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**Statement of the Council for Court Excellence
Before the Committee on Public Works and Operations
of the Council of the District of Columbia**

**Performance Oversight Hearing for the
Office of Administrative Hearings**

February 6, 2023

Good afternoon, Chairperson Nadeau and members of the Committee. My name is Danielle Burs, and I'm testifying in my role as Senior Policy Counsel for the Council for Court Excellence (CCE). CCE is a nonpartisan, nonprofit organization with a mission to enhance justice for all in the District of Columbia. For over 40 years, CCE has worked to improve the administration of justice in the courts and related agencies in D.C. through research and policy analysis. (Please note that in accordance with our policy, no judicial member of CCE participated in the formulation or approval of this testimony. This testimony does not reflect the specific views of, or endorsement by, any judicial member of CCE.) Thank you for this opportunity to present our organization's views on the Office of Administrative Hearings (OAH) FY22-23 performance.

We are lucky that our "new" Chairperson previously served on the committee with oversight of OAH, and so will provide less background. CCE advocated for the creation of OAH beginning in 1999 and has supported its mission ever since. Over the years, OAH's jurisdiction and caseloads have grown, increasing the importance of its role in ensuring fair and robust administrative adjudication in the District – though not always matched with additional funding. In 2016, CCE developed a report, on behalf of the Office of the D.C. Auditor,

which made a variety of recommendations for the continued improvement of OAH.¹ That report is linked in the footnotes of this testimony, and a summary of its recommendations is attached.

We and others have continued to testify about opportunities to meet two of the needs identified in our 2016 audit: 1) the need for online access to OAH case records, and 2) the need for greater investment to ensure meaningful and effective participation in OAH proceedings by pro se litigants. We appreciate the dedication that the Committee that previously held jurisdiction over OAH has shown by going into detail in its report on the FY22 budget regarding these and other potential improvements, committing to fund them, making a detailed request for a benchmark study, and by taking the time to meet and discuss potential improvements during the FY23 budget process.

Over the past year, we were pleased to note that OAH launched a limited eFiling Portal, made revisions to its website intended to improve user experience, and made some new hires. OAH has not yet filled all of its vacant positions (including needed IT staff and an independent COST staffer), contracted with a vendor for the baseline study required in last year's Budget Support Act, or published a searchable database of final orders. In fact, OAH removed the partial offering of final orders that was previously on its site. The Fiscal Year 2022 Annual Report published by OAH includes general goals for FY23 that seem to align with these needs – we of course had hoped these goals would be met by now, but look forward to hearing more about when and how they will be met over the coming year as well as how CCE and other stakeholders can support these efforts.

We gladly offer to consult and collaborate with OAH's excellent administrative law judges and seek opportunities to assist OAH in effectively serving the District. Today, CCE urges this Committee to help broadcast to the public the steps forward OAH made in FY23, and what more

¹ Council for Court Excellence, *Administrative Justice in the District of Columbia: Recommendations to Improve D.C.'S Office of Administrative Hearings* (2016), http://www.courtexcellence.org/uploads/publications/OAH_Final_Report_20160908_1.pdf.

can be done through funding, staffing, and planning to ensure that any new or outstanding opportunities are embraced as quickly and effectively as possible. We would be very happy to meet with you, members of the Committee, and staff to support that work.

Online access to case records.

The OAH Establishment Act requires that the Office make “all documents filed in any case before the Office...available to the public for review.”² The Freedom of Information Act (D.C. FOIA) adds the requirement that final orders be published on the internet.³ Unfortunately, OAH has lacked the necessary funding for the technology and staffing needed to meet these legal obligations for years. The information OAH submitted to this Committee ahead of today’s hearing shows some progress in this area, with the goal of completing a searchable database by the end of FY23 (8 months from now). This is a critical transparency and fairness issue for the District and one that must be remedied immediately.

OAH had published some final orders on a public portal⁴ which was appreciated despite its major limitations. However, only a small portion of orders were uploaded, the search function was of limited use, and there were no orders added after 2019. In updating its website, OAH decided to remove this stopgap. Work has not yet started on an improved, searchable database and we have not heard when it might begin. It seems clear from this delay that OAH is not adequately staffed to establish and maintain the complete and user-friendly database needed, and statutorily required, to create meaningful transparency.

We encourage this Committee to coordinate with OAH representatives and confirm the precise budgetary needs to improve the portal and expand on its current capabilities as soon as

² D.C. Code § 2-1831.13(d).

³ D.C. Code §§ 2-536(a)(3); 2-536(b).

