



# NAHO NEWS

*...benefitting hearing officials  
and the individuals they serve...*

NATIONAL ASSOCIATION OF HEARING OFFICIALS

JUNE 2021

## ELECTION TIME: NAHO NEEDS YOU!

Jan Deshais (CT)

**N**AHO conducts its biennial election this year for the offices of President, Vice-President, Secretary and Treasurer and for six Regional Representatives to serve two-year terms from *January 1, 2022 to December 31, 2023*. Elections will be held this summer and fall, and results will be announced at the annual membership meeting in Philadelphia this fall.

Look for an announcement soon about nominations for officers and regional representatives. See the NAHO Bylaws, [www.naho.org](http://www.naho.org), for more information about the duties of officers and regional representatives.

Please consider serving on the Board or nominating someone you believe would be a great candidate - including yourself! NAHO is as strong as its Board members - please consider serving! 🗳️



### Save the Date!

### 2021 NAHO ANNUAL PROFESSIONAL DEVELOPMENT CONFERENCE

Plan to attend the 2021 Conference in **PHILADELPHIA**  
**October 31 - November 3, 2021**

Registration dates and more details to be announced soon,  
also see [www.naho.org](http://www.naho.org)

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# 2021 MID-YEAR VIRTUAL PROFESSIONAL DEVELOPMENT CONFERENCE

Colleen Ulrich (GA)

**N**AHO continued its mission to provide quality training - even during these crazy times - by holding a virtual Mid-Year Conference on April 21-22, 2021. 134 members registered for the Conference, which offered six classes over these two days and provided more than six hours of possible CLEs. 123 members were able to attend the Conference, a number that rivals many in-person NAHO annual conferences. Of course, we missed seeing everyone in person and enjoying live interactions, but this will not be the case at our in-person Annual Conference this fall in Philadelphia!

The conference included a virtual hearings overview from Toni Boone, who provided the latest information and techniques for adapting to this new way of providing hearings. Attendees were also provided an overview of due process considerations for virtual hearings by Mick Gillette.

As described by the instructors themselves the Conference included the following classes.

## **Bench Skills for Adjudicators**

*Mary Long (PA)*

Good bench skills are essential to conducting a fair hearing. At the inaugural Mid-Year Professional Development Conference, "Bench Skills for Adjudicators" provided a road map for developing best practices to ensure that your hearings are fair and that you create a full and complete record for your decisions. Below is a brief summary of the high points of the class. A written primer will also be available to NAHO members on the NAHO website, along with other written materials from the conference.

### ***Bench skills begin at your desk:***

#### ***Reviewing the file.***

It is very difficult to conduct a fair hearing if you have not prepared ahead of time. Reviewing a file as soon as a case is as-

signed provides you with an important opportunity to resolve problems proactively and plan your hearing effectively. During your initial review, make sure you have contact information for all of the parties; consider whether you have jurisdiction over the parties and subject-matter of the dispute; determine whether the notice for your hearing was properly served. Other things to look for are logistical concerns, such as the need for a foreign language interpreter or whether you may need to make any other accommodation for one of the parties.

It's also a good idea to review the pleadings and evaluate the substance of the dispute. Make a list of statutory or regulatory authority that might control the outcome of the dispute; think about what facts you need in your record and what documents you might need. Check for outstanding motions. This is also a good point to consider any evidentiary issues you might face and develop a plan for the hearing.

#### ***Prehearing Procedure***

Prehearing procedure is also an important tool for providing information to the hearing participants. It is a good practice to issue a prehearing order which describes the basic procedure for your hearing, especially if one of your parties is self-represented. A good order is written in plain and easy-to-understand language and should at a minimum provide the time and date of the hearing, contact information for you or your staff and contact information for the opposing party. It is also a good idea to provide instructions for requesting a continuance or accommodation, presenting exhibits, and any other procedures that will help the parties come to your hearing prepared.

In large or complex cases, a prehearing conference can be very useful. A prehearing conference is another opportunity to anticipate and solve problems before they

become problems. Some topics for discussion might include scheduling and case management, the legal and factual issues of the case and evidentiary challenges. This is also a good time to explore the possibility of settlement.

#### ***Conducting the Hearing:***

##### ***Ensuring the Opportunity to be Heard***

Many studies have been conducted which conclude that it is essential for hearing participants to perceive that a hearing was fair. A losing party is more likely to accept the outcome of the proceeding and the legitimacy of the agency if that party believes the adjudicator listened to their claims and treated them with respect.

You began building a foundation for this perception of fairness by reviewing the case ahead of time. You have arrived to the hearing room prepared. You will continue to build on this foundation with your demeanor and command of the parties and the evidence. Your personal affect in conducting your hearings is an important factor in creating a perception of fairness. Start on time. Introduce yourself and address the parties by name. Most important, focus on the parties - avoid doing other things or needlessly shuffling papers.

