

**Testimony for the Performance Oversight Hearing on the  
District of Columbia Office of Administrative Hearings (OAH)**

**Committee on Government Operations  
February 23, 2017**

**Drake Hagner, Senior Staff Attorney, Legal Aid Society of the District of Columbia**

The Legal Aid Society of the District of Columbia (Legal Aid)<sup>1</sup> offers this testimony regarding the performance of the District of Columbia Office of Administrative Hearings (OAH). Legal Aid's testimony is informed by its regular litigation before OAH in public benefits, unemployment insurance, and rental housing cases on behalf of low-income clients. In addition, as part of its Barbara McDowell Appellate Advocacy Project, Legal Aid routinely reviews OAH decisions that are appealed to the District of Columbia Court of Appeals (Court of Appeals), providing advice and representation in certain cases affecting persons living in poverty in DC. Further, Legal Aid Supervising Attorney Beth Mellen Harrison served on a recent task force to evaluate OAH's performance. The study, commissioned by the District of Columbia Auditor and performed by the Council for Court Excellence, reviewed OAH's performance since its inception twelve years ago and offered wide-ranging recommendations for improvement. The study and final report, *Administrative Justice in the District of Columbia: Recommendations to Improve DC's Office of Administrative Hearings*<sup>2</sup> (hereinafter Report), further informs Legal Aid's testimony.

Legal Aid supported the creation of a professionalized, centralized Office of Administrative Hearings and has been involved with OAH since its inception. In addition to regularly practicing before the agency, we have also worked collaboratively with agency staff and Administrative Law Judges (ALJs) to ensure that the agency is friendly to *pro se* litigants. Since its creation in 2004, OAH has played a crucial role in the District of Columbia government by offering a neutral forum to appeal certain administrative agency decisions. The District of Columbia has much to be proud of as OAH's independent decision-making and relatively strong procedural protections (when compared to central hearing panels in other states) boost confidence in local government by reassuring litigants that agency decisions are fairly and impartially reviewed without agency influence. OAH further boasts a strong bench – several ALJs have been nominated or recommended to serve on the District of Columbia Superior Court

---

<sup>1</sup> 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.” For 85 years, Legal Aid attorneys and volunteers have served tens of thousands of the District's neediest residents. Legal Aid currently works in the areas of housing, family law, public benefits, consumer, and appellate law. Legal Aid's testimony is based on these experiences. More information about Legal Aid can be obtained from our website, [www.LegalAidDC.org](http://www.LegalAidDC.org), and our blog, [www.MakingJusticeReal.org](http://www.MakingJusticeReal.org).

<sup>2</sup> A Report of the 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), <http://www.dcauditor.org/sites/default/files/OAH%20Final%20Report.pdf>.

in recent years. Still, Legal Aid has experienced several areas where OAH should continue to improve its performance – including improving litigant experiences, addressing case processing concerns, and addressing systemic delays in appellate matters – and urges the Committee to oversee implementation of the following recommendations.

## **I. Improving Litigant Experiences**

- a. *Pro se* litigants struggle to understand relevant law and procedure and present evidence.

As a high-volume administrative court with many practice areas that disproportionately impact low-income litigants, it is not surprising that OAH has a high number of *pro se* parties. While OAH does not currently track the number of represented or unrepresented parties (we believe it should), it is likely that the vast majority of individual litigants appear at OAH without legal representation. (Report at 50.) ALJs report that some of these litigants are unfamiliar with the relevant law or procedural rules that impact their case. (*Id.*) Other litigants are hindered by limited English proficiency, low literacy, or limited access to technology.

Legal Aid’s experience reviewing cases appealed to the Court of Appeals further supports the impression that some *pro se* litigants struggle to present evidence that is relevant to their case. Further, without training, ALJs differ in their willingness and skill in engaging in open-ended questioning of the parties to elicit evidence relevant to their claims and defenses. This approach is increasingly accepted as a method called “engaged neutrality,” and is compatible with ALJs’ ethical obligation of impartiality.

Some ALJs’ at OAH have attempted engaged neutrality but without further training on the subject, even a well-intentioned ALJ may misstep. For example, in a recent case, an ALJ began questioning a *pro se* unemployment claimant who had filed his hearing request late. According to this claimant, the ALJ began the direct examination with a question that assumed the administrative denial notice he appealed (that was in the record) was mailed to his home. The claimant became confused -- he did not recall receiving the notice by mail and did not recognize the name of the document (called a Determination by Claims Examiner) as the ALJ used it in court. Because he was given a copy of the notice with oral instructions on what the notice contained and how to appeal, he was also unable to recognize the document on sight when it was provided to him in court along with a stack of other potential exhibits. His confusion rendered him unable to articulate how or when he obtained the denial notice, leaving the ALJ little choice but to deny his claim for late filing without good cause or excusable neglect.