⁴ “On September 1, 2017, OAH began uploading Final Orders to the website for access by the public. At the present time, Final Orders in the following jurisdictions are being uploaded regularly: Department of Public Works, Department of Housing and Community Development, Office of Planning, Fire & Emergency Medical Services, Department of Health, Department of Energy and the Environment, District Department of Transportation, Department of Consumer & Regulatory Affairs, Metropolitan Police Department, and Department of Small and Local Business Development.” See <https://oah.dc.gov/service/find-final-order>.

possible. This includes ensuring that vacancies are filled and additional staff can be recruited and retained, such as by completing the review of salaries that this Committee suggested during FY22 budget oversight. Doing so will not only bring OAH into compliance with D.C. law, but also has the potential to lead to more efficient use of OAH staff – such as reducing the number of emails and calls received in the clerk’s office from litigants and attorneys seeking basic information about their cases. CCE strongly supports the Committee’s request that a “staffing benchmark study” be completed for OAH. We also support OAH’s request that an outside party conduct this evaluation, as OAH staff is already stretched thin and the information is needed in short order.

Assistance for pro se litigants.

OAH proceedings can be complex, and hearings are both vital and intimidating for most litigants. Thousands of D.C. residents pursue cases regarding the denial of benefits they need to survive without legal assistance; this frequently equates to a lack of meaningful participation. Stakeholders have reported that OAH’s Acting Resource Center Coordinator and updated website have been useful. CCE commends OAH’s ongoing collaboration with the legal services community and support of the OAH Legal Assistance Network (OLAN).⁵ However, these good efforts fall short of what is needed. It will be critical for OAH to move forward with plans to hire a full-time, permanent Resource Center Coordinator, continue to expand services, and bring on additional staff to maintain and expand upon these improvements as quickly as possible. When those things are accomplished, pro se litigants will be much better equipped to represent themselves in hearings. Stakeholder conversations have made clear that that the Resource Center, in addition to being understaffed, has been run by an attorney in the Office of General Counsel

⁵ The OAH Legal Assistance Network (OLAN) is a referral hotline that was created in response to the COVID-19 pandemic by four local legal service organizations: Bread for the City, the Legal Aid Society of D.C., Legal Counsel for the Elderly, and the Washington Legal Clinic for the Homeless. OLAN connects unrepresented litigants with an attorney who can provide referrals, advice, and limited or full representation.

and an additional staffer in Agency Management and Operational Support. We recommend supporting the Resource Center with a dedicated attorney who can't be pulled away for other matters, and by support staff who report to that attorney or to that attorney's supervisor. This could be addressed through expanding the planned baseline staffing review or through revision of the OAH Establishment Act to enshrine the Resource Center as a permanent and coherent entity within OAH.

In addition to a robust Resource Center, OAH needs clear and consistent authority, as well as predictable funding, to serve pro se litigants well. In CCE's 2016 report, we raised the concern that OAH's reliance on MOUs for adjudication of matters from several agencies "creates the impression, if not the absolute risk, that a contracting agency that disagrees with OAH's rulings or findings will terminate OAH's jurisdiction, and a perception that OAH's determinations may be influenced by that risk." Our recommendation was to ensure that existing jurisdiction under MOUs be converted to statutory authorization and that any new MOUs be codified as expanded jurisdiction within two years. Bill 22-0352, the *Office of Administrative Hearings Jurisdiction Expansion Act of 2017*, would have addressed this issue. It had broad support from public and government witnesses, and was passed unanimously out of committee and by the full Council. Unfortunately, it was passed subject to appropriations and the funds were never appropriated. However, the amount identified in the Fiscal Impact Statement was 1) a set of reprogrammings, not new funds, and 2) not large in the scope of the District's budget (see Figure 1). It should be straightforward to determine and reprogram funds for an updated amount.

| Office of Administrative Hearings Jurisdiction Expansion Amendment Act of 2018 Reprogrammings Required by Agency | | | | | |
|---|-----------------|-----------------|-----------------|-----------------|------------------|
| Agency | FY 2018 | FY 2019 | FY 2020 | FY 2021 | Total |
| DHCD | \$20,000 | \$20,350 | \$20,706 | \$21,068 | \$82,125 |
| DOEE | \$45,000 | \$45,788 | \$46,589 | \$47,404 | \$184,780 |
| OS | \$1,300 | \$1,323 | \$1,346 | \$1,369 | \$5,338 |
| OSSE | \$10,500 | \$10,684 | \$10,871 | \$11,061 | \$43,115 |
| Total Fiscal Impact^(a) | \$76,800 | \$78,144 | \$79,512 | \$80,903 | \$315,358 |

Table Notes:

(a). Assumes 1.75 percent growth each year to account for inflation.

