

Overview of the Contested Cases Process Under the Administrative Procedures Act

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What is a contested case?

“Contested case means a proceeding before an agency:

- (A) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard;
- (B) Where the agency has discretion to suspend or revoke a right or privilege of a person;
- (C) For the suspension, revocation or refusal to renew or issue a license where the licensee or applicant for a license demands such a hearing; or
- (D) Where the agency by rule or order provides for hearings ...”

ORS 183.310(2)(a)

Types of Contested Cases

- Notice of Civil Penalty Assessment and Order (enforcement order)
- Permitting decision
- License revocations (e.g. asbestos contractor, wastewater operator certification)
- Other agency orders

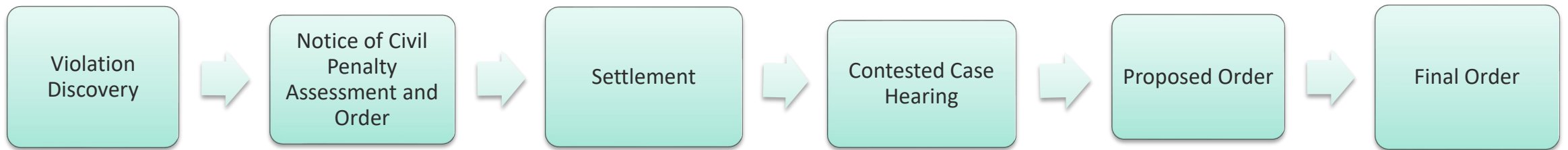
Key Authorities

Procedural Rules

- Administrative Procedures Act (ORS Chapter 183)
- Office of Administrative Hearings Procedural Rules (OAR 137-003-0501 et seq.)
- DEQ Contested Case Rules (OAR 340-011-0500 et seq.)
 - Includes procedures for EQC review at OAR 340-011-0575

Substantive law at issue in the case

Contested Case Process (Enforcement Order)



Violation Discovery

- Enforcement begins when DEQ discovers a violation, usually during an inspection or report review.
- Inspector will conduct a post-inspection conference and write an inspection report.
- DEQ sends a Pre-Enforcement Notice identifying violations and inviting a response.
- Foundational stage of the process. Building a case with evidence.

Notice of Civil Penalty Assessment and Order

- The Notice of Civil Penalty Assessment and Order
 - Findings of fact
 - Conclusions of law (usually statement of violations)
 - Civil penalty and calculation
 - May require specific corrective actions
 - Notice of right to hearing
- Respondent has right to appeal within 20 days.
- Orders that are not appealed become final by default.

Settlement

- Opportunity for Respondent to present additional information to DEQ, to “tell its side of the story.”
- Settlement is executed through a Mutual Agreement and Final Order (MAO), consistent with agency rules, policies, and practices.
- A large majority of DEQ enforcement orders are resolved through settlement.

Contested Case Hearing

- Referral to the Office of Administrative Hearings (OAH), assignment to an Administrative Law Judge (ALJ) who presides over the hearing.
- Pre-hearing conference, motions, discovery.
- Formal contested case hearing is like a trial, with presentation of evidence, witness examination, and closing briefs.
- DEQ has the burden to prove that the violations occurred and that the penalty assessment comports with DEQ's penalty authorities.
- Respondent has the burden to prove any affirmative defenses.

The ALJ's Proposed Order

- After the hearing, the ALJ will issue a Proposed Order.
- The Proposed Order must contain all the elements of a Final Order including:
 - Findings of fact as to each issue of fact and as to each ultimate fact at issue;
 - Conclusions of law based on the findings of fact and applicable law;
 - And an explanation of the reasoning that leads from the findings of fact to the conclusions of law.
- The Proposed Order becomes a Final Order unless a party files Exceptions within 30 days.

Exceptions

- Exceptions briefing includes: an initial exceptions brief, a response to the initial exceptions brief, and a reply to the response brief.
- The exceptions brief must specify the findings of fact and conclusions of law objected to and the alternative findings of fact and conclusions proposed.
- Parties must rely on the factual record from the hearing and can not raise facts outside the hearing record.
- Failure to take exception to a finding of fact or conclusion of law waives the parties' opportunity to later object to the finding or conclusion.

Ex Parte Communications

- An “ex parte communication” is any oral or written communication to the decision maker regarding the case that is made outside the presence of all the parties to the case.
- An agency decision maker must disclose any ex parte communication on a “fact in issue” made to the decision maker during review of a contested case.
- If an agency decision maker receives an ex parte communication on a fact in issue the decision maker must notify all parties and provide them an opportunity to rebut the substance of the communication.

Oral Argument

- After briefs have been filed the matter is set for oral argument during a public meeting of the EQC.
- Parties are each given a time limit for their initial argument and a rebuttal of the other party's argument, with the party that filed the exceptions going first.
- The Commission may run the proceedings as it deems appropriate, and Commissioners may ask questions of the parties.

EQC Action

- After oral argument, the Commission must deliberate and determine by motion its decision on the Final Order.
- Options for adopting a Final Order include:
 - Adopting the ALJ's Proposed Order;
 - Modifying the Proposed Order and adopting it; and
 - Adopting an entirely new order.

EQC Action, Cont.

- The Commission may ask questions to its Counsel, including about issues in the case or how to implement its chosen action.
- If the Commission decides to adopt the Proposed Order with modifications or adopt an entirely new order the Commission may either adopt an order that has already been prepared by the parties or direct Counsel to prepare a Final Order that reflects its decision.
- If the Commission directs Counsel to prepare a Final Order the Final Order will be presented to the Commission for adoption at a future EQC meeting.

EQC's Final Order

Changing findings of fact from the ALJ's Proposed Order:

- Historical facts (whether an event did or did not occur in the past or whether a circumstance or status did or did not exist)
 - *Standard*: clear and convincing evidence in the record
- Non-historical facts
 - *Standard*: preponderance of the evidence (more likely than not)

EQC's Final Order, Cont.

Changing Conclusions of law from the ALJ's Proposed Order:

- The Commission may substitute its interpretation of the law or the application of the law to the facts for the ALJ's.

Reasoning:

- The Final Order must explain any substantial modifications to the Proposed Order.
- Where the EQC is interpreting the law, the Final Order should state the reasons for the interpretation.

Materials for EQC Review

- Staff Report
- DEQ or Respondent's Petition for Review
 - Respondent briefs
 - DEQ briefs
- ALJ's Proposed Order
- Hearing Record
 - Motions and ALJ rulings
 - Evidence presented at hearing
 - Transcript of hearing and pre-hearing conferences
 - Respondent and DEQ closing briefs
- Pre-Hearing Documents
 - DEQ's Order
 - Respondent's Request for Hearing

Questions?

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