

(b) Official notice may be taken of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge.

(c) Parties must be notified of any material of which the judge intends to take official notice, including preliminary reports, staff memoranda or other noticeable data. The judge shall disclose the basis for taking official notice and give the parties a reasonable opportunity to contest the material so noticed.

Amended by R.1996 d.343, effective August 5, 1996.  
See: 28 N.J.R. 2433(a), 28 N.J.R. 3779(a).

In (a) updated Rules of Evidence citation.

#### Case Notes

Official notice may be taken of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. If the agency bases no belief on some unexpressed agency expertise, it should have noted the same for the record (citing former N.J.A.C. 1:1-15.3(b)), *A.C. Powell Health Care Center v. Dep't of Environmental Protection*, 1 N.J.A.R. 454 (1980).

Official notice may be taken of judicially noticeable facts as explained in Rule 9 of the New Jersey Rules of Evidence (citing former N.J.A.C. 1:1-15.3). *Div. of Motor Vehicles v. Exum*, 5 N.J.A.R. 298 (1983).

Parties must be notified before or during the hearing of the material noticed and the parties will be afforded an opportunity to contest that material of which the judge is asked to take official notice (citing former N.J.A.C. 1:1-15.3). In *Re: Perno Bus Co.*, 1 N.J.A.R. 402 (1980).

### 1:1-15.3 Presumptions

No evidence offered to rebut a presumption may be excluded except pursuant to the judge's discretion under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege.

### 1:1-15.4 Privileges

The rules of privilege recognized by law or contained in the following New Jersey Rules of Evidence shall apply in contested cases to the extent permitted by the context and similarity of circumstances: N.J.R.E. 501 (Privilege of Accused); N.J.R.E. 502 (Definition of Incrimination); N.J.R.E. 503 (Self-incrimination); N.J.R.E. 504 (Lawyer-Client Privilege); N.J.S.A. 45:14B-28 (Psychologist's Privilege); N.J.S.A. 2A:84-22.1 et seq. (Patient and Physician Privilege); N.J.S.A. 2A:84A-22.8 and N.J.S.A. 2A:84A-22.9 (Information and Data of Utilization Review Committees of Hospitals and Extended Care Facilities); N.J.S.A. 2A:84A-22.13 et seq. (Victim Counselor Privilege); N.J.R.E. 508 (Newsperson's Privilege); N.J.R.E. 509 (Marital Privilege-Confidential Communications); N.J.S.A. 45:8B-29 (Marriage Counselor Privilege); N.J.R.E. 511 (Cleric-Penitent Privilege); N.J.R.E. 512 and 610 (Religious Belief); N.J.R.E. 513 (Political Vote); N.J.R.E. 514 (Trade Secret); N.J.R.E. 515 (Official Information); N.J.R.E. 516 (Identity of Informer); N.J.R.E. 530 (Waiver of Privilege by Contract or Previous Disclosure; Limitations); N.J.R.E. 531 (Admissibility of Disclosure Wrongfully Compelled); N.J.R.E. 532 (Reference to Exercise of Privileges); and N.J.R.E. 533 (Effect of Error in Overruling Claim of Privilege).

Administrative Correction.

See: 23 N.J.R. 847(a).

Amended by R.1996 d.343, effective August 5, 1996.

See: 28 N.J.R. 2433(a), 28 N.J.R. 3779(a).

Updated Rules of Evidence citations.

Amended by R.2007 d.393, effective December 17, 2007.

See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).

Substituted "Cleric-Penitent Privilege" for "Priest Penitent Privilege".

#### Case Notes

Deliberative process privilege did not apply to Department of Insurance documents. *New Jersey Manufacturer's Insurance Company v. Department of Insurance*, 94 N.J.A.R.2d (INS) 27.

### 1:1-15.5 Hearsay evidence; residuum rule

(a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

(b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

#### Case Notes

While the writings of an administrative analyst with the New Jersey Division of Pensions and Benefits were hearsay, as they appeared highly reliable, they were admissible in an administrative hearing under the residuum rule, N.J.A.C. 1:1-15.5(b), to corroborate a retiree's unrebuted testimony about the advice the retiree received from the Division; therefore, an administrative law judge erred in concluding that there was no corroboration for the retiree's testimony. *Hemsey v. Board of Trustees, Police & Firemen's Retirement System*, 393 N.J. Super. 524, 925 A.2d 1, 2007 N.J. Super. LEXIS 176 (App.Div. 2007).

"Residuum rule" requires that findings be supported by residuum of competent evidence. *Matter of Tenure Hearing of Cowan*, 224 N.J. Super. 737, 541 A.2d 298 (A.D.1988).

Facts did not need to be proved by residuum of competent evidence, so long as combined probative force of relevant hearsay and relevant competent evidence sustained ultimate finding. *Matter of Tenure Hearing of Cowan*, 224 N.J. Super. 737, 541 A.2d 298 (A.D.1988).

Written, sworn statements of evidence to support charges against tenured, public high school teacher could be hearsay. *Matter of Tenure Hearing of Cowan*, 224 N.J. Super. 737, 541 A.2d 298 (A.D.1988).

Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each finding of fact (citing former N.J.A.C. 1:1-15.8(b)). In the *Matter of Tanelli*, 194 N.J. Super. 492, 477 A.2d 394 (App.Div.1984), certification denied 99 N.J. 181, 491 A.2d 686 (1984).

