

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2070

2005 SENATE JUDICIARY

SB 2070

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2070

Senate Judiciary Committee

☐ Conference Committee

Hearing Date: January 5, 2005

Tape Number	Side A	Side B	Meter #
1	X		1784-3646
Committee Clerk Signature <i>Maria L. Solberg</i>			

Minutes: SB 2070 Relating to employment of administrative law judges who are not attorneys.

**Senator John T. Traynor**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

**Testimony In Support of the Bill:**

**Allen C. Hoberg**, (meter 1784) Director of Office of Administrative Hearings testified. (See attachment #1)

**Sen. Trenbeath** questioned if administrative Law Judges need to be attorneys? **Mr. Holberg** respond that since the law has been passed OAH has hired only attorneys. The only person that is effected was a previous employee with years of experience that has made them an expert in several fields.

Discussion of what or why the standard be an attorney. (meter 2608)

**Sen. Traynor** asked if the Judges that handle drivers license issuance, are they under your administration? No they are not, the Department of Transportation handles them. I think they

only hire attorneys, but if I recall in the past that was not always the case. I do not think that it is required by statute for this position to be attorneys.

**Testimony in Opposition:**

**Damian Huettl**, (meter 1784) Attorney, Bismarck. Gave testimony see (Attachment #2).

**Sen. Trenbeath** questioned the commonality of a policy being effective as of the date that it is passed, not retroactive. (meter 2980). Discussion.

**Sen. Traynor** asked of a brief background of the specific attorney effected by this bill (meter 3098) Discussion of her history with **Mr. Huettl** and **Mr. Hoberg**.

**Senator Triplett** questioned if any appellate decisions were critical towards her processes or procedures or way of taking evidence? Mr. Moberg responded no. Discussion (meter 3350)

**Testimony In Support of the Bill:**

**Laurie Storioti** - Director of Human Resources Management Services (meter 3395) Spoke in support of this Attorney.

**Sandi Tabor** - Deputy, Attorney Generals Office. (meter 3530) Clarified that the intent of this bill was for clarification purposes only. The original bills intent was to allow a non-attorney person to not be removed.

**Sen. Traynor closed the hearing.**

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2070

Senate Judiciary Committee

☐ Conference Committee

Hearing Date January 5, 2005

Tape Number	Side A	Side B	Meter #
1		X	2480 - End
Committee Clerk Signature			

Minutes: Relating to employment of administrative law judges who are not attorneys.

**Senator John (Jack) T. Traynor**, Chairman called the Judiciary committee to order. All Senators were present. Discussion by Sen. Nelson on legislative "form and style" The hearing was continued with a Do pass by **Sen. Trenbeath** and seconded by **Senator Triplett** all members were in Favor of the Bill. No one opposed, no one was absent.

**Sen. Trenbeath** will carry the bill.

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing

Date: 01/05/05  
Roll Call Vote #: 1

**2005 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. SB 2070**

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass

Motion Made By Sen. Trenbeath Seconded By Senator Triplett

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	X		Sen. Nelson	X	
Senator Syverson	X		Senator Triplett	X	
Senator Hacker	X				
Sen. Trenbeath	X				

Total (Yes) \_\_\_\_\_ 6 No \_\_\_\_\_ 0

Absent \_\_\_\_\_ 0

Floor Assignment Sen. Trenbeath

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
January 5, 2005 12:55 p.m.

**Module No: SR-02-0101**  
**Carrier: Trenbeath**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2070: Judiciary Committee (Sen. Traynor, Chairman) recommends DO PASS**  
**(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2070 was placed on the**  
**Eleventh order on the calendar.**

2005 HOUSE JUDICIARY

SB 2070



2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2070

House Judiciary Committee

☐ Conference Committee

Hearing Date 2/14/05

Tape Number	Side A	Side B	Meter #
1	xx		22.5-36.4
1	xx		46.3-end
Committee Clerk Signature <i>Dawn Penrose</i>			

Minutes: 12 members present, 2 members absent (Rep. Bernstein & Rep. Charging).