Your prehearing file review and preparation also enhances your ability to manage your record. This involves making sure the testimony on the transcript is clear, tracking the identification and admission of exhibits, and ruling on objections. You may need to ask questions during a hearing to make sure the record is clear and that you understand all of the facts presented in the testimony. By preparing in advance, you have mental bandwidth to pay close attention to what the witness is saying and to ask intelligent questions.

At the conclusion of the hearing, consider

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your closing remarks. Go over any briefings schedule you might set and explain to the parties what happens next. You might permit the parties to make a brief closing argument. Before you dismiss the parties and the court reporter, go over the exhibits that were referenced in the testimony and make sure you have any that the parties have moved for admission of all the exhibits they want you to consider.

### ***After the Hearing***

Building the perception of fairness does not end when you leave the bench, but continues when you write your decision. Right after the hearing, make some notes of general impressions while the hearing is still fresh in your mind. Be sure to calendar when your decision is due and build time into your schedule for research and writing.

When you sit down to write your decision, consider your target audience. If you are writing for a self-represented party you want to take extra care to make sure you are clearly explaining the reason for your decision. A clearly written decision shows the parties that you listened.

You can't be an effective adjudicator if you are constantly disorganized and ill-prepared for your hearing. If you attempt to preside over a dispute when you barely know what the case is about you risk making serious mistakes and you have lost an opportunity to pay attention to the important details of the conduct of the hearing. Instead, take the time to plan ahead and continue to educate yourself to refine and improve your bench skills.

### **Due Process for School Discipline Hearings Officials**

*Jimmy Stokes, Colleen Ulrich,  
Cindy Antrim (GA)*

Due Process is an action guaranteed by Article 5 of the United States Constitution as well as Amendment 14 of the same document "... nor be deprived of life, liberty, or property, without due process of law..."

Virtually every state code requires the specifics of Due Process as illustrated in the Official Code of Georgia Annotated 20-2-754. As used in this context, Due Process consists of

three related parts: 1. Notice, 2. Opportunity to present and cross-examine evidence related to the charge specified in the Notice, and 3. Affirmation that the decision of innocence or guilt is made strictly on the evidence presented in the case. Student disciplinary cases at the discretion of state law can be administered by a tribunal of school officials or by a single hearing officer selected by the local school board.

### ***Fairness to all concerned is the fundamental tenet of due process***

In school disciplinary cases, which involve violations of school district code of conduct, hearings are required and most often are pro se, making adherence to Due Process even more critical. Furthermore, in *Goss v. Lopez* (1975) the Supreme Court set Due Process as the standard which must be used in school disciplinary matters.

Fundamental Due Process as well as universal state law require that parents and students be notified personally or in writing of impending hearings and provide a limited timeframe, usually ten school days, in which the hearing must be held. The notice must include a reference to the specific violation of the code of conduct, must contain a brief and understandable explanation of what allegedly occurred, and must outline the basic rights of the parents including opportunities to subpoena witnesses, have an attorney present, and the specifics for appealing the decision made at the hearing.

A Due Process Hearing such as those used for school disciplinary cases seldom require the formality of court cases. The absence of discovery and the admissibility of hearsay define the less stringent hearing found in school cases. Perhaps the most important point is that the emphasis of a school due process hearing is that everyone is given an opportunity to speak, present their evidence or side, and have a reasonable examination of the evidence existing in the case.

Subpoenas may be issued by a variety of school personnel as well as the parents of the student. Failure to comply with a subpoena generally is enforced by the local superior

court.

School disciplinary hearings involve two phases. The first phase is a classic due process hearing and a student's records, behavior, and attendance are not admissible evidence during that phase. Once innocence or guilt is established and the second phase begins, which metes out the consequence, student records, discipline, as well as recommendations of teachers, friends, and others may be considered.

Every state provides for an appeal of the innocence/guilt or punishment finding of the tribunal or hearing officer. The opportunity for appeal to the local school board is usually limited to twenty to thirty days. Appeals to local school boards as well as State Boards of Education are commonly On-The-Record appeals and do not provide for De Novo reviews.

School disciplinary hearings are much more informal than court events and are designed to provide a guided conversation between school officials and parents and students to find fairness and what is best for all concerned.

If you have questions regarding this presentation, please do not hesitate to contact us.

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### **Ruling on Objections**

*Peter Halbach (ND)*

A hearing officer is authorized to receive witness testimony and documents into evidence. When evidence is offered, a party or their representative may object to its consideration and the hearing officer must decide whether to admit the evidence. Ruling on objections need not be anxiety causing. Yet, hearing officers new to their gatekeeper role are frequently much more concerned about ruling on objections than most other parts of the job. Even experienced adjudicators can benefit from the occasional opportunity to refresh their knowledge and skills as to this

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function.

