

# An ALJ Panel Perspective: The Hearing Record, Witness Credibility, Evidence, and Implicit Bias

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*NAA CLE*

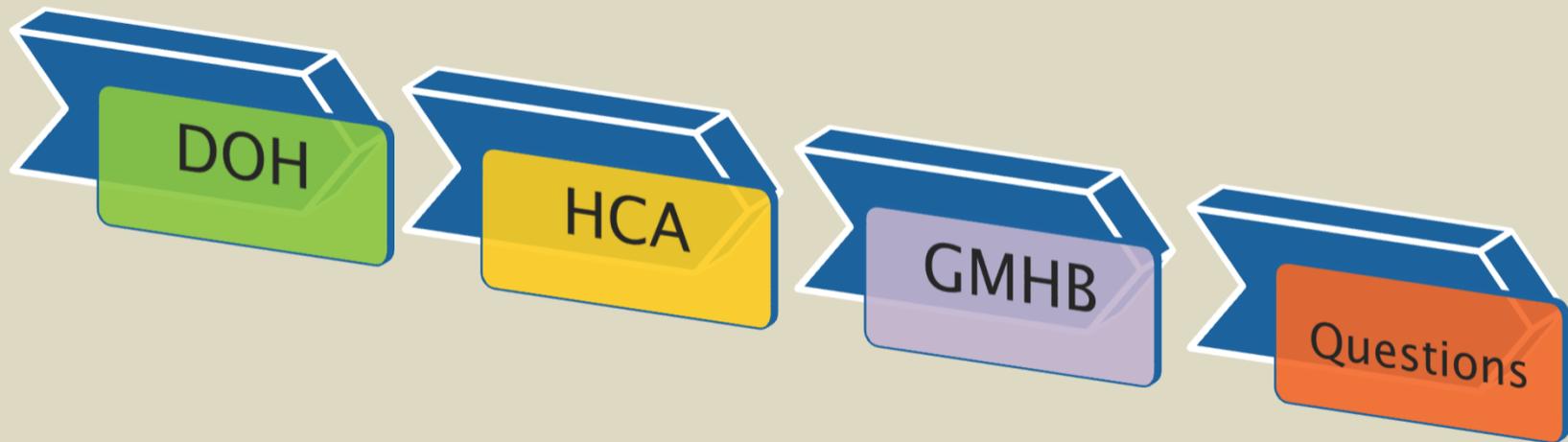
*“The Continuum of a Changing Administrative Law Practice”*

Roman Dixon, *Chief Health Law Judge, Department of Health*

Diamanta Tornatore, *Review Judge, Health Care Authority*

Deborah Eddy, *Board Member, Growth Management Hearings Board*

# ROADMAP



# DOH Overview

Chief Health Law Judge (CHLJ) Roman Dixon – supervises the Adjudicative Services Office and presides over health discipline and licensing cases.

1 Review Judge (RJ) John Kuntz – serves as the Deputy CHLJ, presides over cases, reviews orders, and provides training and consultation to the Line Judges.

5 Line Judges (HLJs) Matthew Herington, Jessica Blye, Susan Kavanaugh, Matthew Wareham, and Joslyn Donlin – serve as presiding officers for the full range of Board/Commission and Secretary cases before the DOH.

3 Legal Assistants (LAs) provide professional support to the judges.

## DOH Overview, Cont'd.

RCW 34.05.425 of Washington State's Administrative Procedure Act (APA) grants an agency head the authority to appoint an individual to decide cases on the agency head's behalf.

Pursuant to the RCW 43.70.740 and the Uniform Disciplinary Act (RCW 18.130), the Secretary of Health may delegate initial decision-making authority to an HLJ. Per RCW 18.130.050, Boards and Commissions may only delegate final decision making authority to an HLJ in cases that do not involve standards of practice or where clinical expertise is necessary. In cases involving clinical expertise, an HLJ conducts the hearing and makes evidentiary rulings, but a panel from the respective Board (Bd.)/Commission (Comm.) decides the case.