**Chairman DeKrey:** We will open the hearing on SB 2070.

**Allen Hoberg, Director, Office of Administrative Hearings:** Support (see written testimony).

**Representative Koppelman:** I certainly understand the technical nature of the bill, and what you are trying to accomplish. I remember when your office advocated for changing the title of the Administrative Hearing Officer to Administrative Law Judges, and as you've testified, you advocated for the idea that those hearing officers should be attorneys. It strikes me as odd, that you are now saying someone who is not one, should be grandfathered in. Either the job requires an attorney, which is what your office seems to advocate and try to move in that direction very aggressively, or it is something that non-attorneys can do, and if they can under certain circumstances, why have the prohibition.

**Allen Hoberg:** This question came up in the Senate too. The term, ALJ, administrative law judges, is sort of a generic term. Yes it has the word "judge" in it, but there are many

administrative law judges across the country who are not attorneys, many hearing officers too.

However, there are not so many in central panels. In central panels, you have a broad range, we do hearings for 70 different agencies over the last many years. It requires a considerable bit of knowledge and experience. This particular non-attorney ALJ, had a wealth of experience even before that person came to this office and has been trained. Would it not be for that experience and training, that person probably would not be able to do the job. However, she does have that training and experience. The reason we put the requirement of the attorneys in, because we saw that, over the years, that there were going to be fewer and fewer people around ND, that were non-attorneys that had that kind of experience and training. It's really people coming out of the law schools, attorneys with some experience, that are capable of handling this job, because of the broad range of law and procedures that are involved. This is a rare individual who has been around a long time, who is able to handle it; it would be my opinion that other non-attorneys probably would not.

**Representative Koppelman:** It seems to me that you're seeking the designation that every employee after a certain date must be an attorney, so it precludes you from hiring someone who might come along, and have similar experience.

**Allen Hoberg:** That's the point, we have someone on board from the beginning, in 1991, and who has been serving all of this time, and after 1995, we are precluded from hiring anybody who is not an attorney.

**Representative Koppelman:** That's my point. What you are saying is that, you're singing the praises of this employee, but you're also at the same time you've asked for a preclusion against ever hiring anybody in that position who is not. It would be nice to be able to hire someone, and

if you didn't have the requirement that they be attorneys, that would not preclude you from hiring attorneys if you wanted to.

**Allen Hoberg:** I guess the answer to that is that we don't think there are very many people out there who can do the job who aren't attorneys. That's why we put the requirement in, in 1995. But we do feel that the person that's now doing the job has the experience and knowledge to be able to do the job. It's kind of a contradiction.

**Representative Kretschmar:** This just involves one individual, correct.

**Allen Hoberg:** That's correct.

**Representative Kretschmar:** Do you think this bill should have an emergency clause on it, do you anticipate any lawsuits going on where this would be a problem.

**Allen Hoberg:** We didn't ask for an emergency clause, and there are no lawsuits currently in the mill that we are aware of, the answer is no, we didn't think it was necessary.

**Chairman DeKrey:** Thank you. Further testimony in support, testimony in opposition. We will close the hearing.

(Reopened later in the same session).

**Chairman DeKrey:** What are the committee's wishes in regard to SB 2070.

**Representative Koppelman:** I don't mind the bill, I understand what he's trying to do, but it troubles me when we adopt laws to accommodate one or two people and then change the process to keep people out. I think I would remove the requirement in general, which would also solve the problem with this individual. I make a motion that we remove the requirements that these folks be attorneys.

**Representative Meyer:** Second.

**Representative Delmore:** I think there is a good reason why we want someone who is law trained, which we determined several sessions ago.

**Representative Zaiser:** I guess I am concerned about how you would establish criteria "being knowledgeable". When you have the attorney in there, that's standard. Certainly there are good people that aren't attorneys, but that would be my concern.

**Representative Kretschmar:** I am going to oppose this proposed amendment. I think it is a step backward. Clearly I think the person who has been employed since 1991 has a wealth of experience and we should not fire her, that's for sure, but I think it is a good rule that from now on, since 1995, ALJ's are licensed attorneys.