Fortunately, in this case, the claimant sought help and Legal Aid filed a Motion for Reconsideration and for a new hearing, which was granted, allowing the claimant to testify accurately and completely. However, this fact pattern – which likely repeats itself in different ways on a regular basis – demonstrates the importance of OAH continuing to improve its processes (and its adjudication techniques) for unrepresented litigants.

b. Mediation is under-utilized.

The OAH mediation program offers litigants an opportunity to discuss their goals confidentially with another ALJ and the opposing party with the goal of resolving, or at least narrowing, the issues in the case. Legal Aid's experience with the mediation program has been very positive. Mediation may be especially suitable for *pro se* parties as even an "unsuccessful" mediation may help the parties better present their position in court (and understand the opposing party's position).

However, according to the Report, mediation is under-utilized at OAH and is not routinely offered to the parties. Further, ALJs who serve as mediators do not receive professional credit for their time and rely on the good will of their colleagues (who are already juggling their own caseloads) thus creating a disincentive for further participation in the mediation program. (Report at 53-55.)

c. Administrative Staff and Pro Se Resource Center can improve customer service.

Legal Aid applauded the creation of the OAH Pro Se Resource Center (Resource Center) in 2011. The Resource Center offers plain language forms and litigation guides in English and Spanish along with opportunities to sign up for referrals for free legal advice or representation.

However, in the past few years, OAH transitioned from having a full-time attorney dedicated to overseeing the Resource Center to the use of a rotating system where attorney-advisors take turns staffing the Resource Center. Where the Resource Center could once offer robust services to support *pro se* litigants, outreach now appears to be more limited and walk-in traffic appears to have declined. (See Report at 55-56 (noting that only about half of *pro se* litigants utilized the resource center, though those that did found it generally helpful).) Legal Aid has noticed a decline in referrals to our services from the OAH Resource Center, as have several local law school clinics that represent claimants in unemployment insurance matters. Legal Aid has also observed members of the public being treated quite brusquely by the OAH staff members providing service at the Resource Center.

**Recommendations:**

- Train Administrative Law Judges on best practices in engaged neutrality especially within the context of low-income *pro se* litigants and/or litigants with no or limited English proficiency.
- Track the number of *pro se* litigants in each practice area and publish this data annually.
- Boost mediation by consistently notifying parties of the option to mediate (and crediting ALJs for their mediation work).
- Identify a dedicated staff person to improve customer service and oversee legal information provided at the Pro Se Resource Center.
- Encourage ALJs to reach out to legal services providers in cases in which a lawyer could make a difference.

## II. Case Processing Delays

### a. Delays are extensive in certain case areas (such as rental housing).

Another problem highlighted by the Report is delays in the processing of cases at OAH to final decision. Last year at these oversight hearings, OAH reported that 1,200 cases were older than 120 days and 104 cases were more than a year old. (Report at 44 & n. 95.) Surveys by the Council for Court Excellence revealed that a substantial number of litigants, agencies, and counsel with cases at OAH felt that delays in case processing were a significant concern. A quarter of these survey respondents said case processing delays were among the top three problems facing OAH, and 20 percent of ALJs at OAH agreed. (Report at 45.)

Legal Aid has witnessed the effects these delays can have on our clients. Rental housing cases – challenging rent increases or seeking rent abatement based on housing conditions – can linger for months or even years. In several recent cases in which Legal Aid has represented tenants, dispositive motions took as long 12 months or more to resolve, and decisions following a final evidentiary hearing took just as long. This appears to be a classic case where lack of resources has real world consequences. ALJs are tasked with resolving complex legal issues and weighing hundreds of exhibits, too often without resources and with daunting caseloads.

OAH already is implementing solutions that may help to address these problems. The current case assignment system seeks to distribute case more evenly, with appropriate randomization to ensure that all ALJs have a mix of cases. The results of this new case assignment system should be monitored to ensure that it is resulting in more efficient case processing. Deadlines established by statute and regulation or in the collective bargaining agreement should be monitored and enforced. The Council should ensure that OAH is properly resourced, so that ALJs have sufficient support to issue final decisions in a timely manner while allowing for a full and fair review in each case.

### b. Technology is not optimized.

One step to improving overall efficiency at OAH, including in case processing, is better use of technology. OAH still relies primarily on paper records; few cases are submitted electronically, only select agencies have access to the electronic case management system, and no private parties or counsel have access. (Report at 47.) As a result, OAH provides no electronic public access to its case dockets or decisions, decreasing transparency and making it difficult for *pro se* parties to perform basic legal research for their cases. (*Id.*) OAH also does not consistently use telephone or video conferencing for routine hearings. (*Id.* at 48-49.)

