

AN OVERVIEW OF ADMINISTRATIVE HEARING PROCEDURE

Prepared by the Administrative Agency Committee of the California Access to Justice Commission

In California, when an individual or business disagrees with a government agency's action, that action can be challenged. This is done by asking the agency for an administrative hearing. Administrative law hearings are less formal than court-room trials. Administrative law judges (ALJs) run the hearings. They are neutral judicial officers who conduct hearings and settlement conferences. If you do not win, you can ask the superior court to review the hearing decision. This is called a writ of mandate. You may contact the agency that you are having a problem with and ask how to review the agency's action. A list of agencies and their web sites appear at the end of this discussion.

Some California administrative agencies, such as the Department of Motor Vehicles, and the Department of Social Services, run their own hearings, and they have their own procedures. Some agencies, however, have independent appeals boards. For example, the California Unemployment Insurance Appeals Board (CUIAB) is independent from the Employment Development Department (EDD), the agency that decides whether you should receive unemployment or disability benefits, or whether you should be required to pay state taxes. CUIAB ALJs do not work for the EDD. They do not have to follow technical rules of evidence and procedure, and they are required to conduct the hearings to make sure that the substantial rights of the parties are protected Cal. Unemp. Ins. Code section §1952. The CUIAB ALJs have a duty to develop the record (which means to find out what the facts are) through evidence, which consists of your testimony, witnesses' testimony, and documents (paper, and audio or video recordings). CUIAB ALJs also will ask questions of you and your witnesses and help you ask questions of witnesses. You may have anyone, even someone who is not a lawyer, represent you at the hearing.

CUIAB's web site has a video of a mock hearing that shows how that agency conducts its hearings. <http://www.cuiab.ca.gov/index.shtm>

The local offices also have an ALJ "on duty" to answer your questions about evidence and procedures. If you don't agree with the ALJ's decision, you may appeal it to the CUIAB Appeal Board with a simple letter at no cost to you, but you have to mail it or deliver it in person to the local CUIAB office no later than 20 days from the mailing date stamped at the bottom of the decision. If you lose the appeal and the Appeal Board sides with the ALJ, you must file a "writ of mandate" in the Superior Court within six months of the Appeal Board's decision.

Other state and local agencies contract with and pay the Office of Administrative Hearings (OAH) to handle their appeals. OAH is an agency within the Department of General Services that runs administrative hearings for over 1,400

state and local government agencies. The agency may adopt the ALJ's decision or issue its own new decision.

OAH is divided into two divisions: the General Jurisdiction Division and the Special Education Division. OAH also has alternative dispute resolution and mediation services, which work to find a settlement agreeable to both sides. [Click here](http://www.oah.dgs.ca.gov/About/default.htm) <<http://www.oah.dgs.ca.gov/About/default.htm>> to find out more about the OAH. This web site also has a link to the Administrative Procedure Act (the Government Code) that provides rules for certain hearings.

Certain agencies are required by statute to provide language assistance in hearings. These include CUIAB, State Board of Barbering and Cosmetology, State Department of Developmental Services, Franchise Tax Board, State Department of Health Services, Department of Housing and Community Development, Department of Industrial Relations, State Department of Mental Health, Department of Motor Vehicles, Public Utilities Commission, Office of Statewide Health Planning and Development, State Department of Social Services, Workers' Compensation Appeals Board, Department of Insurance, State Personnel Board and Department of the Youth Authority. Be sure to let the agency know if you need an interpreter.

Because of the high number of agencies who contract with OAH, a detailed discussion of OAH's procedures follows. The discussion of how to conduct a hearing, however, should be helpful to you in any agency hearing.

OAH PROCEDURES.

1. OAH Pre-Hearing Procedures.

OAH handles hearings that are under the state Administrative Procedure Act, and hearings that are under another statute setting out the minimum requirements for due process. OAH handles appeals for child support, Regional Center Services and Special Education, as well as appeals involving licenses and disciplinary actions.

At a minimum, an agency must give a person notice and an opportunity to be heard, including the opportunity to present evidence and rebut evidence. Cal. Gov't Code §114251.10(a)(1). The agency must also "make available" a copy of the governing procedures available to the person against whom the agency action is directed, and state whether the state APA applies (Cal. Gov't Code §115000). Agencies may include provisions more protective of the rights of the person to whom the agency action is directed. The presiding officer's decision must be in writing, must be based on the record, and include a statement of the factual and legal basis of the decision. Cal. Gov't Code § (a)(6). The presiding officer may be subject to disqualification for bias prejudice or interest, and is prohibited from ex parte communication. Child support hearings are often done

by telephone, and you have to ask for an in-person hearing if you want one. You may have to wait longer for in-person hearing to be scheduled. Special education cases involve experts and are usually conducted in person. Check with the local office issuing the hearing notice as to the procedures followed for the hearing.