While the rules of evidence vary somewhat from one jurisdiction to another, the objections we hear are pretty much the same. This session sought to encourage you, as a hearing official, to embrace the rules of evidence so you can confidently respond to the most common objections. Knowing what to do and, perhaps as importantly, what the objecting party must do and when, will help you hold fair hearings for all parties while producing a better record for any subsequent review.

This course began by emphasizing the need to familiarize yourself with the rules that apply to your hearings. Do formal rules of evidence govern the admission of evidence in the cases you hear? Perhaps, your jurisdiction's Administrative Procedure Act provides a different and less stringent or formal standard for the admission of evidence. Your agency's organic statute may provide additional guidance as to what evidence is admissible. A hearing officer must know what rules apply before the hearing officer can accurately rule on objections. Regardless of what rules apply, by understanding the concepts contained within the rules of evidence, i.e., hearsay, relevancy, privilege, the confidence of the hearing officer will be enhanced.

It is important to gain an appreciation of the purpose of objections. Whether to prevent the admission of the evidence or at least to highlight any concern over its reliability, objections may be essential to the making of a record. That said, there is a correct way of presenting the objection and making the record, without objections becoming an undue obstacle to the orderly conduct of the hearing. The timing of the objection matters. Objections can be waived if not timely made. Nor should an objection be made too early. An objection to the form of a question, for example, should be made after the question is asked, yet before an answer is given. Likewise, objections to foundation should be made after the party seeking the admission of evidence has attempted to lay a foundation.

There are fundamental steps for making an

objection to the admission of evidence. The objection is addressed to the presiding officer and must be timely. In addition to being timely, the objection must specify what is objected to and specify the grounds for the objection. There are additional steps a party could employ. For example, if the answer was already given before the party could interpose an objection, a motion to strike may be required. If an objection to a question has been sustained, the party may make an offer of proof. Holding parties to proper procedure will not only produce a more orderly hearing but also preserve a better record for review.

At times, the hearing officer may want to delay ruling on an objection. Perhaps, requesting an additional explanation or argument as to the objection would be helpful for a better ruling on the objection. This additional explanation should not be extensive and is not an opportunity to argue the case. Other times may call for admitting evidence subject to the objection so the matter can be given further consideration. In the case of a witness, it would permit the hearing officer to hear the testimony and be better informed before ruling on the objection. Perhaps, the ruling could wait until the end of the proceeding or even to the issuance of the written decision. Recognize the danger, however, of forgetting to rule on the objection, which may imply the objection was overruled.

The hearing official must allow for the making of the record of an objection, its basis, and the ruling, without the interruption of the proceeding through excessive argument as to the objection. Ruling with confidence, based upon a knowledge of the applicable rules, allows for an orderly hearing. The hearing participants' confidence in the hearing official's knowledge of the rules governing objections to evidence goes to the core goal, a fair hearing.

### **Virtual Supervising**

*Sarah Huber (ND), Bobbie Marshall (TX) and Wendy Johnson (TX)*

Supervising virtually is still supervising, but it is imperative to think of and implement a few new ways of conveying the communication that is essential to any type of supervising.

Let's start with the process of bringing on new members of your team in a virtual setting. There are several things to consider. First, getting ready to interview. Be sure everyone has access to the software/applications that will be needed and that there are no issues with connectivity. Ensure that everyone has emergency contact information if there are technical difficulties during the process. Confirm that you have the materials you need for your agency to successfully complete the interview. For example, is there a testing process for skills or knowledge? Is there a timed writing section? Will your applicant need special items to complete any portion of the interview and how are you delivering that information? Second, during the interview, start with an explanation of the process and any specific expectations, such as if there is monitoring and what should happen if there are technical difficulties. Remember that you are learning this process too and it is ok if you improve your process through experience.

Once you have settled on a new employee, consider having an onboarding checklist for both you and your employee to ensure that they have received each of the items they need, such as an ID badge, equipment, completion of HR requirements and your orientation process. If possible, assign a specific mentor to each of your team members, but especially ones that are new or struggling in the virtual setting. Allow time for observation of others completing the work or create mock practice hearings and writing sessions to ensure that your supervisees understand your agencies' expectations.

One of the biggest challenges is addressing goals/productivity in non-office settings and staying connected. To meet this challenge, it is best to listen to your employees. Get to know them so that you can build the relationship with them to the degree that you and they are comfortable with. Be understanding; know that there will be different kinds of distractions. To minimize the distractions, if possible, consider implementing a flex schedule throughout the day or week to accommodate the employee's and employer's

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needs. Create a shared file of useful templates, scripts, grammar tips and contact information.

It is also important to acknowledge that not everyone enjoys teleworking and that there are mental health concerns that may arise. It also takes time, at least six months, to acclimate to new work situations. Some of the strategies to address these concerns are to set up a system of expectations. So, when moving into new situations or switching to new technology to maximize working virtually, as a supervisor it is important that, if possible, you have taken the time to practice using the new applications' technology before you are required to use it. Create or provide clear

templates or job aids to ensure that everyone understands how to properly implement the technology or application. Find outside resources that can be watched or read. And lastly, remember to take the time to reach out to everyone that you are supervising to ensure that they have adequate time to learn the new technology and application or that they have access to someone who can answer questions so that they are adequately prepared to complete the work.