**Chairman DeKrey:** Motion failed.

**Representative Meyer:** I move a Do Pass.

**Representative Maragos:** Second.

12 YES 0 NO 2 ABSENT      DO PASS

CARRIER: Rep. Koppelman

Date: 2/14/05  
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2070

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass

Motion Made By Rep. Meyer Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	A		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	A				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
**February 14, 2005 11:32 a.m.**

**Module No: HR-29-2751**  
**Carrier: Koppelman**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2070: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS**  
**(12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2070 was placed on the**  
**Fourteenth order on the calendar.**

**2005 TESTIMONY**

SB 2070



Allen C. Hoberg  
DIRECTOR

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To: Fifty-ninth Legislative Assembly  
State of North Dakota  
Senate Judiciary Committee

From: Allen C. Hoberg, Director  
Office of Administrative Hearings

AH

Re: Senate Bill No. 2070

Date: January 5, 2005

Senate Bill 2070 is being introduced at the request of the Office of Administrative Hearings because of the unintended consequences of legislation passed in 2001, 2001 House Bill 1071.

In 1995, OAH introduced House Bill 1089 which amended N.D.C.C. § 54-57-01(3) to require that its hearing officers be titled administrative law judges (commonly called "ALJs") and to require that all ALJs employed by OAH after August 1, 1995, be attorneys.

OAH had at that time one hearing officer who was not an attorney. She was transferred to OAH from the Central Personnel Division in 1991, when OAH was established. She was grandfathered in as an ALJ to OAH when 1995 HB 1089 passed, if not in 1991, because that bill required that only ALJs employed after



August 1, 1995, be attorneys. This non-attorney ALJ has been continuously employed by OAH from July 1, 1991, to the present.

In 2001, HB 1071 was introduced to change the name of the state bar board to the board of law examiners. It was introduced at the request of the supreme court. The language "After August 1, 1995, the" was taken out of the sentence in N.D.C.C. § 54-57-01(3) that required OAH to employ only attorneys. See 2001 N.D. Sess. Laws ch. 286. This stricken language was not part of the bill as introduced by the supreme court but was taken out later as part of a form and style amendment. OAH did not testify on that bill because it appeared to OAH that the employment situation regarding the non-attorney ALJ was not changed by that legislation.

There is nothing in the legislative history of 2001 HB 1071 that indicates that a change was intended to exclude non-attorney ALJs who were employed prior to August 1, 1995, from employment by OAH.

However, in 2003, OAH, its director, and the non-attorney ALJ were sued in district court by means of a petition for a writ of mandamus, because the director did not remove the non-attorney ALJ from a case in which she was presiding, at the request of an attorney for the party in the case. Burleigh County, the other party in the case,

joined in the lawsuit with OAH. The reason given for the request to remove the ALJ was that she was not an attorney and the party argued that N.D.C.C. § 54-57-01(3) requires the director of OAH to employ only attorneys as ALJs.

The district court for Burleigh County ruled in favor of OAH, denying the petition requesting that the director remove the ALJ. The court said that the non-attorney ALJ already employed by OAH was not required by N.D.C.C. § 54-57-01(3) to be an attorney, *i.e.*, that she was qualified to conduct the hearing. The party appealed to the supreme court, but the supreme court did not reach the merits of the appeal. The supreme court held that mandamus was not available in this case and did not reach the issue decided by the district court.

Thus, the issue from that lawsuit could be raised again. Although there is a district court decision holding for OAH's interpretation, the issue could be brought up on appeal in another action. The issue is essentially this: does N.D.C.C. § 54-57-01(3) require that all ALJs currently employed by OAH be attorneys, even though OAH has a non-attorney currently employed who has been continuously employed by OAH since 1991. The effect of a "yes" answer to that question would mean that OAH would have to dismiss an ALJ who has honorably and admirably served OAH as a hearing officer and ALJ since 1991. The district court answered "no" to that question

but the issue has not been fully resolved in the courts. OAH believes that a "no" answer is correct; so did Burleigh County; and so does the Attorney General (the attorney general took a "no" position in the lawsuit).