2. OAH Hearings under the State APA

If the state wishes to take away your license, such as a contractor's license, day care license, or barber license, or the agency wants to discipline you for some you did wrong while operating your licensed business, the agency will send an accusation or a statement of issues, depending on the type of case. You are called the "Respondent."

The agency is required to provide certain information to you as the respondent. If the hearing is to determine whether your license or other right or privilege should be revoked, the "accusation" must list the rules that you are supposed to have violated, and state how you violated those rules. If the hearing is one to determine whether you should get a license or other right or privilege, the agency must give you a "statement of issues" that lists the rules you should have complied with in order to obtain the license, right or privilege.

You must ask for a hearing in writing within fifteen days of the mailing date of the accusation or statement of issues. This is called a "notice of defense." You may be represented by a lawyer at your own expense, but not at public expense. You may also represent yourself. You may bring a friend or other person to assist you at the hearing. An interpreter will be provided at the hearing without charge to you.

Witnesses and Evidence:

You also have the right to get the names and addresses of witnesses that will testify at the hearing if you have a licensing or other type of hearing if the state administrative procedure act applies to your case (which it does if it's a licensing or discipline case). You also get to review and to copy the agency's evidence. The agency also has to give you a copy of the discovery rules so you can get evidence you need for your case. The agency must make a copy of the governing procedures (the rules that say how the hearing will be held) "available", but it is not required to affirmatively offer or provide it. That means you may have to look it up on the web site or go to the local office to read a copy.

Within 30 days, both you and the agency are entitled to the names and addresses of all known witnesses, including witnesses the other side does not intend to call at the hearing. You may also ask to see reports made by or on behalf of the agency, any statements made by any party relating to the subject matter of the hearing, and any witness statements. If the agency refuses to give

you what you ask for, or you refuse to give the agency what it asks from you, you or the agency may ask the ALJ to “compel discovery of the information”, which means the ALJ makes either you or the agency give the information. This is called a motion for discovery. The motion must describe the agency’s refusal to agree with your request for discovery, describe the evidence you are asking for, and the reason why you need it. You must also include how you tried to settle informally (by calling or writing letters), and you must say why the agency still refuses to agree to give you the information, which is called “discovery.” The ALJ must hold a hearing on your discovery motion within 15 days, although the ALJ may postpone the hearing for good cause.

Either the agency or you may file pre-hearing motions. These motions may try to keep out certain evidence or limit what a witness can say at the hearing. The motion should be submitted 15 days before the hearing. Any response to the agency’s motion must be filed at least 3 days before the hearing date of the motion. If you file the motion, the motion must state, in plain language, the relief you are asking for (which means what you want the ALJ to do or what you want the agency to do), and the law and facts that show you should win the motion. The ALJ may decide any motion with or without oral argument. The ALJ also may decide if the oral argument should be recorded, but the decision, which is called a “ruling” on the pre-hearing motion, must be made by written order of the ALJ.

Formatting:

All motions or other papers must be filed with a title page. The title page must include the name, address, and telephone number of the person filing the paper and it must have a caption as well as the agency and OAH case numbers. The title page must include a brief statement describing the paper filed, and the dates of the hearing and any pre-hearing or settlement conferences. Papers must be filed on 8 1/2" x 11 stock paper of customary weight and quality, with two normal-sized holes punched at the top (centered 2 1/2 inches apart, and 5/8 inch from the top of the paper). All papers must be typed.

Subpoenas of witnesses and for production of documents:

OAH may issue subpoenas to make witnesses appear or make someone bring a document, if it’s set for a reasonable time and place. If you subpoena documents from the agency, the agency may comply by making the subpoenaed documents reasonably available for your review, which means you may have to go to the agency to read the document. If you subpoena a witness, you must pay all witness and mileage fees, and serve the subpoena on the witness.

Pre-Hearing Conference:

You or the agency may request a pre-hearing conference, either in person or by telephone or videoconference, or the ALJ may decide to set a pre-trial conference even if the parties do not ask for it. At the pre-hearing conference, the ALJ may try to settle the case or send the case for alternative dispute resolution. There also may be discussion of the issues and what evidence the parties want the ALJ to see at the hearing. If a pre-hearing conference is scheduled, then 3 days before the date of the conference, both you and the agency must give each other a statement that includes a list of witnesses, experts, and exhibits you and the agency will present at the hearing. If you and the agency agree, the pre-hearing conference may be an informal hearing or alternative dispute resolution, or you and the agency may agree to have an informal hearing or alternative dispute resolution at a later date.

