

**Legal Aid Society of the District of Columbia¹
Testimony of Jonathan M. Smith, Executive Director**

**Before the District of Columbia Council
Committee on Public Safety and the Judiciary**

**Confirmation hearing on
Mary Oates-Walker for Chief Judge of the Office of Administrative Hearings**

January 15, 2010

The Office of Administrative Hearings (OAH) is a critical component in the District's justice system. We strongly support the idea of the central panel of professional judges to implement the District's administrative law. While in many ways, the OAH is and should be structured as an independent tribunal; it is not entirely separate from the agencies that bring cases before it. This hybrid status creates both challenges and opportunities to increasing access to justice in the District of Columbia.

Many, although certainly not all, of the matters that are heard by OAH concern people living in poverty. The comments in this testimony are directed primarily at those cases where important individual interests are at stake, the litigant is likely to be low-income and without counsel. In particular we are concerned about cases that involve public benefits, housing conditions and rent disputes, cases arising under the Homeless Services Reform Act and persons appealing from adverse unemployment insurance decisions.

It is fair to say that Legal Aid has been concerned about the operation of the agency since its inception. The initial design of the Court and its rules created substantial barriers to the ability of pro se litigants to get their disputes resolved on the merits without the assistance of counsel. Over the last two years, we have engaged in a productive dialogue with OAH and there have been important improvements. We look forward to continuing this dialogue.

I have had an opportunity to meet with Chief Judge Oates-Walker to discuss our concerns. We had a good discussion and I hope have laid the foundation for a productive dialogue. I shared with her our view that there is still much that needs to be done and she was opening to engaging with advocates to make necessary changes.

¹ Legal Aid was formed in 1932 to provide legal assistance to families and individuals living in poverty. We have a domestic violence satellite office at the Greater South East General Hospital, at the Children's Health Project clinic in Southeast, in the Superior Court and at Advocates for Justice and Education in Anacostia. Legal Aid staff handle cases involving domestic violence, custody, child support, housing, and public benefits. We receive about 10,000 requests for help each year. We are able to provide limited assistance in about 1100 cases and we take approximately 750 matters for litigation each year.

The new Chief Judge has her work cut out for her. The agency is preparing to move to permanent space, caseloads in certain areas including unemployment insurance are on the rise and the District's budget is tight. Recognizing that she has a great deal on her plate, we believe that there are there are important operational issues that will require her attention, especially for the dockets that effect persons who are low-income. These issues include:

Formalistic Rules that Favor Procedural Decisions Over Resolution on the Merits

Since the creation of OAH, the Court has been criticized for employing overly formal rules of procedure and for resolving a high number of cases on procedural defaults rather than reaching the merits. We continue to see cases thrown out because litigants make a procedural mistake. These technical foot faults have resulted in numerous decisions by the Court of Appeals and many more cases in which a litigant has lost a right or benefit and lacks the capacity to appeal. (See by way of illustration, Frausto v. United States Dep't of Commerce, 926 A.2d 151 (D.C. 2007); Kidd Int'l Home Care, Inc. v. Dallas, 901 A.2d 156 (D.C. 2006); Coto v. Citibank FSB, 912 A2d 592 (D.C. 2006); Rhea v. Designmark Services, Inc., No. 06-AA-1014 (D.C. Feb. 21, 2008); Gomez v. Consolidated Engineering Services, Inc., No. 06-AA-764 (D.C. Mar. 13, 2008); Barbee v. Bright Horizons Children's Center, Summary reversal (December 2, 2009)).

Through its decisions, the Court of Appeals is rewriting OAH rules and procedures one rule at a time. This is a slow and cumbersome way to address the problem. I suggest the following:

- Establishment of a Rules Advisory Committee to do a top-to-bottom review of the rules and procedures. These committees exist in each of the divisions of the Superior Court and are effective tools to correct problems as they emerge. We understand that the Court is currently engaged in a rules review. More engagement from stake holders would benefit the process.
- Develop a mechanism to ensure that Court of Appeals decisions are applied in a uniform manner and that rules changes made necessary by a decision are promptly implemented.
- Create an OAH Ombudsman with the mandate to identify and eliminate barriers to meaningful access to the tribunal by unrepresented litigants.

The Need to Create a Pro Se Friendly Forum

OAH has a very broad mandate and different case might require different rules. In some cases -- a hospital challenge in connection with a certificate of need, for example -- the formality is wholly appropriate. In others, where a high percentage of litigants are living in poverty or are unrepresented -- Unemployment Insurance, tenant petitions, Homeless Services Reform Act case and others -- flexible procedures that favor merits resolution are more appropriate.

The Court has created a committee of Judges who have been working to increase pro bono assistance and to create supports for pro se litigants. Their work has included the promotion of a self help center, outreach to law schools and firms and plain language forms. Most significantly, the Court's scheduling orders and some of its other forms have been redrafted for clarity and for the non-lawyer.

While these efforts are important and will help, they will never be a complete solution. Rather than find ways for unrepresented litigants to muddle through a process that is designed for lawyers, the rules and procedures of the forum should be designed for unrepresented litigants. This can be done without lowering standards or interfering with judicial independence.

Language Access

An increasing percentage of District residents have limited or no English language (LEP). For agencies, including the OAH to function effectively, it is critical that they become linguistically accessible. OAH has taken some steps to serve LEP litigants, but has a long way to go. We recommend the following:

- OAH recognize that it is an agency governed by the District's Language Access Act. D.C. Code Section 2-1931 et seq. OAH has claimed exemption from coverage despite that it is clearly "District government agency, department, or program that furnishes information or renders services, programs, or activities directly to the public or contracts with other entities, either directly or indirectly, to conduct programs, services, or activities." D.C. Code Section 2-1931(2). There is a strong argument that the agency falls has enhanced requirements under the statute because it has significant contact with the public and has been delegated duties by listed agencies.
- Use in-person interpreters for hearings. Currently, OAH relies on telephonic interpretation through Language line for hearings when a party or a witness is LEP. It is nearly impossible for an interpreter on a speakerphone to properly interpret the proceedings.
- Translate instructions, forms and orders. Legal Aid recently represented a Spanish speaker who had requested that he be provided translated notices. Nevertheless, a notice of hearing was sent to him in English causing him to miss the hearing date.
- Develop strategies, such as the "I speak" posters and cards used by the Department of Human Services for front desk and other personnel. In our experience, LEP individuals have trouble communicating with the clerks and the clerks do not appear to have access to Language Line.

Support Staff

The Judges of OAH have identified the need for additional support staff. While I do not have enough information to form a view on the issue as a general matter, we have seen one manifestation of the problem that does interfere with the efficient administration of justice.

When a litigant appeals from a decision of OAH to the District of Columbia Court of Appeals, OAH is required to transmit the record of the administrative hearing within 45 days. This rarely happens. In our experience it takes from six to nine months for the record to be prepared.

The delay is often harmful to the litigants. In many of the cases in which we are involved, the litigant is challenging the wrongful denial of unemployment benefits. They are without benefits until the Court rules and the delay in the transmission of the record extends the period that they are denied necessary income.

Conclusion

We look forward to working with the new Chief Judge to solve these concerns and to help make the OAH an effective and efficient tribunal for all litigants.