To be safe, however, OAH is taking no chances. We introduced this bill to make certain that this situation which has been in place since 1991 remains in place and to save the state money by avoiding further litigation. We added the underscored sentence in the bill to make it clear that a non-attorney ALJ who has been grandfathered into OAH since 1995, if not in 1991, remains grandfathered into OAH as an ALJ, and continues to serve the state of North Dakota.

Further, the state has much invested in this ALJ and has seen a great return on its investment. She has received extensive training in administrative law through attendance at the National Judicial College and national conferences. She is a certified ALJ mediator and a certified administrative law judge by the National Association of Hearing Officials (NAHO). She has served on the NAHO board from 2002 to the present, and last fall she secured Bismarck-Mandan as the site for the 2006 NAHO Conference. OAH, the Department of Human Services, Human Resource Management Services, and the Department of Public Instruction have all contributed to her education and training. See attached list of courses.

There is no fiscal impact to passing this bill. There could be a substantial fiscal impact in not passing this bill, in terms of expenditure for possible future litigation, and in the unlikely but possible event of losing and having to replace a highly trained and experienced ALJ.

For your information, since August 1, 1995, OAH has hired five ALJs as employees and all of them were attorneys. OAH is now required to hire attorneys as ALJs, but we do not believe we are required or should be required to dismiss a non-attorney ALJ who has been continuously employed by OAH since 1991, and we do not believe it would be right or expedient to do so. Accordingly, we request a DO PASS on this bill to make certain that further attempts are not made through the courts that would require OAH to expend further money in litigation or to dismiss a non-attorney ALJ who was grandfathered in previously.

fz

## COURSES ATTENDED

**Important:** These charts must be completed for all courses for which you seek credit for certification. List the course under the applicable general subject matter. Please indicate under "Sponsor" if the course was on video or audio tape. List the length of the course under number of hours. For all courses except those sponsored by the National Association of Hearing officials, please attach a copy of the course agenda or outline showing subject matter, speaker, duration, and content of presentation. Do not send a copy of the course materials. Please attach additional sheets as necessary.

MANDATORY COURSES			
REQUIREMENT	COURSE TITLE	SPONSOR/ADDRESS	DATE/# HOURS

<b>Administrative Law</b> (In-depth discussion of underlying theories and concepts supporting Administrative Law Hearings) 5 Hours	Administrative Law - Professor Lee Albert	NAHO - Sante Fe, NM	11-16-1999 (3 hrs)
	Administrative Law - Professor William Anderson	NAHO - Seattle, WA	10-06-1997 (3 hrs)

<b>Conduct and Control of Administrative Hearings</b> 5 Hours	Conduct and Control of the Hearing	NAHO - Seattle, WA	10-07-1997 (3 hrs)
	Conduct and Control of the Hearing	NAHO - Rapid City, SD	10-19-1993 (1.5 hrs)
	It's Tune-up Time for Hearing Officers	LRP National Institute on Legal issues of IDEA San Francisco, CA	05-03-2003 (3.75 hrs)
	Exploring the Role of the Hearing Official (Parts 1 & 2)	NAHO - Minneapolis, MN	09-15-2003 (3 hrs)
	A Day in the Life of a Hearing Official (Parts 1 and 2)	NAHO - Ft. Worth, TX	10-19-2004 (3 hrs)
	Developing the Record	NAHO - Ft. Worth, TX	10-19-2004 (1.5 hrs)

<b>Credibility</b> 2 Hours	Credibility	NJC - Bismarck, ND	06-28-1988 (.8 hrs)
	Credibility	NAHO - Seattle, WA	10-06-1997 (1.5 hrs)
	Credibility of Witnesses	NAHO - Anchorage, AK	09-30-2002 (1.5 hrs)