Postponements:

The hearing may be postponed (continued) for good cause by filing a written motion within 10 working days after you discover the reason why you cannot attend the hearing on a particular date. You must first talk to the agency representative to make sure you know what dates the representative is not available, and you must let the ALJ know when the agency representative is not available. The motion for postponement must be in writing and served on the agency, unless the ALJ agrees to waive these requirements. The motion must include the following:

- all facts that show you have good cause to continue the hearing;
- the case name and number;
- the date, time and place of the hearing;
- the address and daytime telephone number of the party who wants the continuance;
- the name, address and telephone number of all other parties;
- a list of all previous motions to continue the hearing and whether or not the ALJ continued the hearing;
- whether or not any party opposes the motion;
- any future dates when any party is unavailable for a hearing over the next six months;
- any preferred future hearing dates of the other party; and
- and, if a hearing has to be held within a certain time, the reference to any legal or other requirement to set the hearing within that certain period of time, and whether or not the

parties have agreed that the required time should not apply, which is called a waiver of the required time.

You may ask for a written decision on a motion for a postponement. Within 10 working days of denial of a postponement, you may ask a judge in Superior Court to review the denial. You must give the agency notice of this request for review by giving them a copy of the request.

Time and Place of Hearing:

The agency decides on the time and place of the hearing in consultation with OAH. Hearings are typically held at the OAH office nearest either the place of the transaction or your residence. If the OAH hearing facility is far from your residence or where the transaction occurred, or the parties agree, the hearing may be held anywhere in the state. If you want to change the place of the hearing, you must ask for it within 10 days of service of notice of the hearing. If you want to appear by telephone instead of appearing in person, or if a telephone hearing is scheduled and you want to appear in person, make that request to the agency and the OAH within 10 days of the mailing date of the hearing notice. You must be given at least 10 days notice of any hearing date.

Name of ALJ:

If you ask, OAH must disclose the name of the ALJ assigned to hear your case so that you may decide if you want to disqualify the ALJ for bias. You must describe why you believe the ALJ is biased and therefore subject to disqualification.

2. OAH Hearing Procedures.

A. Failure to Appear.

If either you or the agency fails to file a defense or to appear at the hearing, OAH may take evidence and decide the case without you or the agency, relying on any express admissions you made and any other evidence presented by the agency. If you want the agency to grant you a license or take some other action, and you do not appear at the hearing, the agency may proceed without taking evidence because you have “defaulted” by not appearing. Even if you do not appear or file a notice of defense, the agency and the ALJ have discretion to schedule a hearing. Within seven days of service of the default decision, you may ask the agency or the ALJ to have the decision vacated, which means the decision would have no effect and you would start over with a new hearing. You must show a good reason, which is “good cause.” If you did not get the notice of the hearing or have some other good reason for not appearing at the hearing, the motion to vacate the decision generally will be granted.

B. The Hearing.

Hearings are public, but the ALJ may close all or part of the hearing from the public, seal the record, and make other protective orders if there is a good reason. A protective order may be made to satisfy federal or state law related to privilege or confidentiality; to make sure that there is a fair trial; or to protect a minor witness or a witness with a developmental disability. An ALJ may also agree to a request from a party or a third party to film or otherwise record all or part of a hearing, although the ALJ must consider the effect this will have on witnesses and the hearing process. In all cases, the hearing will be recorded by the ALJ by audio or video tape.

The ALJ will decide a request for a continuance in the same way the ALJ decides the motion for postponement, which is described above.

During the hearing, both you and the agency have the right to have witnesses testify and to ask your witnesses questions. You and the agency also may introduce exhibits and cross-examine the other side's witnesses. You also may have your witnesses testify again after you ask cross-examination questions of the agency witness to show that the agency's witness facts are incorrect or untrue. This is called rebuttal evidence. All testimony during a hearing must be sworn, and any relevant evidence will be admitted by the ALJ if it is the sort of evidence on which "responsible persons are accustomed to rely in the conduct of serious affairs," regardless of formal rules of evidence. Hearsay evidence, which is evidence that was taken outside the hearing room, may be used to support other evidence, but hearsay evidence alone cannot support a finding of fact under the California Administrative Procedures Act. "Relevant evidence" means evidence that proves your case.

