

A-Engrossed
House Bill 2822

Ordered by the House May 2
Including House Amendments dated May 2

Sponsored by Representative RICHARDSON (at the request of Oregon Law Center)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Clarifies duties of hearing officer in contested case proceedings. Requires that hearing officer [*inquire into and explore all relevant facts and legal issues relevant to correct determination of case*] **ensure correct application of law to inquiry of facts necessary for consideration of issues before hearing officer.**

A BILL FOR AN ACT

1
2 Relating to contested case proceedings; amending ORS 183.415, 183.482 and 183.615.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 183.415 is amended to read:

5 183.415. (1) In a contested case, all parties shall be afforded an opportunity for hearing after
6 reasonable notice, served personally or by registered or certified mail.

7 (2) The notice shall include:

8 (a) A statement of the party's right to hearing, or a statement of the time and place of the
9 hearing;

10 (b) A statement of the authority and jurisdiction under which the hearing is to be held;

11 (c) A reference to the particular sections of the statutes and rules involved; and

12 (d) A short and plain statement of the matters asserted or charged.

13 (3) Parties may elect to be represented by counsel and to respond and present evidence and
14 argument on all issues involved.

15 (4) Agencies may adopt rules of procedure governing participation in contested cases by persons
16 appearing as limited parties.

17 (5)(a) Unless precluded by law, informal disposition may be made of any contested case by stip-
18 ulation, agreed settlement, consent order or default. Informal settlement may be made in license
19 revocation proceedings by written agreement of the parties and the agency consenting to a suspen-
20 sion, fine or other form of intermediate sanction.

21 (b) Any informal disposition of a contested case, other than an informal disposition by default,
22 must be in writing and signed by the party or parties to the contested case. The agency shall in-
23 corporate that disposition into a final order. An order under this paragraph is not subject to ORS
24 183.470. The agency shall deliver or mail a copy of the order to each party, or, if applicable, to the
25 party's attorney of record. An order that incorporates the informal disposition is a final order in a
26 contested case, but is not subject to judicial review. A party may petition the agency to set aside
27 a final order that incorporates the informal disposition on the ground that the informal disposition

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 was obtained by fraud or duress.

2 (6) An order adverse to a party may be issued upon default only upon prima facie case made
3 on the record of the agency. When an order is effective only if a request for hearing is not made
4 by the party, the record may be made at the time of issuance of the order, and if the order is based
5 only on material included in the application or other submissions of the party, the agency may so
6 certify and so notify the party, and such material shall constitute the evidentiary record of the
7 proceeding if hearing is not requested.

8 (7) At the commencement of the hearing, the officer presiding shall explain the issues involved
9 in the hearing and the matters that the parties must either prove or disprove.

10 (8) Testimony shall be taken upon oath or affirmation of the witness from whom received. The
11 officer presiding at the hearing shall administer oaths or affirmations to witnesses.

12 (9) The officer presiding at the hearing shall place on the record a statement of the substance
13 of any written or oral ex parte communications on a fact in issue made to the officer during the
14 pendency of the proceeding and notify the parties of the communication and of their right to rebut
15 such communications. If an ex parte communication is made to an administrative law judge assigned
16 from the Office of Administrative Hearings established by ORS 183.605, the administrative law judge
17 must comply with ORS 183.685.

18 *[(10) The officer presiding at the hearing shall ensure that the record developed at the hearing
19 shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the
20 presiding officer in the case.]*

21 **(10) The officer presiding at the hearing shall ensure that the record developed at the
22 hearing shows a full and fair inquiry into the facts necessary for consideration of all issues
23 properly before the presiding officer in the case and the correct application of the law to
24 those facts.**

25 (11) The record in a contested case shall include:

26 (a) All pleadings, motions and intermediate rulings.

27 (b) Evidence received or considered.

28 (c) Stipulations.

29 (d) A statement of matters officially noticed.

30 (e) Questions and offers of proof, objections and rulings thereon.

31 (f) A statement of any ex parte communications on a fact in issue made to the officer presiding
32 at the hearing.

33 (g) Proposed findings and exceptions.

34 (h) Any proposed, intermediate or final order prepared by the agency or an administrative law
35 judge.

36 (12) A verbatim oral, written or mechanical record shall be made of all motions, rulings and
37 testimony. The record need not be transcribed unless requested for purposes of rehearing or court
38 review. The agency may charge the party requesting transcription the cost of a copy of tran-
39 scription, unless the party files an appropriate affidavit of indigency. However, upon petition, a
40 court having jurisdiction to review under ORS 183.480 may reduce or eliminate the charge upon
41 finding that it is equitable to do so, or that matters of general interest would be determined by re-
42 view of the order of the agency.

43 **SECTION 2.** ORS 183.482 is amended to read:

44 183.482. (1) Jurisdiction for judicial review of contested cases is conferred upon the Court of
45 Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The

1 petition shall be filed within 60 days only following the date the order upon which the petition is
2 based is served unless otherwise provided by statute. If a petition for rehearing has been filed, then
3 the petition for review shall be filed within 60 days only following the date the order denying the
4 petition for rehearing is served. If the agency does not otherwise act, a petition for rehearing or
5 reconsideration shall be deemed denied the 60th day following the date the petition was filed, and
6 in such cases, petition for judicial review shall be filed within 60 days only following such date. Date
7 of service shall be the date on which the agency delivered or mailed its order in accordance with
8 ORS 183.470.

