

Third Supplement to Memorandum 94-19

Administrative Adjudication: Comments on Tentative Recommendation

§ 643.110. OAH administrative law judge as presiding officer

- The staff has given further consideration to the Attorney General's suggestion to restore existing law that a presiding officer must be an administrative law judge from OAH only if required by statute. See Second Supplement to Memorandum 94-19, p. 7. The Tentative Recommendation reverses this presumption by requiring formal hearings to be presided over by an ALJ from OAH unless exempted by statute. We did this so statutory hearings created in the future would be conducted by an OAH ALJ unless a conscious decision is made to exempt the hearing. The AG's suggestion would dramatically reduce the number of conforming revisions needed to exempt from this requirement agencies not now subject to the APA.

We can achieve both the objective of having OAH ALJ's preside over hearings created in the future that are not specifically exempted and the objective of avoiding hundreds of conforming revisions. We would do this by:

(1) Deleting the requirement in Section 643.110 that an adjudicative proceeding must be conducted by an ALJ from OAH unless exempted by statute, and replacing it with a provision that Section 643.110 applies only where a statute expressly so provides.

(2) Applying Section 643.110 to present APA hearings in conforming revisions to the statutes that govern those hearings, so they will be continue to be conducted by an ALJ from OAH.

(3) Adding a provision to Section 643.110 that hearings created by statute in the future must be presided over by an ALJ from OAH unless exempted.

Revisions to Section 643.110 are set out in the attached Exhibit. We will review conforming revisions in the APA and other statutes at a later meeting. In the Comments to conforming revisions for present APA agencies, we would note the hearing must be conducted by an ALJ from OAH, whether the formal or informal hearing procedure is used. For present non-APA agencies, the administrative adjudication provisions will apply, minus the requirement that

the proceeding be conducted by an ALJ from OAH. See Section 612.110 (except as expressly provided by statute, administrative adjudication provisions apply to all state agencies).

§ 643.320. When separation of functions required

- As the Commission requested, the Department of Motor Vehicles has provided estimates of what it might cost to require separation of functions for hearings on school bus driver and ambulance certificates and other commercial license endorsements. See the DMV memorandum of June 8, 1994, included in the attached Exhibit. The cost estimate for 4,259 annual commercial driver's license hearings using a DMV hearing officer (not an ALJ from OAH) is as follows:

Current hearing costs	\$203,797.00 (\$48/hearing)
Cost using a DMV non-attorney advocate	\$1,716,377.00 (\$403/hear'g)
Cost using a DMV attorney advocate	\$2,078,392.00 (\$488/hear'g)

It is not clear why requiring two agency personnel to be involved in the hearing instead of the present one would do any more than double the cost. Yet these figures show the cost would increase more than eight-fold. The staff has ask the DMV representative to be prepared to provide more justification for these estimates at the Commission meeting.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

Exhibit

**ADMINISTRATIVE ADJUDICATION: OAH ADMINISTRATIVE LAW
JUDGE AS PRESIDING OFFICER**

§ 643.110. OAH administrative law judge as presiding officer

~~643.110. Unless an adjudicative proceeding is exempt by statute from the requirement that it~~

(a) This section applies:

(1) To an adjudicative proceeding if a statute expressly so provides.

(2) To an adjudicative proceeding newly required by a statute that becomes operative after July 1, 1997, unless the statute provides that the proceeding need not be conducted by an administrative law judge employed by the Office of Administrative Hearings, the following provisions apply: .

(b) The presiding officer shall be an administrative law judge assigned by the director of the Office of Administrative Hearings.

~~(b)~~ (c) In the discretion of the agency head, the administrative law judge may hear the case alone or the agency head may hear the case with the administrative law judge.

~~(c)~~ (d) If the administrative law judge hears the case alone, the administrative law judge shall exercise all powers relating to the conduct of the hearing.

~~(d)~~ (e) If the agency head hears the case with the administrative law judge:

(1) The administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency head on matters of law.

(2) The agency head shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge.

(3) The agency head shall issue a final decision as provided in Section 649.110. The administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency head. No agency member who did not hear the evidence shall vote.

(4) Notwithstanding any other provision of this subdivision, if after the hearing has commenced a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall deliver a proposed decision to the agency head as provided in Section 649.110.

Comment [revised]. Subdivision (a)(1) of Section 643.110 and conforming revisions to other statutes continue existing law with respect to hearings that must be conducted by an

administrative law judge from the Office of Administrative Hearings. See, e.g., former Section 11501. For statutes that expressly apply Section 643.110, see [citations for present APA hearings].

Subdivision (a)(2) is new. Under subdivision (a)(2), this section applies to an adjudicative proceeding newly required by a statute that becomes operative after the operative date of this act, unless the proceeding is exempted by statute from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Subdivision (b) restates the substance of the first sentence of former Section 11512(a). Assignment of an administrative law judge under subdivision (b) is governed by Section 636.150 (Office of Administrative Hearings).

Subdivision (c) restates the second sentence of former Section 11512(a).

Subdivision (d) restates the second sentence of former Section 11512(b).

Subdivisions (e)(1) and (2) restate the first sentence of former Section 11512(b). Subdivision (e)(3) restates former Section 11517(a) with the addition of a sentence that makes clear the agency head may issue a final decision in the proceeding. Subdivision (e)(4) restates former Section 11512(e).

Memorandum

Date : June 8, 1994
To: : Madeline Rule
From : Kathy Keers
Subject : Hearing Costs for Commercial Drivers

At your request, we have determined the following annual costs for 4,259 hearings for commercial drivers.

Current DMV Hearing Costs	\$203,797
Cost of DMV Hearings with a DMV Hearing Officer and a Non-Attorney Advocate	\$1,716,377
Cost of DMV Hearings with a DMV Hearing Officer and a DMV Attorney Advocate	\$2,078,392
Cost of DMV Hearings with an Administrative Law Judge and a Non-Attorney Advocate	\$5,328,009
Cost of DMV Hearings with an Administrative Law Judge and a DMV Attorney Advocate	\$5,690,024

Please contact Terry Keenan at 7-6265 or Gary Meteer at 7-5676 if you have any questions regarding this information.



KATHY KEERS, Manager
Driver Safety Policy Unit

Attachments