The second part of staying connected is to create an atmosphere of supervision that is similar to supervision in person at work. Work with everyone to find the best method of communication at your agency. Set

expectations of how you are monitoring or checking in with the individual, whether it be through a setting in an application such as Skype or Teams or through some other means. If necessary, coordinate daily "check ins." Encourage everyone to use their status applications if available. Set regular meetings with set agendas. Ensure that there are methods of tracking work and deadlines in your agency. Model the behavior you would like to see and be receptive to what your employees are saying and not saying. Lastly, always respond to any communication that you have received. And take the time to set up some meetings that include everyone in your team. Encourage virtual "water cooler" moments and don't be afraid to acknowledge achievements or life milestones. 📌

## MEMBERSHIP CORNER

Marilyn Slifman (CA)

Welcome to our 96 new members for 2021! NAHO has continued to provide quality education for administrative adjudicators virtually during the pandemic year and further its mission to improve fairness and effectiveness of the administrative hearing process.

Our current membership is 336 active members from 36 states and territories serving in federal, state, and municipal agencies. NAHO's member adjudicators hear cases in subject areas too numerous to mention all, including health and human services, regulatory and licensing compliance, fair employment and labor, environmental, public safety, tribal government, transportation, education, and occupational safety. NAHO's membership includes experienced Administrative Law Judges and Hearing Officers as well as adjudicators new to the administrative process, which further promotes its mission of affording a national forum for discussion of important issues and furnishing leadership.

The majority of NAHO's members are adjudicators, but Associate Membership is available to those who are involved in the administrative hearing process, but who do not or have not presided over administrative hearings. Associates enjoy all membership benefits except NAHO certification and voting rights.

NAHO's membership fees have not increased since 2017. The monthly live Webinars free of charge for members are presently

intended to continue. In May we all took a break after the Mini-Conference, but "Hearing Challenges", the next Webinar, resumes on Thursday, June 17<sup>th</sup> and all future Webinars will be on the third Thursday of the month. These Webinars are also available for viewing On-Demand for members.

The Annual Professional Development Conference is scheduled now for October 31-November 3, 2021 in Philadelphia, our first in-person event in 2 years! If your membership lapsed in 2021, you can still receive special member pricing for the conference by renewing your membership.

NAHO Membership is January 1 yearly. (A \$10 late fee applies after March 1).

- 1 Year New - \$60 (Associate Members \$45)
- Renewal - \$50 (Associate Members \$35)
- 3 Year New - \$135 (Associate Members \$120)
- Renewal - \$115 (Associate Members \$100)
- Groups of 5 or more at the same time from same agency (Full Members)
- 1 Year New - \$50 each
- Renewal - \$40 each
- 3 Year New - \$120 each

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## FROM THE EDITOR

## LESSONS

Bonny M. Fetch (ND)

When I was about 6 or 7, I wanted to pick some flowers for my mom. Instead of hunting for some prairie wildflowers to make a nice bouquet, I helped myself to a lovely bunch of blooms from our neighbor's flowerbed. When I excitedly brought them in to my parents, announcing I had found them in the field, my dad knew immediately where they had come from. He glanced next door and remarked how much they looked like the flowers from Edna's flowerbed. I knew I was not supposed to pick Edna's flowers and I realized I was in for some trouble. But instead of some outright punishment, which I expected and deserved, spanking or yelling was not my father's way. He usually got his message across in a much more effective way. He was a genius at teaching us a lesson we would not soon forget. And so it was this time. As we tenderly arranged the stolen blooms in a vase (probably a mason jar) of water, my father pointed out that they were now eagerly drinking water through their stems. This made me happy as I thought it meant they would thrive. But dad then remarked that the flowers would be able to live a couple of days like that, but that in fact they were now dying because they did not have the food they needed from the ground or the nourishment from the sun. He gently suggested I watch the flowers for the next few days and then look at those still blooming in Edna's garden. I did so, and every day I felt regret that I had so recklessly caused those beautiful flowers to die. It was a powerful lesson, much more effective and life-changing than a spanking or some other punishment. To this day I prefer to receive flowers in a plant rather than cut flowers.



Bonny M. Fetch (ND)

Over the years I have reflected on that incident, and I realize I learned several lessons that day. I learned that stealing is not an easy way to get something. I learned that taking any life, even flowers, has consequences. I learned that regret and shame cannot alter reality. I learned that being a decent human being means always being truthful and taking responsibility for one's own actions.

Each one of us is presented with multiple opportunities to learn lessons every day. The real test is whether we recognize the opportunity to apply those lessons. Some years ago I wrote a poem entitled "Lesson", and in it I wrote these lines....