In cases subject to the Secretary's jurisdiction, parties may seek administrative review of an Initial Order before the Agency's Review Officer (WAC 246-10-701). Parties seeking review of Bd./Comm. final orders, must petition the Superior Court for judicial review.

# The HLJ's Role in Disciplinary Hearings



# The Role of the HLJ, Cont'd.



While they don't wear robes or wigs, HLJs:

- \* Function as the Gate Keepers of the official record of proceedings and are charged with maintaining the balance of fairness in cases before the department.
- \* Decide the legal issues and serve as the trier of fact in Secretary cases.

- Issue legal rulings and aid the triers of fact during deliberations in cases brought before Health Disciplinary Boards and Commissions.
- Draft and edit initial and final orders after hearings; these orders include a brief procedural history, findings of fact, conclusions of law and sanction language (when appropriate).
- Review petitions for reconsideration and modification of initial and final orders and conduct emergency *ex parte* summary suspension proceedings.

# Procedure and Evidence

- HLJs issue written orders on all procedural matters related to (1) Discovery, (2) Witnesses, (3) Admissibility of Evidence, (4) Dispositive Motions, and (5) Hearing Procedure.
- HLJs rule on objections to the admissibility of evidence pursuant to RCW 34.05.452. The Washington Rules of Evidence serve as guidelines for those evidentiary rulings.
- HLJs also rule in accordance with agency significant decisions. WAC 246-08-480. Significant decisions are decisions that contain an analysis or decision of substantial importance to the Department in carrying out its duties. The index of significant decisions can be accessed at <https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings/SignificantDecisions>
- In addition, HLJs analyze documentary and testimonial evidence at hearing to make appropriate factual findings.
- Depending on the profession, the standard of proof in all cases is either by a preponderance of the evidence or clear and convincing evidence. *See Nguyen v. Department of Health*, 144 Wn.2d 516, 534 (2001), *cert. denied*, 535 U.S. 904 (2002); *see also Hardee v. Dept. of Social and Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011).

# HCA BOA Overview

- \* Chief Review Judge/Appeals Administrator (*Kerry Breen*: independently administers the BOA and supervises staff; also is the presiding officer for non-BAP PEBB and SEBB cases).
- \* 2 Line Review Judges (*Diamanta Tornatore and Clayton King*: the reviewing officers for the Medicaid caseload).
- \* Legal Administrative Manager (*Brianna Peterson*: PEBB/SEBB/M'caid).
- \* Legal Assistant 3 (*open*: primarily Medicaid caseload).

RCW 34.05.425 and 34.05.464(2) of Washington State's Administrative Procedure Act (APA) grant an agency head the authority to appoint an individual to decide cases on the agency head's behalf.

Pursuant to the APA and RCW 41.05.021(1), the HCA Director delegates final decision making authority in HCA administrative hearings to the Chief Review Judge and the Line Review Judges. *See also* 42 C.F.R. § 431.10 (M'caid single state agency requirement).

# HCA BOA Review Function

*(RCW 34.05.452 and RCW 34.05.464)*

The HCA BOA performs administrative review of Initial Orders issued by the OAH in medical assistance cases.



- When reviewing these OAH orders, the BOA Line Review Judges analyze the hearing records, including the audio recordings or transcripts of testimony, evidentiary exhibits, and party briefings.

- Each review is done by an individual Line Review Judge, not as a board although there is collaborative discussion to ensure consistency in decision-making.

- The Line Review Judges then enter Final Orders that may subsequently be reconsidered by the Review Judges per RCW 34.05.470 and/or appealed to Superior Court per RCW 34.05.510 to RCW 34.05.598

## Hearing Record on Review at the HCA BOA

The hearing record is generally established by the time a case reaches the HCA BOA.