## MANDATORY COURSES

REQUIREMENT	COURSE TITLE	SPONSOR/ADDRESS	DATE/# HOURS
<b>Diversity or Multiculturalism</b> 2 Hours	Do You Mean What I Thought You Said? Cultural Differences and Courtroom Behavior	NAALJ - Lexington, KY	10-21-2002 (1.5 hrs)
	Opening the Judicial Process to All - Racial Fairness for the Courts	NAALJ - Lexington, KY	10-23-2002 (1 hr)
	Justice vs. Prejudice	NAHO - Minneapolis, MN	09-17-2003 (1 hr)
<b>Due Process in Admin Hearings (discussion of due process from a legal and constitutional perspective)</b> 4 Hours	Due Process - Professor William Anderson	NAHO - Anchorage, AK	09-30-2002 (1.5 hrs)
	Due Process Today - The Role of the ALJ	NJC - Bismarck, ND	06-27-1988 (2 hrs)
	Due Process in Administrative Hearings	NAHO - Santa Fe, NM	11-14-1999 (1.5 hrs)
	Winning the Battle but Losing the War: Ensuring the Hearing Provides Due Process and Promotes Public Confidence	NAALJ - Lexington, KY	10-20-2002 (1.75 hrs)
	History of Administrative Due Process	NAHO - Minneapolis, MN	09-15-2003 (1.5 hrs)
<b>Ethics for and before the Hearing Official or ALJ</b> 4 Hours	Ethics in Administrative Hearings	NAHO - Seattle, WA	10-07-1997 (1.5 hrs)
	Ethics for and Before the Hearing Official/ALJ	NAHO - Santa Fe, NM	11-15-1999 (1.5 hrs)
	Ethical Considerations in the Administrative Hearings Process	NAHO - Norfolk, VA	10-16-2000 (1.5 hrs)
	Ethics - Professor Gregory Ogden	NAHO - Anchorage, AK	10-01-2002 (1.5 hrs)

## MANDATORY COURSES

REQUIREMENT	COURSE TITLE	SPONSOR/ADDRESS	DATE/# HOURS
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Evidence in Administrative Hearings 4 Hours	Introduction to Evidence	NJC - Bismarck, ND	06-27-1988 (1.8 hrs)
	Trends in Evidence with Some Unique Evidentiary Problems	NJC - Bismarck, ND	06-28-1988 (2.9 hrs)
	Evidentiary Developments in Administrative Law	NJC - Reno, NV	06-25-1991 (1.6 hrs)
	Unique Evidentiary Problems	NJC - Reno, NV	06-26-1991 (1.7 hrs)
	Basic Evidence	NAHO - Seattle, WA	10-18-1993 (3.0 hrs)
	Adventures in Evidence	NAHO - Seattle, WA	10-08-1997 (2 hrs)
	Basic Evidence in Administrative Hearings	NAHO - Santa Fe, NM	11-15-99 (1.5 hrs)
	Examining the Evidence	NAHO - Norfolk, VA	10-16-00 (1.5 hrs)
	Evaluating Evidence	NAHO - Minneapolis, MN	09-16-2003 (1.5 hrs)
	Scientific Evidence	NAHO - Ft. Worth, TX	10-18-2004 (1.5 hrs)

Legal Research 2 Hours	Legal Research and Writing	NAHO - Seattle, WA	10-19-1993 (2.75 hrs)
	Legal Research via Internet (Pts 1 & 2)	NAHO - Norfolk, VA	10-17-2000 (3 hrs)
	Tech Tips from the Pros - Researching Administrative Law	NAALJ - Lexington, KY	10-22-2002 (1 hr)

Decision Writing 5 Hours	Decision Writing	NJC - Bismarck, ND	06-28-1998 (1.6 hrs)
	Decision Writing	NAHO - Santa Fe, NM	11-16-1999 (1.5 hrs)
	Decision Writing - Part 1	NAHO - Norfolk, VA	10-16-2000 (1.5 hrs)

# MANDATORY COURSES

REQUIREMENT	COURSE TITLE	SPONSOR/ADDRESS	DATE/# HOURS
Decision Writing (continued)	Excellence in Decision Writing	NAALJ - Lexington, KY	10-22-2002 (2.25 hrs)
	Decision Writing - Parts 1 and 2	NAHO - Anchorage, AK	10-01-2002 (3 hrs)
	Decision Writing	NAHO - Ft. Worth, TX	10-18-2004 (1.5 hrs)