**"For you're given many lessons to learn along the way and if you do not learn them, you'll repeat them all one day..."**

How often have you found yourself faced with the same problem or stumbling over the same obstacle over and over again? Have you ever asked yourself "why does the same thing keep happening over and over"? Do you feel stuck in a rut, personally or professionally? Do you say to yourself things like "I need to start doing things differently" or "I've always done it this way and it's too hard to learn something new", and so on. We are all familiar with Einstein's famous quote, "insanity is doing the same thing over and over again and expecting different results." Well, maybe it's time for some quiet introspection, time to look inside to see what lessons are waiting to be revealed to you. 🐘

## MEMBERSHIP CORNER

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To renew, log in with your email and password at [www.naho.org](http://www.naho.org). For groups, new and renewing, please have your Administrator contact me for a group invoice to make sure you receive the discounted group pricing. If you need to reset your email or password, there is a link on the homepage, or you can always email me for assistance at [marilyn.slifman@naho.org](mailto:marilyn.slifman@naho.org).

If you are a new applicant or a former member who is reapplying, go to [Join NAHO](#) or the "Join NAHO" tab at [www.naho.org](http://www.naho.org).

And, as a reminder, in the event you attended the Mini-Conference in April as a non-member, but have not yet completed the membership application at [Join NAHO](#), please do so and click "Invoice Me" when you get to the payment page. Your membership fee through December 31, 2021 was paid with your conference fee and a receipt will be sent.

As always, you can contact your Regional Representative if you have any questions about NAHO or want to bring attention to current issues in administrative law. These six members (including me for the Western Region) are elected to the Board of Directors for a 2-year term to serve you and be your voice to the Board. Their regions and email links are all listed at the [About Us-Board](#) tab on the NAHO homepage.

Have a safe and healthy summer and I'll see you in Philadelphia!

# NAHO'S 2021 POST-PANDEMIC CONFERENCE: What "Live" Might Look Like (Note: Article written 5/13/21)

Toni Boone, NAHO President (OR)

It has now been around 14 months since most parts of the nation either shut down or scaled back drastically because of Covid-19. Like most other organizations with in-person events planned, NAHO postponed its 2020 in-person conference. Now, our nation seems to be turning a corner. With 35% of the U.S. population fully vaccinated against Covid-19 and 52% having received at least one injection, both deaths and new infections have dropped significantly. Is it time for us to see each other in person again? We hope so. We plan to.

It seems that we've lived the last year of our lives in front of a screen—attending virtual meetings and classes, watching live-streamed events, and binge-watching our favorite shows or films sequentially. All that screen time has become tiresome and exhausting. But when you have been sequestered for over a year, seeing and hearing speakers live and interacting in-person with conference attendees can cause a new type of fatigue—post-pandemic in-person fatigue.

We have had some control over our onscreen time. We can turn off our cameras, mute ourselves, and multi-task (respond to emails, etc.). Engaging in an in-person conference obligates the attendee to interact with others, remain attentive to presenters for extended periods of time, and to dress more appropriately from the waist down. After a year of virtual solitude, our conference comportment will require a little fine-tuning.

The most immediate difference we may notice at a post-pandemic in-person conference is a change in personal etiquette. Some attendees may feel uncomfortable sharing a handshake or a hug. Oth-

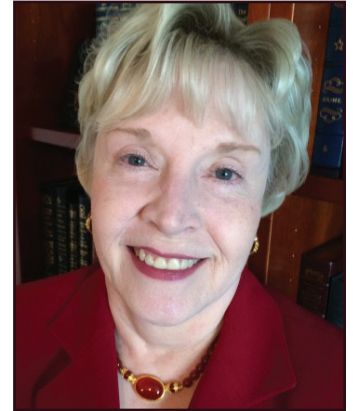
ers may default to that or may prefer to simply wave or exchange an elbow bump. How will we feel in a large group? How will we handle getting on an elevator at the end of the day? We should consider comfort level—both ours and that of others—before we arrive at the conference and boarding that elevator becomes an immediate, split-second decision.

Another consideration will be our excitement at being together with our peers again. Virtual meetings cannot accomplish the quality of interaction in-person meetings achieve. During breaks between sessions, attendees may have difficulty choosing between the next class or continuing the great conversation that just began. NAHO understands that your interest in speaking to one another is significant. We all share that desire. We will try to add additional networking opportunities to the conference schedule to satisfy that need.

While some agencies and their administrative adjudicators may have returned to normal or an approximation of normal, others may still have restrictive rules about travel and meeting attendance. Still others of our members simply may not feel comfortable traveling to an in-person event quite yet. NAHO is looking into the possibility of a hybrid event—which means we would livestream a few of the conference classes to our members back home. This would be a monumental undertaking for a small, all-volunteer non-profit like NAHO. It may be logistically impossible. But to include all our members in our conference, a hybrid event is being considered.

