

Testimony before the House Committee on Health Care
HB 2329
On behalf of the Oregon State Bar Administrative Law Section
February 3, 2017

Chair Greenlick, members of the committee:

Thank you for allowing the Administrative Law Section of the Oregon State Bar to share their concerns with HB 2329, as introduced. The Administrative Law Section's membership includes attorneys who represent private citizens and public agencies, as well as administrative law judges. The section works to ensure the public's access to administrative justice and reflects a cross-section of administrative law practitioners throughout Oregon.

The section would like to express concern about the assessment of costs in ORS 675.110(16) proposed in HB 2329. ORS 675.110 relates to powers of the State Board of Psychologist Examiners, and with the addition of subsection 16, would include the ability to assess costs in disciplinary proceedings. The Administrative Law section most recently expressed concerns about this type of cost assessment during the 2015 Legislative Session with HB 2642.

HB 2329 gives the board the power to collect its disciplinary costs and attorney fees from the licensee seeking a fair hearing. As drafted, only the board can recover its costs and attorney fees. The regulated individual has no right to reimbursement if the licensee is successful in defending against the board's charges.

The board's power to exact this payment can be an unfair deterrent. It could create artificial leverage in favor of the board in prosecuting allegations against licensees. This leverage can cause a licensee to decide against requesting a fair hearing because of the fear of paying fees and costs, rather than deciding on the merits of a particular case. This power has a disparate and negative impact on those with limited means.

There are recent examples of how this cost recovery works in other agencies that have the power to assess its costs from licensees who requested a hearing.

- In *Genova v. Veterinary Medical Examining Board*, 282 Or App 234 (2016), the Veterinary Examining Board ordered Genova to pay a \$750 penalty and \$5,594.28 in hearing costs. The Court of Appeals found that the decision to discipline Genova lacked "substantial reason" and reversed the order.
- In *Murphy v. Oregon Medical Board*, 270 Or App 621 (2015), the Oregon Medical Board's final order imposed a \$5,000 civil penalty and costs of the disciplinary action in the amount of \$14,068.88. The Court of Appeals reversed the order because it concluded

that the lack of notice the board provided prejudiced Murphy's ability to prepare an adequate defense.

- In *Weldon v. Bd. of Lic. Pro. Counselors and Therapists*, 266 Or App 52 (2014), the board assessed \$24,301.91 in attorney fees and costs. The Court of Appeals overturned the board regarding the factual basis for three of the violations and the court returned the case to the board to properly reconsider these violations. In order to correct its errors, the board may be able assess even more costs and attorney fees against the licensee.

There is already a strong incentive for a licensee to avoid the headache and the financial costs inherent in challenging an agency's action by requesting a hearing. Licensees' costs are already formidable because they are not able to run their businesses while they pursue administrative justice in contested case hearings. The added potential burden of having to also pay the agency's costs and attorney fees could provide an insurmountable barrier to requesting a hearing for a licensee who disagrees with the agency.

The vast majority of persons facing agency enforcement actions do not request a hearing. The small percentage of people who do request a hearing should be able to present their case on a level playing field, rather than having the constitutional right to due process hampered by the agency. The licensee's own costs — in time, expenses, and attorney fees — are already a system-wide deterrent to frivolous hearing requests by licensees.

Cases should be resolved quickly and cost-effectively, and settlement is an efficient solution in many cases. However, the threat of exacting all the board's costs and attorney fees against someone requesting a hearing creates an unfair board advantage that does not merely support efficiency, but is, instead, an unfair barrier to exercising one's right to due process. Relinquishing one's right to due process should be a choice, not the result of unfair leverage.

Thank you for the opportunity to provide testimony. Please contact us with any questions.

Respectfully submitted by Carson Bowler, Chair
Administrative Law Section of the Oregon State Bar