Figure 1

We urge this Committee to support and monitor the expansion of the OAH Resource Center in the remainder of FY23 and provide any additional resources needed in FY24. This should include staff on duty in the Center full time, improvement of online materials, collaboration with legal service providers, law schools, and other volunteers so that every possible kind of assistance is available for litigants, and finding a permanent home for the Resource Center and all its staff within a specific place in the OAH organizational chart. The staffing benchmark study requested by this Committee could include an evaluation of what combination of staff, volunteers, and contracts would enable the Center to fully meet the needs of stakeholders and where the Center should fall in OAH’s structure.

OAH serves a vital role in ensuring that D.C. residents can fairly and quickly adjudicate problems with D.C. government agencies. We are glad to acknowledge the effort and creativity that OAH has dedicated to improving self-help resources for pro se litigants – but the current staffing and funding available to OAH are not adequate to meet the Office’s mandate quickly, efficiently and transparently. Thankfully, previous versions of this Committee, which included Chairperson Nadeau, voiced a clear commitment to ensuring that OAH performs at the level that District residents deserve. We request that this Committee act swiftly to ensure an evaluation of the agency take place in time for decisions and all case filings to be available online by the end of

FY23 and for the Resource Center to complete an expansion plan with clear benchmarks. CCE staff and board members would like to meet with you to discuss these issues in more detail, and to offer our assistance to this Committee and to our colleagues at OAH any time.

Thank you for your consideration and I welcome any questions.

Summary of Recommendations

Administrative Justice in the District of Columbia:

Recommendations to Improve D.C.'S Office of Administrative Hearings (2016)

CCE recommends that OAH make various changes to its organizational and management structure to more closely resemble other central hearing panels and model legislation. We believe that these changes will enable OAH to operate more efficiently and effectively, while improving the delivery of hearing services and resolving management and morale issues. Many of the recommended changes below can be made by changing OAH's internal policies. Other changes would require amending OAH's enabling act.

Jurisdiction: OAH's jurisdiction over cases is currently conferred both by statute and by a wide range of Memoranda of Understanding ("MOUs"), essentially contracts, with a variety of DC executive agencies. The reliance on MOUs creates the impression, if not the absolute risk, that a contracting agency that disagrees with OAH's rulings or findings will terminate OAH's jurisdiction, and a perception that OAH's determinations may be influenced by that risk. We recommend that the existing jurisdiction under MOUs be converted to statutory authorization. While OAH should retain the power to enter into MOUs initially, any expanded jurisdiction should be codified within two years.

Organizational Structure: OAH's current management structure does not support efficient and effective operations and supervision of staff. The Chief ALJ is responsible for directly supervising 33 ALJs and other senior staff, while also carrying out myriad other duties. In part because performance standards have not been prepared until 2016, and employee evaluations have not been conducted since 2011, OAH staff lack clarity about their job roles and those of their colleagues. OAH's management structure should be revised by reinstating a Deputy Chief ALJ, who should manage the five Principal ALJs, who in turn would manage groups of other ALJs. These changes would allow more individualized and effective management of employees and work groups, and also allow the Chief ALJ to focus on overseeing the agency as a whole. OAH also should continue to clarify the responsibilities of each OAH staff member by ensuring job descriptions are clear and accurate and that employees are aware of the responsibilities of individual staff and departments as a whole.

ALJ Selection, Evaluation, and Tenure: ALJs currently do not have the security of career positions, but rather serve for an initial two-year term, followed by a six-year term with the possibility of reappointment. ALJ should have a longer term, or their positions should be converted by statute to career positions, subject to termination for "good cause" only. ALJs also have not been evaluated on any regular basis. All ALJs should be evaluated annually, including the Chief ALJ, using meaningful and measurable criteria.

Improving Agency Culture: Although improving agency culture has been a focus of OAH's new administration, ALJ morale remains a significant challenge that impairs OAH operations. Given that a positive agency culture is essential for the agency to perform at its best, OAH should consult with an expert in organizational culture development to improve in this area. The Chief ALJ should continue efforts to establish policies and procedures that are fair to all, while striving to be transparent about proposed and adopted changes. The Chief ALJ should be evaluated annually by the Committee on Selection and Tenure of Administrative Law Judges ("COST"), with COST interviewing ALJs as part of this process. OAH leadership should

regularly consult with ALJs and staff regarding the agency's performance and seek ideas for improving OAH.