The most important lesson learned from the pandemic is that we should make

every reasonable effort to protect and maintain our good health. Although the details of the health and safety protocols have not



Toni Boone (OR)

yet been established, precautions will be taken to ensure that everyone remains safe. Of course, it will be necessary that we follow the health protocols of the host hotel. The tables in the classrooms and at the luncheon meetings will be set for fewer people instead of the usual eight to ten. We may allow attendees to signify their vaccination status on their name badges. We will have hand sanitizer in all classrooms and in the registration area. We will clearly articulate the health and safety protocols of our conference as the date approaches. NAHO believes in transparency and we want every conference attendee to enjoy the conference without worrying about health and safety.

Yes, returning to an in-person conference in the post-pandemic era will require some adjustments. As for me, I will make those adjustments joyfully, expecting this conference, for many reasons, to be the best we've ever had. Besides, I've missed you. I hope to see you in the fall. 🐾

# THE CARE AND FEEDING OF THE MEDIA, THE PUBLIC, AND YOURSELF IN HIGH-PROFILE CASES

Janice Deshais (CT) and Bonny Fetch (ND)

**M**ost hearing officials handle a “high profile” case at least once in their career; others conduct such hearings on a regular basis. For many of us, hearings that were once fairly routine and pretty much “under-the-radar,” now have a higher profile due to public access to virtual meetings and hearings through web-based platforms such as Zoom.

## What Makes a Case “High Profile”?

In addition to increased visibility because of the way we do hearings these days, the profile of a case may be raised because of the subject of that hearing, which can be controversial, contentious, misunderstood, or even feared. The parties in a matter may be well-known, famous or even notorious. Certain matters may impact a large number of people or resources or could be caught up in a local battle unrelated to the subject of your hearing. A case may garner public attention because your agency is in the spotlight due to other issues. Keeping political issues or interests unrelated to your hearing at bay is another challenge for all hearing officials.

So, how do you know when a case is “high profile”? Sometimes, it is apparent at the time of assignment, but sometimes a case might surprise you and become high profile at the hearing, after the hearing, or after your decision is released. An appeal can elevate a matter; changes in the law or other external events can also change the status of even a minor case.

The following tips will help you survive - and even thrive - when dealing with a high-profile case.

## Interest by the Public and the Media

Many agency rules provide that hearing officials must permit broadcasting, televising, recording, or photographing in

a hearing room, subject to certain provisions. The proliferation of Zoom meetings and hearings have expanded this concept. You need to get ahead of the process so that your hearing will accommodate media presence but not interfere with the orderly conduct of the hearing.

## Interactions with the Media

- In a case in which there has been media interest, send notice to the media with time to arrive and meet with you prior to the hearing. Set it at least a half hour or more ahead of the hearing start time.
- Prior to the parties entering the hearing room, take media into the room and show them where they can set up equipment, where they can sit, and show them the distance they must keep from the proceedings.
- Explain that the press cannot cause any disruptions, such as approaching parties or witnesses. And, if you have the power per your rules, tell them they will be asked to leave if they cause any problems. (However, even without such a specific rule, it is within your authority and your responsibility to control the hearing and keep the process orderly.)
- Make the process and expectations/obligations clear. Explain hearing procedures thoroughly at the outset of the hearing. Note media presence and what the parameters are (what you discussed with media prior to the hearing).
- If your agency has policies or guidelines on Media Relations, know them. Check your own state statutes, agency rules, and policies as they apply to media relations in administrative proceedings and become familiar with them.
- If you have a media person/communications officer, use them! They know how to talk to the media and can prepare helpful communications, such as a press release.
- If you talk to the media, be consistent with your information. (It is helpful to keep notes by the phone to rely on.) Use “talking points” and keep it short. The media often uses “sound bites” in reporting.
- Remember, the media often knows very little or nothing about your case or subject; they are also often working “at deadline” and need to get up to speed quickly.
- Avoid discussing the specifics of any case, but if the case is not a matter protected by confidentiality requirements in statute or rule, information may be provided about its procedural aspects, such as scheduling the hearing, its time and location and the parties involved. Just remember, provide no details or anything substantive.
- Be polite. Try to avoid being rude or antagonistic, even if the media is. Be friendly but firm. Do not be provoked into saying something you might wish you had not said. If you focus on giving only procedural information it will help you keep out of trouble by saying anything which might jeopardize the



*Janice B. Deshais (CT)*

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## THE CARE AND FEEDING OF THE MEDIA, THE PUBLIC, AND YOURSELF IN HIGH-PROFILE CASES *From page 8.*

appearance of fairness and professionalism or compromise your objectivity in any way.

- Avoid comments about decision-making in any ongoing case, other than to say that they can read about your analysis of the evidence and rationale for how you decided in the written decision. It is not a good idea to grant an interview after the decision. You do not want to embellish or risk saying something that was not in your decision – say something like “I wrote it all in my decision and I have nothing further to add.”
- Remember, the media has a job to do too. But, you are the one to set the limits.

