

B-Engrossed
Senate Bill 274

Ordered by the House June 4
Including Senate Amendments dated April 24 and House Amendments
dated June 4

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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.

Removes authority of Director of Employment Department to hire chief administrative law judge for Office of Administrative Hearings. Authorizes Governor to appoint chief administrative law judge.

Directs Employment Department to provide administrative services to office.

Directs Attorney General to consult with advisory group of specified members when adopting model rules of procedure for contested case hearings conducted by office.

Changes evidentiary standard for modifying finding of historical fact made by administrative law judge from office.

Requires administrative law judge assigned from office to disclose ex parte communications made by any agency. Eliminates exemption for duty of disclosure for certain communications from assistant attorneys general.

Requires Secretary of State to use administrative law judge from office.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to administrative law judges; creating new provisions; amending ORS 183.605, 183.610,
3 183.630, 183.635, 183.650, 183.685 and 183.690; repealing ORS 183.600; and declaring an emer-
4 gency.

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

6
7 **APPOINTMENT OF CHIEF ADMINISTRATIVE LAW JUDGE**

8
9 **SECTION 1.** ORS 183.610 is amended to read:

10 183.610. (1) The [*Director of the Employment Department*] **Governor** shall [*employ*] **appoint** a
11 person to serve as chief administrative law judge for the Office of Administrative Hearings. The
12 [*director*] **Governor** shall consider recommendations by the Office of Administrative Hearings
13 Oversight Committee in [*hiring*] **appointing** a chief administrative law judge. The person
14 [*employed*] **appointed** to serve as chief administrative law judge must be an active member of the
15 Oregon State Bar. The chief administrative law judge has all the powers necessary and convenient
16 to organize and manage the office. Subject to the State Personnel Relations Law, the chief admin-
17 istrative law judge shall employ all persons necessary for the administration of the office, prescribe
18 the duties of those employees and fix their compensation. The chief administrative law judge shall
19 serve for a term of four years. [*Notwithstanding ORS 236.140, the chief administrative law judge may*
20 *be removed during a term only for inefficiency, incompetence, neglect of duty, malfeasance in office,*

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 *unfitness to render effective service or failure to continue to meet the criteria for appointment.] The*
2 **chief administrative law judge serves at the pleasure of the Governor.**

3 (2) The chief administrative law judge shall employ administrative law judges. The chief admin-
4 istrative law judge shall ensure that administrative law judges employed for the office receive all
5 training necessary to meet the standards required under the program created under ORS 183.680.

6 (3) The chief administrative law judge shall take all actions necessary to protect and ensure the
7 independence of each administrative law judge assigned from the office.

8 **SECTION 2. The amendments to ORS 183.610 by section 1 of this 2009 Act do not affect**
9 **the term of the person currently serving as the chief administrative law judge on the effec-**
10 **tive date of this 2009 Act. Upon the completion of the term of that person, or the position**
11 **otherwise becoming vacant before the completion of the term, the Governor shall appoint a**
12 **person to serve as chief administrative law judge under ORS 183.610, as amended by section**
13 **1 of this 2009 Act.**

14 **SECTION 3.** ORS 183.690 is amended to read:

15 183.690. (1) The Office of Administrative Hearings Oversight Committee is created. The com-
16 mittee consists of nine members, as follows:

17 (a) The President of the Senate and the Speaker of the House of Representatives shall appoint
18 four legislators to the committee. Two shall be Senators appointed by the President. Two shall be
19 Representatives appointed by the Speaker.

20 (b) The Governor shall appoint two members to the committee. At least one of the members
21 appointed by the Governor shall be an active member of the Oregon State Bar with experience in
22 representing parties who are not agencies in contested case hearings.

23 (c) The Attorney General shall appoint two members to the committee.

24 (d) The chief administrative law judge for the Office of Administrative Hearings [*employed under*
25 *ORS 183.610*] shall serve as an ex officio member of the committee. The chief administrative law
26 judge may cast a vote on a matter before the committee if the votes of the other members are
27 equally divided on the matter.

28 (2) The term of a legislative member of the committee shall be two years. If a person appointed
29 by the President of the Senate or by the Speaker of the House ceases to be a Senator or Represen-
30 tative during the person's term on the committee, the person may continue to serve as a member
31 of the committee for the balance of the member's term on the committee. The term of all other ap-
32 pointed members shall be four years. Appointed members of the committee may be reappointed. If
33 a vacancy occurs in one of the appointed positions for any reason during the term of membership,
34 the official who appointed the member to the vacated position shall appoint a new member to serve
35 the remainder of the term. An appointed member of the committee may be removed from the com-
36 mittee at any time by the official who appointed the member.