# ELECTIVE COURSES

SUBJECT	COURSE TITLE	SPONSOR/ADDRESS	DATE/# HOURS
Recent Developments in Administrative Law	Recent Decisions and New Trends in Administrative Law	NJC - Reno, NV	06-24-1991 (3.1 hrs)
Hearing Techniques	Hearing Techniques	NJC - Reno, NV	06-24-1991 (1.7 hrs)
Mediation and ADR	Mediation	NJC - Reno, NV	06-24-1991 (.6 hrs)
[No subject]	Professional Responsibility and Judicial Conduct in the Administrative Law Setting	NJC - Reno, NV	06-25-1991 (1.7 hrs)
Immunity/Liability of Hearing Officials/ALJs	Judicial Immunity	NJC - Reno, NV	06-26-1991 (.8 hrs)
Logic for Decision Making	Decision-making	NJC - Reno, NV	06-26-1991 (.9 hrs)
Logic for Decision Making	Judicial Decision-making	NAHO - Minneapolis, MN	09-16-2003 (1.5 hrs)
Review of Decisions: Judicial	Special Problems in Judicial Review of Administrative Agency Action	NJC - Reno, NV	06-27-1991 (1.7 hrs)
Review of Decisions: Judicial	Judicial Review - Sufficiency of the Evidence	NJC - Reno, NV	06-27-1991 (.8 hrs)
Prehearing Procedures	Prehearing Practice and Procedures	NJC - Reno, NV	06-26-1991 (.9 hrs)
Prehearing Procedures	Case Preparation and Management	NJC - Bismarck, ND	06-17-1988 (2.7 hrs)
Hearing Techniques	Hearing Techniques	NJC - Bismarck, ND	06-28-1988 (1.7 hrs)
Review of Decisions: Judicial	Judicial Review of Administrative Law Decisions	NJC - Bismarck, ND	06-29-1988 (1.7 hrs)
Stress Management for Hearing Officials and ALJs	Stress Management	NAHO - Anchorage, AK	10-02-2002 (1.5 hrs)

## ELECTIVE COURSES

SUBJECT	COURSE TITLE	SPONSOR/ADDRESS	DATE/# HOURS
Stress Management for Hearing Officials and ALJs	Be All You Can Be (Stress Management)	NAHO - Norfolk, VA	10-18-2000 (1.5 hrs)
Logic for Decision Making	Perspectives on Decision Making	NAHO - Santa Fe, NM	11-15-1999 (1 hr)
Stress Management for Hearing Officials and ALJs	Balancing Professionalism and Personal Lives	NAHO - Santa Fe, NM	11-15-1999 (1.5 hrs)
[No subject]	Public Confidence in the Judiciary	NAALJ - Lexington, KY	10-21-2002 (1 hr)
Recent Developments in Admin. Law	Current Developments in Administrative Law	NAHO - Seattle, WA	10-20-1993 (2 hrs)
Prehearing Procedures	Special Issues in Complex Adjudication	NAALJ - Lexington, KY	10-22-2002 (3.2 hrs)
Mediation and ADR	Comparing Methods of Dispute Resolution	NAALJ - Lexington, KY	10-21-2002 (1.5 hrs)
Dealing with Difficult People	A Judge's Role in Determining Whether Hardball is Fair Game	NAALJ - Lexington, KY	10-23-2002 (1 hr)
Mediation and ADR	Mediation for Administrative Law Judges	NAALJ, NCALJ, ABA, Maryland Assn. of Admin. Adjudicators	May 11-15, 1998 (38.5 hrs)