### Dealing with the Public

- If possible and appropriate, encourage staff and the applicant/appellant to hold a public information session outside of the administrative hearing process so you are not involved.
- Provide a process to answer questions from the public.
- Make sure your communications about the process, including notifications about meetings, hearings, or dates that decisions may be released, are consistent, clear and readily accessible.
- Be honest about the process and the role of the public. Do not try to “play” the public or make any false promises.
- Explain the impact of public comments – manage expectations.
- Be courteous and responsive to public concerns and questions when you can or, if you cannot answer a question, refer it to someone who can.
- Even if you know quite a bit about a matter, the public may not and may be responding to information they have received from another source. Be understanding.
- Use the same rules that you would use for interactions with the media. Be courteous, but do not tolerate insults, disruptions or dramatics in a hearing. Remind the public that you are open to hear their concerns or questions, but will not tolerate discourteous or threatening behaviors.
- If a matter is controversial and you think there may be problems, ask local law enforcement to attend a hearing. Their presence may keep a matter in control.

### Maintaining your Independence and Impartiality

- Keeping your own behavior in check is important. Your hard work on a high-profile case can be threatened by accusations of bias or partiality.
- Do not discuss any aspect of a case with any member of the agency except your own staff, and then, only if appropriate.
- Do not show – or even appear to show – any deference to staff or personal familiarity with staff at any time during the hearing process.
- Do not travel to any site or hearing site with members of agency staff or the applicant/appellant.
- Do not socialize (including eating) with staff while the hearing is ongoing and the case is pending.
- Recuse yourself from any agency meetings where the case or its subject matter might be discussed.
- Include language in your decision about your impartiality and independence from your agency.
- Do not react to any comments or show any emotional reactions during the hearing.
- Do not tell any member of your staff “how you really feel” at any time – ever.

### Taking Care of Yourself

- Learn to deal with the stress.
- Put the case “in a box” and continue to live the rest of your life.
- Separate yourself from your emotions.
- If the hearing is being filmed for TV or broadcast is live on Zoom or the internet, try not to think about that or focus on how you look or sound – be yourself and always, whether filmed or not, be professional.
- Don’t personalize the case. It is not about you. If you can, develop a “thick skin.”
- Always try to stay in control.
- Stick to your reality – don’t adopt their reality or go down their “rabbit hole.”
- Remember it is your job to render the most accurate decision you can. You’re not in the job to be popular. And that is not even possible.
- You might have minutes of fame, but remember, the average citizen pays little attention; tomorrow the story will be about someone else.
- Finally, remember that the media will get it wrong at times, and, at other times, it may be at least only half right.
- Keep your sense of humor, but show it at home, not in the hearing room.
- Remember, you will not make everyone happy, and sometimes, you will make no one happy.
- Finally, do the best job you can, whether under public scrutiny or not. At the end of the day, if you can look in the mirror and know the person looking back at you has done the best job he or she could, that is the best accolade of all. 🙏

# MAKING OBJECTIVE DECISIONS IN A SUBJECTIVE WORLD: How to Resist Pressure to be Partial

*At the NAHO 2016 Annual Professional Development Conference, then-President Janice Deshais (CT) and former Presidents Norman Patenaude (NH) and Bonny Fetch (ND), presented their thoughts and advice on making impartial decisions in the face of the challenges of our partial (and increasingly political) world. Looking back at their presentation, the thoughts and ideas that were shared seem especially relevant for hearing officials today, so they are offered below.*

It is not enough for the administrative hearing system to be independent. Individual hearing officials must be seen to be objective and impartial. Indeed, they have an ethical obligation to do so.

In their personal lives, which includes their time on social media, hearing officials must avoid words, actions or situations that might make them appear to be biased or disrespectful of the laws they are sworn to uphold. Hearing officials must treat all hearing participants with respect and must refrain from comments that suggest they have made up their minds in advance. Outside the hearing room, hearing officials must not socialize or associate with lawyers or other persons connected with hearings so there is no appearance of favoritism. (This is especially tough with agency staff who might share offices and do share elevators with hearing officials.)

A hearing official must declare a conflict and withdraw from a case that involves relatives or friends. The same is true if the case involves a former client, a member of the hearing official's former law firm, law partners or a former business associate, at least for a few years since ties were severed. Hearing officials must disclose any potential conflicts or what might be perceived to be a conflict.

What is impartiality? Rules of Codes, such as those found in statutes, case law, model codes, and the codes or principles adopted by organizations such as NAHO, define the issue generally as not being prejudiced towards or against any

particular side or party; being fair and unbiased. This seems straightforward, but there are many challenges.

There are at least three contexts in which a hearing official must be subjective.