Ex parte communications – communications made to the ALJ outside of the hearing and not in the presence of the agency - regarding any substantive issue or any contested procedural issue - are prohibited. If the ALJ receives an improper communication, the ALJ must put the communication on the record and notify the parties. Any party must be allowed to comment on the communication upon request, and the ALJ has discretion to admit evidence regarding the communication, even if the hearing has already concluded. An improper *ex parte* communication may be grounds for disqualification of the ALJ.

Upon notice to all parties, the agency may file an amended or supplemental accusation any time before the case is submitted for decision. If the amended or supplemental accusation presents new charges, the agency must afford the respondent a reasonable opportunity to prepare a defense, but the respondent is only entitled to file a further pleading at the discretion of the agency. If the amended accusation is filed after the case is submitted for decision, you, the

respondent, must be given an opportunity to show how this prejudices you. The case must be reopened if you show you are prejudiced.

B1. How to conduct Hearing.

Prepare your case before the hearing. People's memories fade fast, a witness may move, and documents are thrown away. As soon as possible after you file an appeal or request a hearing, interview witnesses, review the agency's files and records, and begin to get the evidence necessary for you to win at the hearing. Start by examining the agency case file. Check all agency documents. This will give you an idea of what you will need to show the agency's facts and conclusions are incorrect or correct. Study the accusation, statement of issues or other agency determination to make sure you are aware of all the issues. You may only need your testimony, one witness or one document, or you may need more.

Analyze the case. A common mistake is preparing only to attack your opponent. Concentrate on the legal and factual issues to show you should win.

Take notice of the hearing. If you cannot appear in person or need a continuance, make a timely motion to continue and give all the good reasons you have. If the time and date is ok, make sure you write down the location of the hearing so you arrive on time. You will want to arrive early to look at the file if you haven't had a chance to do so before the hearing.

Subpoena witnesses whose attendance you cannot control.

Due process of law requires only that you be given one reasonable opportunity to present your evidence. The fact that you believed the missing witness would appear voluntarily does not mean you get a second chance or even a continuance. Make sure you leave time for service of the subpoena. Witnesses are entitled to reasonable advance notice that their attendance is required. If your witness is served at the last minute, you run the risk that you won't be able to enforce the subpoena.

Do not subpoena witnesses who are against you. If you know a witness is not helpful to your case, do not subpoena that witness. You have no obligation to produce evidence at the hearing that hurts your case. There is always the chance that the other side won't produce the witness.

Discuss the witness' testimony before the hearing, but do not coach or attempt to get your witness to give false testimony. You may interview and review a witness' testimony before the hearing. Witnesses often innocently create the wrong impression or, fail to understand the issues on appeal and talk about things that are not about the case. It is also possible after discussing the witness' testimony that you'll decide you don't want the witness to testify, and

that decision is better made before the hearing than in the middle of his or her testimony.

When in doubt, present testimony, especially the eye-witness. While statements under oath (declarations) are evidence, and they may be appropriate sometimes, the best evidence is live testimony, especially where the dispute is over what was said or what was done. Live testimony often is viewed as better evidence than written statements because a document cannot be cross examined and the author cannot be observed. Remember, the best form of evidence to an event is the testimony of an eye-witness.

Present the key document. If there is a key document, and you do not have it, get a subpoena for it.

Summarize lengthy written material. You can overdo the submission of documents. You the right to introduce the documents you want, but if you have stacks of documents, it might be too much. It's a good idea to have an index or a simple chart or written summary that states the key information. ALJs review all evidence carefully, but technical records can be confusing, especially if they contain abbreviations or ambiguous symbols. The other side has the right to challenge your summary, so make sure you have all the documents that you used to make the summary.

Avoid leading questions when you question your own witness. If your series of questions all call for a "yes" or "no" answer, then you're probably leading the witness' testimony, and the other side will object. When it's necessary for you to question your own witness, use short questions that can be answered by stating a fact, rather than yes or no. Your questions should ask for one key fact at a time. It is also best to ask a series of short questions leading up to the crucial point, and when you reach that point, simply ask "what happened next?" Who, what, where, when and why will keep you focused.

Do not attempt to get your witness to change his or her testimony. Unless the witness made an obvious misstatement that can be easily fixed, don't try to get the witness to change his or her testimony. If the witness testified to something you know to be untrue, you may impeach your own witness. Cal. Code of Evidence section 785. This means you offer evidence to show that the witness' testimony was incorrect.

Explain technical terms, slang, and any strange custom of the trade. Clearly define and explain any special and customs of your business or trade, if necessary.

On cross-examination , do not ask the witness to restate testimony. You do not want to give the witness a second opportunity to state evidence against you. If you don't know what to ask, don't ask any questions. You do not tell your

story through cross-examination and you may not argue with the witness' answer. You are stuck with the witness' answer. If this witness can establish a fact helpful to you, frame the question so that you ask it in a way the witness has to answer either yes or no answer. If the witness does give an answer that's helpful, resist the temptation to rub it in. The old adage, "when you strike oil, stop drilling" applies here.