37 (3)(a) The members of the committee shall select from among themselves a chairperson and a
38 vice chairperson.

39 (b) The committee shall meet at such times and places as determined by the chairperson.

40 (4) Legislative members shall be entitled to payment of per diem and expense reimbursement
41 under ORS 171.072, payable from funds appropriated to the Legislative Assembly.

42 (5) The committee shall:

43 (a) Study the operations of the Office of Administrative Hearings;

44 (b) Make any recommendations to the Governor and the Legislative Assembly that the commit-
45 tee deems necessary to increase the effectiveness, fairness and efficiency of the operations of the

1 Office of Administrative Hearings;

2 (c) Make any recommendations for additional legislation governing the operations of the Office
3 of Administrative Hearings; and

4 (d) Conduct such other studies as necessary to accomplish the purposes of this subsection.

5 (6) The Employment Department shall provide the committee with staff, subject to availability
6 of funding for that purpose.

7 **SECTION 4. ORS 183.600 is repealed.**

8
9 **EMPLOYMENT DEPARTMENT SERVICES**
10 **TO OFFICE OF ADMINISTRATIVE HEARINGS**

11
12 **SECTION 5.** ORS 183.605 is amended to read:

13 183.605. (1) The Office of Administrative Hearings is established within the Employment De-
14 partment. The office shall be managed by the chief administrative law judge [*employed*] **appointed**
15 under ORS 183.610. The office shall make administrative law judges available to agencies under ORS
16 183.600 to 183.690. Administrative law judges assigned from the office under ORS 183.600 to 183.690
17 may:

18 (a) Conduct contested case proceedings on behalf of agencies in the manner provided by ORS
19 183.600 to 183.690;

20 (b) Perform such other services, as may be requested by an agency, that are appropriate for the
21 resolution of disputes arising out of the conduct of agency business; and

22 (c) Perform such other duties as may be authorized under ORS 183.600 to 183.690.

23 (2) All persons serving as administrative law judges in the office must meet the standards and
24 training requirements of ORS 183.680.

25 **(3) The Employment Department shall provide administrative services to the Office of**
26 **Administrative Hearings, including budget services, accounting services, procurement ser-**
27 **vices, contracting services, human resources services and information technology services.**
28 **The services must be provided in a manner that is consistent with law, rules and state poli-**
29 **cies. The Office of Administrative Hearings shall reimburse the Employment Department for**
30 **the costs of the services provided.**

31
32 **RULES OF PROCEDURE**

33
34 **SECTION 6.** ORS 183.630 is amended to read:

35 183.630. (1) Except as provided in subsection (2) of this section, all contested case hearings
36 conducted by administrative law judges assigned from the Office of Administrative Hearings must
37 be conducted pursuant to the model rules of procedure prepared by the Attorney General under ORS
38 183.341 if the hearing is subject to the procedural requirements for contested case proceedings.

39 (2) The Attorney General, after consulting with the chief administrative law judge, may exempt
40 an agency or a category of cases from the requirements of subsection (1) of this section. The ex-
41 emption may be from all or part of the model rules adopted by the Attorney General. Any exemption
42 granted under this subsection must be made in writing.

43 **(3) The Attorney General shall consult with an advisory group when adopting model rules**
44 **of procedure for the purpose of contested case hearings conducted by administrative law**
45 **judges assigned from the Office of Administrative Hearings. The advisory group shall consist**

1 of:

- 2 (a) **The chief administrative law judge;**
- 3 (b) **An officer or employee of a state agency, appointed by the Governor;**
- 4 (c) **An attorney who practices administrative law, appointed by the Oregon State Bar;**
- 5 (d) **A deputy or assistant attorney general appointed by the Attorney General; and**
- 6 (e) **A public member, appointed by the Governor, who is not an attorney or an officer or**
- 7 **employee of a state agency.**

8 [(3)] (4) Except as may be expressly granted by the agency to an administrative law judge as-
 9 signed from the office, or as may be expressly provided for by law, an administrative law judge
 10 conducting a hearing for an agency under ORS 183.600 to 183.690 may not authorize a party to take
 11 a deposition that is to be paid for by the agency.