## SUBSTANTIVE PROGRAM AREA COURSES

SUBJECT	COURSE TITLE	SPONSOR/ADDRESS	DATE/# HOURS
Department of Human Services Hearings	Administrative Disqualification Hearings	NAHO - Norfolk, VA	10-17-2000 (1.5 hrs)
Department of Human Services Hearings	Child Support Enforcement Hearings	NAHO - Santa Fe, NM	11-17-1999 (2 hrs)
Department of Human Services Hearings	Administrative Disqualification Hearings	NAHO - Seattle, WA	10-18-1993 (3.25 hrs)
Department of Human Services Hearings	Child Welfare Hearings	NAHO - Seattle, WA	10-19-1993 (1.25 hrs)
Special Education Hearings	Due Process Hearings	LRP - 22nd National Institute on Legal Issues of Educating Individuals with Disabilities - Las Vegas, NV	05-09-2001 (1.25 hrs)
Special Education Hearings	How to Get Help from Your Hearing Officer	LRP - 24th National Institute on Legal Issues of Educating Individuals with Disabilities - San Francisco, CA	05-06-2003 (1.25 hrs)
Department of Human Services Hearings	Child Maltreatment Appeals: Child Witnesses and Identifying Abuse	NAHO - Minneapolis, MN	09-16-2003 (1.5 hrs)
Department of Human Services Hearings	Computer Forensics in Detecting Welfare Fraud	NAHO - Minneapolis, MN	09-17-2003 (1.5 hrs)
Department of Human Services Hearings	Administrative Disqualification Hearings	NAHO - Ft. Worth, TX	10-18-2004 (1.5 hrs)
Special Education Hearings	IDEA and Special Education Hearings	NAHO - Ft. Worth, TX	10-19-2004 (1.5 hrs)
Department of Human Services Hearings	Medicaid and Elder Law	NAHO - Ft. Worth, TX	10-19-2004 (1.5 hrs)

January 5, 2005

SENATE JUDICIARY COMMITTEE  
SB #2070

CHAIRMAN TRAYNOR AND COMMITTEE MEMBERS:

My name is Damian Huettl. I am an attorney from Bismarck appearing here today on my own behalf.

I oppose this bill amending subsection 3 of section 54-57-01 of the North Dakota Century Code for the following reasons:

1. The original law requiring that an administrative law judge be law trained is sound public policy considering the complexity of the legal issues before the administrative law judges, especially in the area of medical assistance in which I actively practice.
2. Although an individual may appeal an administrative decision, the record that is reviewed on appeal is the record established at the administrative level. If an administrative matter is appealed to the North Dakota Supreme Court, the Supreme Court reviews the administrative hearing record. Without the expertise of a law trained administrative law judge, the record on appeal may be unfairly prejudicial to the litigants.
3. North Dakota does not have a shortage of attorneys willing to serve as administrative law judges. Without a shortage of ready and able administrative law judges, this proposed amendment is unnecessary.
4. To the best of my recollection, this proposed amendment would only affect one individual. It is contrary to the dictates of sound public policy to alter the law for the benefit of a single individual.

I respectfully request that the Committee gives this bill a DO NOT pass recommendation. I thank you for your time and consideration. I would be glad to answer any questions that you may have.



Allen C. Hoberg  
DIRECTOR

## OFFICE OF ADMINISTRATIVE HEARINGS

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To: Fifty-ninth Legislative Assembly  
State of North Dakota  
House Judiciary Committee

From: Allen C. Hoberg, Director   
Office of Administrative Hearings

Re: Senate Bill No. 2070

Date: February 14, 2005

Senate Bill 2070 is being introduced at the request of the Office of Administrative Hearings because of the unintended consequences of legislation passed in 2001, 2001 House Bill 1071.

In 1995, OAH introduced House Bill 1089 which amended N.D.C.C. § 54-57-01(3) to require that its hearing officers be titled administrative law judges (commonly called "ALJs") and to require that all ALJs employed by OAH after August 1, 1995, be attorneys.

OAH had at that time one hearing officer who was not an attorney. She was transferred to OAH from the Central Personnel Division in 1991, when OAH was established. She was grandfathered in as an ALJ to OAH when 1995 HB 1089 passed, if not in 1991, because that bill required that only ALJs employed after

August 1, 1995, be attorneys. This non-attorney ALJ has been continuously employed by OAH from July 1, 1991, to the present.