1. As to facts – A hearing official must be open minded about facts and make factual findings based only on evidence presented by the parties.
2. As to parties – A hearing official cannot favor one party over another and must work to not give the appearance of any favoritism.
3. As to law – The parties in a matter cannot be the source that educates a hearing official about the law in a matter.

These situations do present challenges to impartiality.

As to facts – As an agency hearing official, that official knows how an agency or state deals with certain situations. The facts found, as presented by the parties, must govern the decision. Impartiality must be maintained even if the outcome of a decision, especially a “ruling against the agency” may impact policy, budget, etc. if you “rule against the agency.” Although hearing officers may be employed by an agency, they do not “work for the agency.” Furthermore, hearing officers are not political appointees. They owe their loyalty not to an agency or to a political head, but rather to the administrative process and to providing

a fair and equitable adjudication of the facts and the law.

As to parties – Hearing officials often work with staff on matters that do not involve contested hearings. They are at least friendly with many staff, visiting with them in the lunch room, riding together on the elevator, or celebrating at agency social events. Other parties may be residents of the same town as the hearing official, members of the same church, or even a neighbor. If this relationship has not resulted in the need to recuse, the appearance of partiality due to familiarity must be avoided. Another challenge is presented when hearings on a docket are similar in nature, or at least the same kinds of cases such that a hearing officer knows how staff thinks and knows most of the arguments that will be presented. Staying open to new thoughts and ideas is crucial even when it has been said before. Finally, there are some parties that appear before a hearing officer again and again. Care must be taken to hear the evidence with an open mind and to treat these “frequent flyers” fairly.

As to law – Experienced hearing officials - and those gaining experience – often know the law they need to know to do their jobs and feel no need to look elsewhere when rendering a decision. They also have their own opinions about the law, which is hard to prevent when that law governs many or most of their cases. Despite the temptation to go with

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## MAKING OBJECTIVE DECISIONS IN A SUBJECTIVE WORLD: How to Resist Pressure to be Partial *From page 10.*

their own knowledge and opinions, hearing officials must remember that even well-established laws can be changed by recent case law, statutory or regulatory revisions, or even by how an agency has changed a process or policy based on new interpretations of the law.

Finally, hearing officials may find they are pressured to be partial by bosses, the agency, a desire to keep their job, and by time and resource constraints. Although these external burdens may weigh heavily upon a hearing official, dedication to an impartial administrative process must govern all actions and decisions.

So, how can YOU remain impartial?

You should create an atmosphere of impartiality by isolating yourself and your office at your agency, if possible. Try to avoid certain conversations, with staff or others, to prevent ex parte communications or other “innocent” conversations at agency meetings, discussions, or trainings.

Make sure you are impartial in anything you do in hearings and make sure the parties understand that this is not only your goal, but your obligation. You can ask peers to observe your hearings to make sure you are not giving an appear-

ance of partiality. If you are pressured by others in your agency to be partial, have a conversation with them about your obligation to be impartial and explain why this is so.

Finally, if you cannot remain impartial despite your best efforts, give yourself and the process the gift of an honest evaluation of yourself and disclose your conflict. If necessary, recuse yourself and remove any chance that a partial hearing official could render a decision that is not the product of a fair and impartial administrative process. ↗

## NAHO MEMBER NEEDS OUR HELP!

**S**uzette Carlisle Flowers, a NAHO member and ALJ for the state of Missouri, is currently a doctoral candidate in the Judicial Studies Program at the University of Nevada, Reno. Suzette is conducting a research study for her dissertation and needs your opinions about in-person and remote hearings for her work. She has asked NAHO to share the survey links below. Please consider completing the survey. Your knowledge and opinions are crucial for the success of this project - [you do not need to conduct mediations or hearings to complete the survey.](#)

ALL adjudicators are invited to participate. This includes hearing officers, commissioners, judges, and anyone who adjudicates disputes, both legally trained and non-legally trained adjudicators. The brief online survey takes approximately 10-15 minutes to complete. Your responses will remain completely confidential and reported in group form only, no responses will be tied back to you individually. [If you receive a copy of this invitation from another source, please take the survey only once.](#)

Just click on the link below and share your opinions. At the end of the survey, you will also be invited to participate in an online focus group on a different date. Both the survey and focus group are completely voluntary, and participation in one does not require your participation in the other. Your survey and focus group responses will be used to create a quick, easy to follow checklist for judges who conduct any court proceedings using distance technology. We will send a copy of this checklist to you to thank you for your participation in this study.

Thank you for taking time from your duties to improve the administration of justice across our country.

Follow this link to the Survey:  
[tinyurl.com/judgesurvey2021](http://tinyurl.com/judgesurvey2021)

Or copy and paste the URL below into your internet browser:  
[http://unrcfr.co1.qualtrics.com/jfe/form/SV\\_20taNVtByK1ULQy](http://unrcfr.co1.qualtrics.com/jfe/form/SV_20taNVtByK1ULQy)