12
 13 **MODIFICATION OF ADMINISTRATIVE LAW JUDGE'S**
 14 **ORDER BY AGENCY**
 15

16 **SECTION 7.** ORS 183.650 is amended to read:

17 183.650. (1) In any contested case hearing conducted by an administrative law judge assigned
 18 from the Office of Administrative Hearings, the administrative law judge shall prepare and serve on
 19 the agency and all parties to the hearing a form of order, including recommended findings of fact
 20 and conclusions of law. The administrative law judge shall also prepare and serve a proposed order
 21 in the manner provided by ORS 183.464 unless the agency or hearing is exempt from the require-
 22 ments of ORS 183.464.

23 (2) If the administrative law judge assigned from the office will not enter the final order in a
 24 contested case proceeding, and the agency modifies the form of order issued by the administrative
 25 law judge in any substantial manner, the agency must identify the modifications and provide an ex-
 26 planation to the parties to the hearing as to why the agency made the modifications.

27 (3) An agency conducting a contested case hearing may modify a finding of historical fact made
 28 by the administrative law judge assigned from the Office of Administrative Hearings only if the
 29 agency determines that *[the finding of historical fact made by the administrative law judge is not*
 30 *supported by a preponderance of the evidence in the record]* **there is clear and convincing evidence**
 31 **in the record that the finding was wrong.** For the purposes of this section, an administrative law
 32 judge makes a finding of historical fact if the administrative law judge determines that an event did
 33 or did not occur in the past or that a circumstance or status did or did not exist either before the
 34 hearing or at the time of the hearing.

35 (4) If a party seeks judicial review of an agency's modification of a finding of historical fact
 36 under subsection (3) of this section, the court shall make an independent finding of the fact in dis-
 37 pute by conducting a review de novo of the record viewed as a whole. If the court decides that the
 38 agency erred in modifying the finding of historical fact made by the administrative law judge, the
 39 court shall remand the matter to the agency for entry of an order consistent with the court's judg-
 40 ment.

41 **SECTION 8.** The amendments to ORS 183.650 by section 7 of this 2009 Act apply only to
 42 hearings for which an administrative law judge is assigned from the Office of Administrative
 43 Hearings on or after the effective date of this 2009 Act.

44
 45 **EX PARTE COMMUNICATIONS**

1 **SECTION 9.** ORS 183.685 is amended to read:

2 183.685. (1) An administrative law judge assigned from the Office of Administrative Hearings
3 who is presiding in a contested case proceeding and who receives an ex parte communication de-
4 scribed in subsections (3) and (4) of this section shall place in the record of the pending matter:

5 (a) The name of each person from whom the administrative law judge received an ex parte
6 communication;

7 (b) A copy of any ex parte written communication received by the administrative law judge;

8 (c) A copy of any written response to the communication made by the administrative law judge;

9 (d) A memorandum reflecting the substance of any ex parte oral communication made to the
10 administrative law judge; and

11 (e) A memorandum reflecting the substance of any oral response made by the administrative law
12 judge to an ex parte oral communication.

13 (2) Upon making a record of an ex parte communication under subsection (1) of this section, an
14 administrative law judge shall advise the agency and all parties in the proceeding that an ex parte
15 communication has been made a part of the record. The administrative law judge shall allow the
16 agency and parties an opportunity to respond to the ex parte communication.

17 (3) Except as otherwise provided in this section, the provisions of this section apply to commu-
18 nications that:

19 (a) Relate to a legal or factual issue in a contested case proceeding;

20 (b) Are made directly or indirectly to an administrative law judge while the proceeding is
21 pending; and

22 (c) Are made without notice and opportunity for the agency and all parties to participate in the
23 communication.

24 (4) The provisions of this section apply to any ex parte communication made directly or indi-
25 rectly to an administrative law judge, or to any agent of an administrative law judge, by:

26 (a) A party;

27 (b) A party's representative or legal adviser;

28 (c) Any other person who has a direct or indirect interest in the outcome of the proceeding;

29 (d) Any other person with personal knowledge of the facts relevant to the proceeding; or

30 (e) Any officer, employee or agent of *[the] an agency [that is using the administrative law judge*
31 *to conduct the hearing].*

32 (5) The provisions of this section do not apply to:

33 (a) Communications made to an administrative law judge by other administrative law judges;

34 **or**

35 (b) Communications made to an administrative law judge by any person employed by the office
36 to assist the administrative law judge[; or].