In 2001, HB 1071 was introduced to change the name of the state bar board to the board of law examiners. It was introduced at the request of the supreme court. The language "After August 1, 1995, the" was taken out of the sentence in N.D.C.C. § 54-57-01(3) that required OAH to employ only attorneys. See 2001 N.D. Sess. Laws ch. 286. This stricken language was not part of the bill as introduced by the supreme court but was taken out later as part of a form and style amendment. OAH did not testify on that bill because it appeared to OAH that the employment situation regarding the non-attorney ALJ was not changed by that legislation.

There is nothing in the legislative history of 2001 HB 1071 that indicates that a change was intended to exclude non-attorney ALJs who were employed prior to August 1, 1995, from employment by OAH.

However, in 2003, OAH, its director, and the non-attorney ALJ were sued in district court by means of a petition for a writ of mandamus, because the director did not remove the non-attorney ALJ from a case in which she was presiding, at the request of an attorney for the party in the case. Burleigh County, the other party in the case,

joined in the lawsuit with OAH. The reason given for the request to remove the ALJ was that she was not an attorney and the party argued that N.D.C.C. § 54-57-01(3) now requires the director of OAH to employ only attorneys as ALJs.

The district court for Burleigh County ruled in favor of OAH, denying the petition requesting that the director remove the ALJ. The court said that the non-attorney ALJ already employed by OAH was not required by N.D.C.C. § 54-57-01(3) to be an attorney, *i.e.*, that she was qualified to conduct the hearing. The party appealed to the supreme court, but the supreme court did not reach the merits of the appeal. The supreme court held that mandamus was not available in this case and did not reach the issue decided by the district court.

Thus, the issue from that lawsuit could be raised again. Although there is a district court decision holding for OAH's interpretation, the issue could be brought up on appeal in another action. The issue is essentially this: does N.D.C.C. § 54-57-01(3) require that all ALJs currently employed by OAH be attorneys, even though OAH has a non-attorney currently employed who has been continuously employed by OAH since 1991. The effect of a "yes" answer to that question would mean that OAH would have to dismiss an ALJ who has honorably and admirably served OAH as a hearing officer and ALJ since 1991. The district court answered "no" to that question

but the issue has not been fully resolved in the courts. OAH believes that a "no" answer is correct; so did Burleigh County; and so does the Attorney General (the attorney general took a "no" position in the lawsuit).

To be safe, however, OAH is taking no chances. We introduced this bill to make certain that this situation which has been in place since 1991 remains in place and to save the state money by avoiding further litigation. We added the underscored sentence in the bill to make it clear that a non-attorney ALJ who has been grandfathered into OAH since 1995, if not in 1991, remains grandfathered into OAH as an ALJ, and continues to serve the state of North Dakota.

Further, the state has much invested in this ALJ and has seen a great return on its investment. She has received extensive training in administrative law through attendance at the National Judicial College and national conferences. She is a certified ALJ mediator and a certified administrative law judge by the National Association of Hearing Officials (NAHO). She has served on the NAHO board from 2002 to the present, and last fall she secured Bismarck-Mandan as the site for the 2006 NAHO Conference. OAH, the Department of Human Services, Human Resource Management Services, and the Department of Public Instruction have all contributed to her education and training. See attached list of courses.



There is no fiscal impact to passing this bill. There could be a substantial fiscal impact in not passing this bill, in terms of expenditure for possible future litigation, and in the unlikely but possible event of losing and having to replace a highly trained and experienced ALJ.

OAH would not be here before you now but for the unintended consequences resulting from the passage of 2001 House Bill 1071. However, we believe we should be here to allow you to correct that result.

For your information, since August 1, 1995, OAH has hired five ALJs as employees and all of them were attorneys. OAH is now required to hire attorneys as ALJs, but we do not believe we are required or should be required to dismiss a non-attorney ALJ who has been continuously employed by OAH since 1991, and we do not believe it would be right or expedient to do so. Accordingly, we request a DO PASS on this bill to make certain that further attempts are not made through the courts that would require OAH to expend further money in litigation or to dismiss a non-attorney ALJ who was grandfathered in previously.