

**Testimony before the House Committee on Health Care**  
**HB 2642**  
**On behalf of the Oregon State Bar Administrative Law Section**  
February 18, 2015

Chair Greenlick, members of the committee:

Thank you for allowing the Administrative Law Section of the Oregon State Bar to share their concerns with HB 2642, as drafted. The Administrative Law Section's membership includes attorneys who represent private citizens and public agencies, as well as administrative law judges. The section works to ensure the public's access to administrative justice and reflects a cross-section of administrative law practitioners.

The section would like to express concern about the assessment of costs in ORS 676.992(2) included in this bill. ORS 676.992(2) relates to the assessment of costs in disciplinary proceedings by the Health Licensing Office for a new board created by this bill, the Board of Certified Laser Estheticians. The section has no objections to the creation of the board itself or its substance.

Requesting a hearing is the licensee's way of getting an agency to take a second look at the issues. A hearing provides the forum where the evidence can be reviewed and evaluated. The prospect of having the agency unilaterally assess the agency's investigation and hearing costs, as well as its attorney fees, against a licensee creates a profound deterrent to anyone requesting a hearing to test the validity of an agency action. Accordingly, the Administrative Law Section is concerned about the extension of this unfair practice to new agencies placed in the Health Licensing Office.

The recovery of these costs is only available to the agency and is not available to parties who prevail in contested case hearings. Even if licensees could recover their costs and attorney fees in these agency proceedings, this kind of simple reciprocity--like in judicial proceedings--will not suffice here. An independent judge does not make the determination in these cases. The agency is the final decision-maker, irrespective of what the administrative law judge finds. The agency would be required to sacrifice its own budget to absorb defense costs and attorney fees, should the licensee be allowed to prevail in a hearing. There is already an economic incentive for agencies to prevail in these proceedings through the collection of civil penalties, and reciprocity would enhance that incentive.

Likewise, there is already a strong incentive for a licensee to avoid the headache and the financial costs inherent in challenging an agency's action by requesting a hearing. Licensees costs are already formidable because they are not able to run their businesses while they pursue administrative justice in contested case hearings. The added threat of having to also pay the agency's costs and attorney fees can provide the final and insurmountable barrier to requesting a hearing for a licensee who disagrees with the agency.

The threat of these assessments is a very powerful deterrent to the exercise of the right to request a hearing.

Respectfully submitted,

Janice Krem, Chair, and Judith Parker, 2016 Chair-Elect  
On behalf of the Administrative Law Section of the Oregon State Bar