COST and Advisory Committee: OAH does not follow best practices recommended for central hearing panels in the management and support of its ALJs. While the Chief ALJ directly supervises the ALJs, the Chief cannot appoint, reappoint, or terminate ALJs, and has limited rights to discipline them. These 6 decisions instead are made by COST, whose members lack first-hand knowledge about OAH. While ALJs value COST for preserving judicial independence, it is questionable whether COST actually serves that function, and its role is out of step other central hearing panels across the country. OAH also has a separate Advisory Committee tasked with advising OAH and the Chief ALJ about larger policy concerns, but that Committee meets very infrequently and no longer is an effective support. To operate more efficiently and effectively, the Advisory Committee should be eliminated and the role of COST changed to more closely resemble the other 31 central hearing panel jurisdictions and model legislation. Over the course of the next two years, many of COST's responsibilities over selection, evaluation, and retention of ALJs should be transferred to the Chief ALJ. COST should retain jurisdiction to hear ALJ discipline and removal issues, and conduct an annual evaluation of the Chief ALJ. All of the Advisory Committee's current functions also should be transferred to COST and the Advisory Committee should be dissolved. Implementing many of these changes will require amending OAH's enabling act, a process that may take as long as one or two years. In the interim, COST should amend its procedures to ensure that its members actively engage in the Commission's work.

Case Assignment System: Through January 2016, OAH's process for assigning cases resulted in uneven workloads for ALJs. Chief Judge Eugene Adams implemented a new system effective February 1, 2016, which groups all ALJs into assigned jurisdictional clusters and is aimed at improving fairness and transparency in the case assignment process. To ensure the integrity of the case assignment system, procedures for Principal Administrative Law Judge ("PALJ") case assignment should include random assignment within categories of cases. OAH should analyze the effectiveness of its new case assignment system over the coming months. OAH also should regularly evaluate the ALJs' workloads, particularly new jurisdictional assignments, to ensure cases are distributed fairly.

Case Processing: Litigants have been negatively affected by delays in the resolution of their cases due in part to inefficiencies in OAH's case processing system. Moreover, OAH's technology systems are not optimally supporting the agency's case management needs. To improve its case processing, OAH should ensure that caseloads are assigned equitably and reevaluate caseloads on a regular basis; meet recommended case processing deadlines by case type; and return to scheduling cases on an individual basis. Finally, OAH should utilize technology to improve case management by: (1) implementing a uniform case filing system; (2) making OAH records publicly accessible, and case files available online to litigants and agencies; (3) educating all OAH staff about technology systems; (4) increasing the use of telephone video conferencing; and (5) allowing fines to be paid by credit card online.

Improving Litigant Experience: Litigants using OAH's adjudicatory services face various challenges. Pro se litigants are unable to participate effectively and meaningfully in the hearing process. Litigants with limited English proficiency also struggle to use OAH's language access resources. Mediation, which can be particularly meaningful for unrepresented litigants, is underutilized. Gaps remain in the guidance and materials available through OAH's Resource Center for unrepresented litigants. Finally, OAH does not provide clear guidance on how to

submit feedback to the agency. Litigants, agencies, and counsel are confused about this process. To improve litigants' experience, OAH should partner with the DC legal community to increase the availability of advice and representation for unrepresented litigants at least as to more complex matters, and should focus on making the Resource Center, its website, and its materials more user-friendly and accessible. OAH should improve the process for scheduling interpreters and ensure compliance with the DC Language Access Act of 2004 with respect to written materials. ALJs can improve the experience for litigants by consistently notifying parties of the option to mediate their cases and using judicial "engaged neutrality" through more active ALJ participation in developing the facts and legal theories to ensure a more complete and fair record in all cases. Mediation can be encouraged further by developing a roster of volunteer mediators and ensuring that ALJs who opt to mediate are credited in the case management system for this important work. Finally, OAH should update its website to allow stakeholders to submit comments online, better advertise other ways to provide feedback, and adopt systems to review and respond to this feedback.

Appeals: OAH and the DC Court of Appeals do not have written procedures in place for the transmission of the Court's appellate opinions, both unpublished and published, and OAH does not consistently track data related to appeals. The Clerk of Court for OAH should work with the Clerk of the DC Court of Appeals to establish such procedures. OAH should track OAH cases on appeal, particularly whether they are affirmed or overturned, by case type and ALJ, and report this data internally and in its annual report.

Full report available here:

http://www.courtexcellence.org/uploads/publications/OAH_Final_Report_20160908_1.pdf.