37 *[(c) Communications made to an administrative law judge by an assistant attorney general if the*
38 *communications are made in response to a request from the administrative law judge and the assistant*
39 *attorney general is not advising the agency that is conducting the hearing.]*

40
41 **AGENCIES REQUIRED TO USE ADMINISTRATIVE LAW JUDGES**
42 **FROM OFFICE OF ADMINISTRATIVE HEARINGS**
43

44 **SECTION 10.** ORS 183.635 is amended to read:

45 183.635. (1) Except as provided in this section, all agencies must use administrative law judges

1 assigned from the Office of Administrative Hearings established under ORS 183.605 to conduct con-
2 tested case hearings, without regard to whether those hearings are subject to the procedural re-
3 quirements for contested case hearings.

4 (2) The following agencies need not use administrative law judges assigned from the office:

5 (a) Attorney General.

6 (b) Boards of stewards appointed by the Oregon Racing Commission.

7 (c) Bureau of Labor and Industries and the Commissioner of the Bureau of Labor and Industries.

8 (d) Department of Corrections.

9 (e) Department of Education, State Board of Education and Superintendent of Public Instruction.

10 (f) Department of Higher Education and institutions of higher education listed in ORS 352.002.

11 (g) Department of Human Services for vocational rehabilitation services cases under 29 U.S.C.
12 722(c) and disability determination cases under 42 U.S.C. 405.

13 (h) Department of Revenue.

14 (i) Department of State Police.

15 (j) Employment Appeals Board.

16 (k) Employment Relations Board.

17 (L) Energy Facility Siting Council.

18 (m) Fair Dismissal Appeals Board.

19 (n) Governor.

20 (o) Land Conservation and Development Commission.

21 (p) Land Use Board of Appeals.

22 (q) Local government boundary commissions created pursuant to ORS 199.430.

23 (r) Oregon Youth Authority.

24 (s) Psychiatric Security Review Board.

25 (t) Public Utility Commission.

26 [(u) *Secretary of State.*]

27 [(v)] (u) State Accident Insurance Fund Corporation.

28 [(w)] (v) State Apprenticeship and Training Council.

29 [(x)] (w) State Board of Parole and Post-Prison Supervision.

30 [(y)] (x) State Land Board.

31 [(z)] (y) State Treasurer.

32 [(aa)] (z) Wage and Hour Commission.

33 (3) The Workers' Compensation Board is exempt from using administrative law judges assigned
34 from the office for any hearing conducted by the board under ORS chapters 147, 654 and 656. Except
35 as specifically provided in this subsection, the Department of Consumer and Business Services must
36 use administrative law judges assigned from the office only for contested cases arising out of the
37 department's powers and duties under:

38 (a) ORS chapter 59;

39 (b) ORS 200.005 to 200.075;

40 (c) ORS chapter 455;

41 (d) ORS chapter 674;

42 (e) ORS chapters 706 to 716;

43 (f) ORS chapter 717;

44 (g) ORS chapters 722, 723, 725 and 726; and

45 (h) ORS chapters 731, 732, 733, 734, 735, 737, 742, 743, 743A, 744, 746, 748 and 750.

1 (4) Notwithstanding any other provision of law, in any proceeding in which an agency is re-
2 quired to use an administrative law judge assigned from the office, an officer or employee of the
3 agency may not conduct the hearing on behalf of the agency.

4 (5) Notwithstanding any other provision of ORS 183.600 to 183.690, an agency is not required to
5 use an administrative law judge assigned from the office if:

6 (a) Federal law requires that a different administrative law judge or hearing officer be used; or

7 (b) Use of an administrative law judge from the office could result in a loss of federal funds.

8 (6) Notwithstanding any other provision of this section, the Department of Environmental
9 Quality must use administrative law judges assigned from the office only for contested case hearings
10 conducted under the provisions of ORS 183.413 to 183.470.

11 **SECTION 11. The amendments to ORS 183.635 by section 10 of this 2009 Act apply to all**
12 **contested case hearings conducted by the Secretary of State on or after the effective date**
13 **of this 2009 Act.**

14
15 **CAPTIONS**

16
17 **SECTION 12. The unit captions used in this 2009 Act are provided only for the conven-**
18 **ience of the reader and do not become part of the statutory law of this state or express any**
19 **legislative intent in the enactment of this 2009 Act.**

20
21 **EMERGENCY CLAUSE**

22
23 **SECTION 13. This 2009 Act being necessary for the immediate preservation of the public**
24 **peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect**
25 **on its passage.**