9 (2) The petition shall state the nature of the order the petitioner desires reviewed, and shall
10 state whether the petitioner was a party to the administrative proceeding, was denied status as a
11 party or is seeking judicial review as a person adversely affected or aggrieved by the agency order.
12 In the latter case, the petitioner shall, by supporting affidavit, state the facts showing how the
13 petitioner is adversely affected or aggrieved by the agency order. Before deciding the issues raised
14 by the petition for review, the Court of Appeals shall decide, from facts set forth in the affidavit,
15 whether or not the petitioner is entitled to petition as an adversely affected or an aggrieved person.
16 Copies of the petition shall be served by registered or certified mail upon the agency, and all other
17 parties of record in the agency proceeding.

18 (3)(a) The filing of the petition shall not stay enforcement of the agency order, but the agency
19 may do so upon a showing of:

20 (A) Irreparable injury to the petitioner; and

21 (B) A colorable claim of error in the order.

22 (b) When a petitioner makes the showing required by paragraph (a) of this subsection, the
23 agency shall grant the stay unless the agency determines that substantial public harm will result if
24 the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically
25 state the substantial public harm that would result from the granting of the stay.

26 (c) When the agency grants a stay, **the agency** [it] may impose such reasonable conditions as
27 the giving of a bond, irrevocable letter of credit or other undertaking and that the petitioner file
28 all documents necessary to bring the matter to issue before the Court of Appeals within specified
29 reasonable periods of time.

30 (d) Agency denial of a motion for stay is subject to review by the Court of Appeals under such
31 rules as the court may establish.

32 (4) Within 30 days after service of the petition, or within such further time as the court may
33 allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire
34 record of the proceeding under review, but, by stipulation of all parties to the review proceeding,
35 the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may
36 be taxed by the court for the additional costs. The court may require or permit subsequent cor-
37 rections or additions to the record when deemed desirable. Except as specifically provided in this
38 subsection, the cost of the record shall not be taxed to the petitioner or any intervening party.
39 However, the court may tax such costs and the cost of agency transcription of record to a party
40 filing a frivolous petition for review.

41 (5) If, on review of a contested case, before the date set for hearing, application is made to the
42 court for leave to present additional evidence, and it is shown to the satisfaction of the court that
43 the additional evidence is material and that there were good and substantial reasons for failure to
44 present it in the proceeding before the agency, the court may order that the additional evidence be
45 taken before the agency upon such conditions as the court deems proper. The agency may modify

1 its findings and order by reason of the additional evidence and shall, within a time to be fixed by
 2 the court, file with the reviewing court, to become a part of the record, the additional evidence,
 3 together with any modifications or new findings or orders, or its certificate that *[it]* **the agency**
 4 elects to stand on its original findings and order, as the case may be.

5 (6) At any time subsequent to the filing of the petition for review and prior to the date set for
 6 hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws
 7 an order for purposes of reconsideration, *[it]* **the agency** shall, within such time as the court may
 8 allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after
 9 withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the
 10 review shall proceed upon the revised order. An amended petition for review shall not be required
 11 if the agency, on reconsideration, affirms the order or modifies the order with only minor changes.
 12 If an agency withdraws an order for purposes of reconsideration and modifies or reverses the order
 13 in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid
 14 from funds available to the agency.

15 (7) Review of a contested case shall be confined to the record, **and** the court shall not substitute
 16 its judgment for that of the agency as to any issue of fact or agency discretion. In the case of dis-
 17 puted allegations of irregularities in procedure before the agency not shown in the record which, if
 18 proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a
 19 master appointed by the court to take evidence and make findings of fact upon them. The court shall
 20 remand the order for further agency action if *[it]* **the court** finds that either the fairness of the
 21 proceedings or the correctness of the action may have been impaired by a material error in proce-
 22 dure or a failure to follow prescribed procedure, **including a failure by the presiding officer to**
 23 **comply with the requirements of ORS 183.415 (10).**

24 (8)(a) The court may affirm, reverse or remand the order. If the court finds that the agency has
 25 erroneously interpreted a provision of law and that a correct interpretation compels a particular
 26 action, *[it]* **the court** shall:

27 (A) Set aside or modify the order; or

28 (B) Remand the case to the agency for further action under a correct interpretation of the pro-
 29 vision of law.

30 (b) The court shall remand the order to the agency if *[it]* **the court** finds the agency's exercise
 31 of discretion to be:

32 (A) Outside the range of discretion delegated to the agency by law;

33 (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency
 34 practice, if the inconsistency is not explained by the agency; or

35 (C) Otherwise in violation of a constitutional or statutory provision.

36 (c) The court shall set aside or remand the order if *[it]* **the court** finds that the order is not
 37 supported by substantial evidence in the record. Substantial evidence exists to support a finding of
 38 fact when the record, viewed as a whole, would permit a reasonable person to make that finding.

39 **SECTION 3.** ORS 183.615 is amended to read:

40 183.615. (1) An administrative law judge employed by or contracting with the chief administra-
 41 tive law judge shall conduct hearings on behalf of agencies as assigned by the chief administrative
 42 law judge. An administrative law judge shall be impartial in the performance of the administrative
 43 law judge's duties and shall remain fair in all hearings conducted by the administrative law judge.
 44 **An administrative law judge shall develop the record in contested case proceedings in the**
 45 **manner provided by ORS 183.415 (10).**

1 (2) Only persons who have a knowledge of administrative law and procedure may be employed
2 by the chief administrative law judge as administrative law judges. The chief administrative law
3 judge by rule may establish additional qualifications for administrative law judges employed for the
4 office.

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