FTC) 1914
- New Deal
- WWII

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Administrative Procedure Act

- In 1946, federal Administrative Procedure Act, with procedures as to adjudications now at 5 U.S.C. § 554.
- 1946 Model State Administrative Procedure Act
- 1961 Model State Administrative Procedure Act
- 1981 Model State Administrative Procedure Act
- 2010 Revised Model State Administrative Procedure Act
- Differences among states as far as adoption of APA

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Fair and Impartial Hearings

- Impartial Decisionmaker
- Notice
- Record
- Right to Counsel
- Opportunity to be Heard and Present Evidence
- Right to Confront and Cross-Examine Witnesses
- Reasoned Decision (based upon the Record)

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Impartial Hearing Official

- Maintain Independence
- Open Minded
- Avoid bias
- Avoid prejudgment
- Avoid *ex parte* communications
- Separation of functions
- Fairness

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Fundamental Fairness

"Don't explain your philosophy. Embody it."

Epictetus

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"Administrative law … can implicate important issues that impact people's health, safety, and welfare and and change business' profitability or even viability."

Adam Babich, "Fun with Administrative Law: A Game for Lawyers and Judges," 4 Michigan Journal of Environmental & Administrative Law, Issue 2, at 341 (2015).

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Delegation and Deference

- Delegation Doctrine: Congress cannot delegate legislative power to agencies. If sufficient standards, can allow the agency "power to fill up the details."
- "Chevron deference": Whether a court should grant deference to an agency's interpretation of its own statutory mandate when the statute is unclear.

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Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

- Is the statute silent or ambiguous as to the issue?
- If so, whether the agency's answer is based on a permissible construction of the statute?

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Kisor v. Wilkie, 588 U.S. ___ (2019)

- *Auer* deference*
- *Stare decisis*
- *"Reinforce its limits."*

**Deference to an agency's reasonable interpretation of its own regulations. Auer v. Robbins, 519 U.S. 452 (1997).*

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Administrative Hearings vs. Court Proceedings

- Flexible procedures
- Differences in minimum due process
- Cost - benefit
- Admissibility of evidence
- Development of expertise

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Criticism of the SEC & its ALJs

- Wall Street Journal articles purportedly asserting securities defendants considerably more likely to lose in administrative proceedings with SEC ALJs than in federal court
- "Home-court" advantage?
- Concern ALJs are biased towards their employers, not just the SEC
- Forthcoming law review article to report difference not statistically significant.

William Funk, Factoids, Alternate Facts, and the Truth, June 9, 2017, review of Urska Velikonja, Are SEC's Adminsitrative Law Judges Biased? An Empirical Investigation, 92 Wash. L.Rev. (forthcoming).

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Development of Central Panels

Advantages – Central Panel

- More Independent
- More Open Minded
- More Fair
- Appearance of fairness
- Broader experience and background

Advantages - within Agency

- More cost efficient
- Development of Expertise

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More Independent & Fair?

In enacting N.D.C.C. § 28-32-08.5(6) and related statutes, the Legislature was concerned with "accurately reflect[ing] the **independent** nature of OAH hearing officers." Hearing on H.B. 1089 Before the House Judiciary Comm., 54th N.D. Legis. Sess. (March 30, 1995) (memorandum from OAH Director Allen C. Hoberg to the Legislature).

Likewise, in creating the OAH, the Legislature emphasized the value of **independence and impartiality** in administrative proceedings. "A central administrative tribunal is inherently separate from and therefore independent of the agency pursuing the issue under adjudication. This simple, yet fundamental feature dramatically enhances . . . **fairness**." Hearing on S.B. 2234 Before the House Judiciary Comm., 52nd N.D. Legis Sess. (March 6, 1991) (letter from Charles D. McFaul, Chief Administrative Law Judge for the City of New York, to North Dakota Attorney General Nicholas J. Spaeth) ["Hearing on S.B. 2234"]. An independent hearing body also "would **remove the appearance of impropriety**" that may exist where an agency uses it own employees as hearing officers. Hearing on S.B. 2234, supra (remarks of North Dakota Senator Jim Maxson).

N.D. Sec. Comm'r v. Juran & Moody, Inc., 2000 ND 136, ¶¶ 12-13, 613 N.W.2d 503 (emphasis supplied).

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Development of Expertise

In the context of "independent" administrative law judges, this Court has explained that, while deference is given to an ALJ's factual findings under the "reasoning mind" standard, similar deference is not given to the ALJ's legal conclusions because, "unlike an agency, [the ALJ] does not necessarily have specialized knowledge or expertise warranting deference to its legal interpretations and conclusions." *** While the office of administrative hearings (OAH) is not a specialized agency and an independent ALJ assigned by the OAH is not interpreting the OAH's own rules, ***, the same cannot be said about the Department's hearing officer. French v. N.D. Dep't of Transportation, 2019 ND 172, at ¶14 (citations omitted).

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Recommended Reading

"ALJ Central Panels:
How is it Going Out There?"

Hon. W. Michael Gillette, The Judicial Edge, National Judicial College, September 17th, 2015
http://www.judges.org/alj-central-panels-how-is-it-going-out-there/

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