As recommended in the Report, OAH should quickly move to an online case management system with public access to online dockets and final decisions. OAH of course must take care to redact sensitive information in certain case types such as public benefits. Legal Aid has found that online dockets at the District of Columbia Superior Court and Court of Appeals has provided greater transparency and access for low-income litigants and legal services attorneys alike. An online case management system also should allow OAH to move to a uniform case-filing system. Legal Aid attorneys in rental housing cases file petitions on behalf of tenants with the Rent Administrator at the Department of Housing & Community

Development and then wait weeks or even months for the case to be transferred to OAH and the first hearing scheduled.

Finally, OAH should identify case types most appropriate for telephone or video hearings (with the parties' consent). Status hearings and similar types of hearings may be most appropriate for this use of technology. In Legal Aid's experience, some ALJs use telephone hearings with great success. OAH also should acknowledge that in some circumstances, parties already have the right to participate by telephone or video where possible, such as individuals with disabilities or those who cannot appear in person due to age or hardship.

### **Recommendations:**

- Establish and enforce case processing deadlines for ALJs.
- Introduce online dockets and publish redacted decisions.
- Identify case types most appropriate for telephone or video hearings (with the parties' consent) while acknowledging that the right to participate by telephone exists for individuals who can't come to OAH due to age, disability, or hardship.
- Ensure that OAH is properly resourced in order to adjudicate cases in a timely manner.

### **III. Appellate Cases**

- a. OAH has been the cause of egregious delays in the creation of administrative records in cases appealed to the Court of Appeals.

As part of the Barbara McDowell Appellate Advocacy Project, Legal Aid reviews OAH decisions that litigants appeal to the Court of Appeals to identify cases where we can be of assistance and to stay abreast of trends in the law. In the past two years, Legal Aid has observed extensive delays in OAH's response to Court of Appeals orders requiring OAH to prepare the administrative record – including creating a transcript and copying all exhibits and orders – within 60 days.

To investigate, Legal Aid began tracking all OAH appeal cases filed between July 1 and September 30, 2015. Of the eighteen cases where OAH was ordered to create the record within 60 days, we were alarmed to discover that as of January 31, 2017, *it took an average of 406 days for OAH to create the administrative record* – and the record has still not been created in seven of these cases. By comparison, during the same time-period, other agencies (such as the Workers Compensation Review Board) with decisions appealed to the Court of Appeals took an average of 52 days to create the record. (See attached case chart.)

To determine if this trend was representative, Legal Aid looked at appeals filed during a more recent period between January 1 and February 28, 2016. Of the sixteen cases where OAH was ordered to create the record, OAH has completed the record in only one of these cases after 288 days.

When OAH fails to create a timely record, the case is stalled at the Court of Appeals. The parties cannot brief the case or move toward adjudication without the administrative record. Many of these appeals involve critical, time-sensitive issues for low-income litigants – including

the receipt of unemployment insurance or public benefits – making the extensive delays even more harmful to the parties.

Legal Aid has worked on this issue for years and has raised this concern with OAH leadership a number of times. Several months ago, we raised this issue with OAH's current leadership. OAH explained that its standard operating procedure was to designate an OAH staff person to listen to the hearing recording in its entirety before the transcript was released to the Court of Appeals, something that we believed was a poor use of OAH's time. Fortunately when we raised this issue again recently, OAH informed us that it ceased this activity, which we hope will prevent delays in future cases. However, OAH should develop interim procedures for addressing the backlog of cases from the last few years that are waiting for an administrative record.

- b. OAH and the Court of Appeals do not appear to have a written process for tracking appellate decisions.

In several appellate cases where Legal Aid has represented an unemployed worker seeking unemployment insurance, even when Legal Aid wins a remand at the Court of Appeals, we have had significant difficulty getting relief from OAH. In some cases, the remand order sent by the Court of Appeals is lost or simply does not come to OAH at all. It often takes Legal Aid several rounds of telephone calls between the clerks' offices at the Court of Appeals and OAH to ensure that the appropriate orders are received and processed by the respective courts.

As the Report revealed, OAH does not appear to have written process for tracking appellate decisions nor for processing decisions remanded from the Court of Appeals. (Report at 58-59.) While individual ALJs follow recent decisions published by the Court of Appeals, OAH also does not digest or circulate these decisions to the ALJs and the attorney-advisors who provide research in support of their decision making.

### **Recommendations:**

- Expediently address the backlog of administrative records ordered by the Court of Appeals.
- Develop procedures to ensure OAH receives copies of all Court of Appeals decisions (published and unpublished).
- Track OAH cases on appeal and report data annually.

### **Conclusion**

Legal Aid thanks the Committee for the opportunity to submit this testimony and looks forward to working with the Committee and OAH on reform efforts.