New evidence submitted on review is rarely admitted to the hearing record and considered because the Review Judge “..in *most* cases, only considers evidence given at the original hearing...” per WAC 182-526-0565.

- The Washington APA/Chapter 34.05 RCW does not explicitly authorize admission of new evidence on review.
- The court in *Towle v. Department of Fish and Wildlife*, 94 Wn. App. 196, 205 (1999) acknowledged that an agency may choose to adopt a rule that permits the consideration of new evidence on review.
- HCA’s rules require a showing of good cause for admission of new evidence to the record.

# Addressing Evidentiary Limits on Review

Generally, the HCA BOA Review Judges rarely complain about too much relevant evidence, but often face the challenge of potentially helpful evidence that is missing. When this happens, the following may result:

- The process is delayed in order to get the necessary information (either in a remand, which is permitted by RCW 34.05.464(7) and WAC 182-526-0600(2), or direct request from the BOA to the parties)
- The party bearing the burden of proof may not prevail.

In lieu of remanding to the OAH, the Review Judge may decide the issue on the evidence available, find a party did not meet the requisite burden of proof, request additional evidence, or ask for oral argument.

# Intersection of Credibility & Implicit Bias

\* Implicit bias can be described as built-in, unconscious patterns that people often use as cognitive shortcuts (because our brains want to quickly classify) that can affect our understanding, actions, and decisions.

\* The Harvard Implicit Association Test (IAT) can be used to discover one's propensity for bias:  
<https://implicit.harvard.edu/implicit/takeatest.html>.

\* Judges' perception of witnesses when evaluating credibility can be subtly influenced by various factors (e.g., age, gender, race, disability, education level, accent, English language proficiency, culture, and ideas about witness demeanor).

\* To prevent such perceptions from mistakenly determining testimony is not credible it is important to refrain from judging truthfulness before examining all the evidence and to remain alert to our biases, recognizing how they may affect decision-making.

## Other Resources When Conducting Review

Pursuant to the requirements of RCW 42.56.070(5)(b), the HCA BOA established the Index of Significant Decisions at <https://www.hca.wa.gov/about-hca/significant-decisions>, which currently includes 5 Medicaid review decisions and 1 SEBB hearing decision, each with a specific headnote.

The HCA BOA Review Judges may consult the BOA Index of Significant Decisions and, if applicable, cite directly to any of the included cases. This saves time because the analysis has already been completed and is precedential per RCW 34.05.473(1)(b), RCW 42.56.070(6), and WAC 182-526-0221(1).

## GMHB Overview/What GMHB Adjudicates?

- RCW 36.070A, SEPA centralized requirements for local government land use.
- De-centralized enforcement through state agencies, private citizens, NGOs.
- GMHB decides if petitioner proves a violation: non-compliance.

# GMHB Process, Simplified

Petition challenges an action, cites goal or requirement violated.

Evidence limited to the record: material available at the time of action.

Briefs limited to legal arguments for pre-approved issues.

Supplementation of record possible, but limited to relevance.

## Statutory standards set the boundaries...

Evidence limited to the record before the body in taking the action, some supplementation (.290(4)).

Comp plan and development regulations presumed valid on adoption (.320(1)).

The petitioner bears the burden of proof that the action is not in compliance w/GMA (.320(2)).

We must find compliance unless the actions were clearly erroneous (.320(3)).

## We don't 'do' policy nor give advice ...

CASES concerning political topics (like housing, homeless) merit extra care in analysis.

GMA reflects intentions of local community, voters, property owners – local government.

GMA makes no provision for economic or racial discrimination in land use.

Some lobbyist groups (realtors, enviros) may use GMA as 'fig leaf' for other interests.

# The *Pro Se* Petitioner

Pro se petitioners usually neighbors or informal community groups.

Most common suit: challenging actions which change the status quo.

The Board's bias may be to the naivete of the petitioner, not understanding legal process.

We take special care that our attempt at negating bias doesn't look like inappropriate legal help.

**QUESTIONS?**