

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
May 19, 2015 Meeting Minutes**

MEMBERS PRESENT

Jane Ann Stautz, Chair
R.T. Green
Jennifer Jansen

NATURAL RESOURCES COMMISSION STAFF PRESENT

Sandra Jensen
Dawn Wilson
Jennifer Kane

PARTICIPANTS AND GUESTS PRESENT

Joy Grow

Call to order

The Chair, Jane Ann Stautz, called the meeting to order at 9:02 a.m., EDT, on May 19, 2015 in the Lawrence Room of the Fort Harrison State Park, The Garrison, 6002 North Post Road, Indianapolis, Indiana. With the presence of all three members, the Chair observed a quorum.

The Chair welcomed Dawn Wilson, the new administrative law judge with the Commission's Division of Hearings, and stated, "We look forward to working together."

Consideration and approval of minutes for meeting held on August 28, 2014

R. T. Green moved to approve, as presented, the minutes of the meeting held on August 28, 2014. Jennifer Jansen seconded the motion. Upon a voice vote, the motion carried.

Consideration of objections and with respect to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Holland v. Phillips and Meiners, and DNR (Agency Respondent)*, Administrative Cause No. 14-056W

This item was withdrawn.

Information Item: Representation of corporate parties in AOPA proceedings

Sandra Jensen, the Commission's Chief Administrative Law Judge, presented this item. She explained that the Indiana Chapter of the National Association of Administrative Law Judges (INAALJ) provides a "good pool of [Administrative Law Judges] from a variety of agencies so now we are in a position where we share." Jensen said the Alcohol and Tobacco Commission (ATC) was recently confronted with the issue whether a limited liability corporation is required to be represented by counsel, which began a discussion amongst INAALJ members. She said the Civil Rights Commission has for some time required corporations to be represented by counsel and now the ATC has adopted a similar policy.

Jensen said that she, Wilson and the environmental law judges with the Office of Environmental Adjudication (OEA) have concerns that requiring small corporate entities to be represented by counsel in cases involving minimal civil penalties may effectively deprive them of an opportunity for review. Jensen said the Commission's ALJs have cases that involve oil and gas operators and small nursery operators who may have had a small civil penalty or a notice of violation on an oil and gas well. "At the same time, though, I do not want to put the decisions in jeopardy... The potential is there that if anything were to come of it I think probably... an outcome may be a remand back. I don't think it would be a dismissal, but I don't want to put us in the position of doing the same thing twice. That's really not efficient."

Jensen said the consensus of INAALJ is to seek an advisory opinion from the Office of the Attorney General. She said the courts have not provided a clear-cut answer regarding whether the practice before an administrative body is the practice of law. "We have a hint at that, because of what happened a few years ago with the temporary admissions rules... Yes, they do consider it to be the practice of law." She noted that ALJ Lucas found in *Edwards v. Pressler*, 12 CADDNAR 325, that Edwards could not be represented by a non-attorney under the authority of a General Durable Power of Attorney. Jensen said court decisions are leading to the idea that corporations, as artificial persons, should be represented by counsel. She also noted that some INAALJ members would like to see included in an advisory opinion as to whether there is some way to analogize with the Small Claims Rule 3, which states that corporate entities may be represented by a designated full-time employee of the corporation if the claim does not exceed \$1,500.

The Chair asked whether INAALJ has already submitted a request for an advisory opinion.

Jensen said that INAALJ has not yet submitted its request. Jensen noted that she serves as the president of INAALJ, but if the AOPA Committee does not wish to pursue an advisory opinion, she would pass the responsibility to another member.

R. T. Green, having served as a judge for a Small Claims, said that Rule 3 was adopted due to small Subchapter S corporations and LLCs bringing cases before the court in which hiring an attorney would be too expensive relative to the claim amount. Green said he was not aware of the reasoning behind the \$1,500 limit, but "what it did encourage on some of those small collection cases you'd end up selling your debt to a collection agency and the collection agency" would appear before the small claims court. He said he does not know whether the origin of the

claim limit was a Supreme Court rule or whether there was a statutory change in the jurisdiction of the Small Claims. “It would be hard for us to say that this is not the practice of law...At the same time try to make access to the little guy, or at least something that we don’t act as an impediment to say that it is the practice of law. I would encourage that.”

Jennifer Jansen agreed, and stated, “It sounds to me like we need to have representation by an attorney,” but noted that she had not considered the impact of the representation requirement on small corporations. “My own bias and my own experience have been, when in doubt it is always a good idea to ask the Attorney General for an opinion.”

The Chair agreed with Green and Jansen. “I’m definitely in support of and it would be in the best interest to craft [the request] in such a way that answers the questions that we need to continue to do business appropriately here.”

Jensen noted that there are probably other agencies besides the NRC and the OEA that may benefit from an Attorney General’s opinion. She noted that the INAALJ representative from Family Social Services Agency raised the issued relative to small corporate vendors.

The Chair said that subsequent to an Attorney General’s opinion, the Commission may need to consider adoption of a guidance document or rule, or whether there would need to be a statutory change.

Jensen noted that the Administrative Order and Procedures Act (AOPA) addresses representation, but does not make it clear that the representation must be by an attorney. She said the Supreme Court’s rule change regarding temporary admission causes the AOPA “not to be completely at odds, but at least not completely in sync.”

The Chair asked whether there would need to be some type of waiver if the claim is below a certain amount. “There is a lot of this to think through, but I do want to be respectful of the cost of hiring attorneys for some of these that are very small claim type situations and not making a burden.”

Jensen explained that the Small Claims Rule 3 requires a designation from the corporation for an employee of that corporation to appear and represent the corporation, but there is still the imposition of a claim amount limit. Jensen said that she cannot imagine a situation regarding any disciplinary action imposed on an ALJ for allowing someone to practice law without a license, but it should be considered.

The Chair noted that many times citizens come before Commission without attorney representation.

Jensen said the request for an advisory opinion would essentially provide the same background as contained in the Committee’s agenda packet and would also include a list of questions. Jensen indicated that she would seek the Committee’s input regarding the list of questions.

The Chair thanked Jensen for her presentation and indicated the AOPA Committee would be happy to review the proposed questions to be included in the request for an advisory opinion. She asked that the AOPA Committee be updated as the request moves forward.

Jensen noted that the AOPA Committee at its August 2014 meeting moved to establish a workgroup to study Information Bulletin #1 (3rd Amendment) with the respect to the consideration of agreed orders. The August 2014 minutes reflect that the constituency of the workgroup would be considered by the Committee at a future meeting.

The Chair recommended that at least one member of the AOPA Committee and one member of the Advisory Council be included in the workgroup. The Chair inquired of any interest by Jansen or Green to serve on the workgroup.

Jansen said she would be interested in serving on the workgroup.

The Chair thanked Jansen for her willingness to serve on the workgroup. The Chair indicated that she would review or coordinate as needed. Chair Stautz said the Commission Chair, Bryan Poynter may wish to provide input, but at the very least may wish to review any amendments.

Jensen noted that the Commission's Division of Hearings no longer provides transcription service. She said Dawn Wilson has assisted in formulating a process in which to review transcriptions of administrative hearings by outside reporting services. Jensen said there may be a future change to Information Bulletin #1 (3rd Amendment) to amend the section regarding transcripts to include the review process that would be followed in order to certify the accuracy of the transcription. She said the proposed amendments would be placed on a future meeting agenda of this Committee.

Adjournment

Jennifer Jansen moved to adjourn the meeting. R. T. Green seconded the motion. The motion was approved and the meeting adjourned at approximately 9:30 a.m., EDT.