Keep in mind the issues. Resist the temptation to fight every point that the other side makes and keep your eye on the ball; the ball is the issue (or issues) and facts that help your case. If the witness' testimony did not hurt you, there's little need for cross-examination.

Rebut the evidence of the other side. Take notes during the hearing and "rebut" the other side's evidence by having your witnesses or documents show facts that support you and/or show the other side's facts are not correct or untrue. **Source: CUIAB's 27 Ways to Handle An Appeal Hearing**

ADMINISTRATIVE AGENCIES

California Department of Child Support Services
<http://www.childsup.cahwnet.gov/>

California Department of Developmental Services <http://www.dds.cahwnet.gov/>
(California Office of Administrative Hearings determines disputes over eligibility for early start program for infants and toddlers with special needs, and Lanterman Act services, as well as audit appeals, residential care appeals and provider employee exclusions)

California Department of Education, Child development Division
<http://www.cde.ca.gov/sp/cd/>

California Department of Fair Employment and Housing
<http://www.dfeh.ca.gov/DFEH/default/>

California Department of Health Care Services and the Department of Public Health <http://www.dhs.ca.gov/> Medi-Cal provider hearings and nursing home eviction hearings

California Department of Housing and Community Development
<http://www.hcd.ca.gov/>

California Department of Mental Health <http://www.dmh.cahwnet.gov/>

California Department of Motor Vehicles <http://www.dmv.ca.gov/>

California Department of Public Social Services – Los Angeles County
<http://www.ladpss.org/>

California Department of Social Services
<http://www.dss.cahwnet.gov/cdssweb/default.htm>

California Department of Vocational Rehabilitation
<http://www.rehab.cahwnet.gov/>

California Unemployment Insurance Appeals Board
<http://www.cuiab.ca.gov/index.shtm> (includes a link to the Administrative Procedure Act, California regulations and all agency precedent decisions; video of hearing procedure)

Division of Labor Standards Enforcement <http://www.dir.ca.gov/DLSE/>

Division of Occupational Safety and Health (DOSH, aka Cal/OSHA) Agency conducts investigations rather than hearings <http://www.dir.ca.gov/dosh/>

Employment Development Department <http://www.edd.ca.gov/>;

Equal Opportunity Commission <http://www.dfeh.ca.gov/DFEH/default/>

Local center-based programs & Alternative Payment Programs – contract with CDD to administer subsidies <http://www.cappaonline.com/>

Public Utilities Commission <http://www.cpuc.ca.gov/puc/>

Social Security Administration (federal SSA) <http://www.ssa.gov/>

State Board of Control (victim/witness benefits)
<http://www.boc.ca.gov/>

State Personnel Board <http://www.spb.ca.gov/index.htm?e=1>

Workers Compensation Appeals Board <http://www.dir.ca.gov/DWC/>

California Department of Social Services hearing request form (NA Back 9)
<http://www.cdss.ca.gov/cdssweb/entres/forms/English/NABACK9.PDF>

Child Support Request for Complaint Resolution
<http://www.childsup.ca.gov/Portals/0/resources/docs/forms/LCR001.pdf>

Child Support Hearing Request Form
<http://www.childsup.ca.gov/Portals/0/resources/docs/forms/SH001.pdf>

Unemployment Insurance appeal form --
http://www.edd.ca.gov/pdf_pub_ctr/de1000m.pdf

Unemployment Insurance Request for Appeals Board review
http://www.cuiab.ca.gov/documents/DE_1000BA.pdf

Workers Compensation application form
<http://www.dir.ca.gov/DWC/iwguides/IWGuide01.pdf>

Workers Compensation appeal form
<http://www.dir.ca.gov/dwc/FORMS/EAMS%20Forms/ADJ/DWC1.pdf>

Wage claim form
<http://www.dir.ca.gov/dlse/Form1.pdf>

Labor Commissioner retaliation complaint form
<http://www.dir.ca.gov/dlse/DLSEForm205.pdf>

Social Security Request for Reconsideration
<http://www.ssa.gov/online/ssa-561.pdf>

Social Security Request for Waiver of Overpayment
<http://www.ssa.gov/online/ssa-632.pdf>

Social Security Request for Administrative Law Judge Hearing
<http://www.ssa.gov/online/ha-501.pdf>

Social Security Request for Appeals Counsel Review
<http://www.ssa.gov/online/ha-520.pdf>