ALJ dismissed one charge of abuse against a certified nurse aide because it was based entirely on hearsay. N.J. Dep't of Health & Senior Services v. O.B., OAL Dkt. No. HLT 2051-07, 2007 N.J. AGEN LEXIS 263, Initial Decision (May 15, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 725) adopted, which concluded that it could not be found that a certified nurse aide threw a

wet pad at a resident of a long-term care facility where there was no competent legal evidence to corroborate the resident's hearsay statement that the act had occurred. *N.J. Dep't of Health & Senior Services v. Turner*, OAL Dkt. No. HLT 2091-06, 2006 N.J. AGEN LEXIS 872, Final Decision (September 20, 2006).

Administrative cases are unique in that N.J.A.C. 1:1-15.5(b), entitled the "residuum rule," allows hearsay to be admitted, but it also requires the ultimate findings be supported by residuum of competent evidence; the residuum rule is consistent with the principle that, like judicial proceedings, administrative adjudication must include procedural safeguards, including notice and an opportunity to be heard and opportunity for cross-examination, defense, and rebuttal — essential for reliable fact finding. *2 Lars, LLC v. City of Vineland*, OAL DKT. NO. ABC 8875-05, 2006 N.J. AGEN LEXIS 730, Initial Decision (September 12, 2006).

Competent evidence refers to evidence that would ordinarily be admissible in a court under the rules of evidence; while hearsay is admissible in an administrative proceeding, the ultimate finding must be based upon competent evidence and may not be based solely upon hearsay. *2 Lars, LLC v. City of Vineland*, OAL DKT. NO. ABC 8875-05, 2006 N.J. AGEN LEXIS 730, Initial Decision (September 12, 2006).

Hearsay cannot be "boot strapped" from a municipal hearing into an administrative hearing by shifting the burden of proof to the licensee; if the municipal hearing was built entirely upon hearsay and the hearsay was accepted by the ALJ at an administrative hearing, it would turn it into a rubber stamp and the administrative process would be rendered meaningless. *2 Lars, LLC v. City of Vineland*, OAL DKT. NO. ABC 8875-05, 2006 N.J. AGEN LEXIS 730, Initial Decision (September 12, 2006).

Where the city's case relied solely on hearsay, as the city's witness to a fight in the licensee's establishment was not presented as a witness at the administrative hearings and her admissions or statements made to the officers were thus out-of-court statements offered for the truth, the licensee was not afforded procedural safeguards, including opportunity for cross-examination, defense and rebuttal; the city therefore failed to establish by competent evidence that the licensee violated N.J.A.C. 13:2-23.1(a). *2 Lars, LLC v. City of Vineland*, OAL DKT. NO. ABC 8875-05, 2006 N.J. AGEN LEXIS 730, Initial Decision (September 12, 2006).

Student accused of possessing marijuana with intent to distribute failed to present any evidence rebutting the police detective's report that he possessed six bags of marijuana, and the fact that the detective's account of the marijuana found with the student was hearsay did not automatically render the evidence incompetent under N.J.A.C. 1:1-15.5(a) and (b). The student himself offered into evidence three exhibits that described circumstances leading to the student's apprehension and possession of marijuana, and while the reports were all hearsay, they nonetheless corroborated each other and were from three separate individuals, one of whom was a witness to the car stop and police activity, and while the witness's statement did not directly refer to the student, it did corroborate facts in police reports. *P.G. ex rel. M.G. v. Bd. of Educ. of Woodcliff Lake*, OAL Dkt. No. EDU 7495-03, 2006 N.J. AGEN LEXIS 572, Commissioner's Decision (June 28, 2006).

Hearsay opinion in police report, when successfully rebutted, was not a sufficient basis to require licensee to undergo driver re-examination. *Division of Motor Vehicles v. Cioffi*, 95 N.J.A.R.2d (MVH) 57.

Hearsay medical reports not sufficient to show police officer permanently and totally disabled for accidental disability retirement purposes. *Mercier v. Board of Trustees, Police and Firemen's Retirement System*, 92 N.J.A.R.2d (TYP) 94.

Residuum rule requires that notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact (citing former N.J.A.C. 1:1-15.8). *Div. of Medical Assistance v. Kares*, 8 N.J.A.R. 517 (1983).

Letters from real estate agents held admissible hearsay (citing former N.J.A.C. 1:1-15.8(a)). *Country Village v. Pinelands Commission*, 8 N.J.A.R. 205 (1985).

Casino Control Commission determined that the residuum rule did not apply to hearings conducted pursuant to the Casino Control Act. The standard to be applied (N.J.S.A. 5:12-107(a)(6)) permits the Commission to base any factual findings upon relevant evidence including hearsay, regardless of the fact that such evidence may be admissible in a civil action, so long as the evidence is the sort upon which responsible persons are accustomed to rely upon in the conduct of serious affairs (citing former N.J.A.C. 1:1-15.8). *Div. of Gaming Enforcement v. Merlino*, 8 N.J.A.R. 126 (1985), affirmed 216 N.J. Super. 579, 524 A.2d 821 (App.Div.1987), affirmed 109 N.J. 134, 535 A.2d 968 (1988).

Hearsay evidence allowed subject residuum rule. In *Re: White Bus Co.*, 6 N.J.A.R. 535 (1983).

#### Law Review and Journal Commentaries

*Approaching Hearsay at Administrative Hearings: Hearsay Evidence and the Residuum Rule.* Joseph R. Morano, 180 N.J. Lawyer 22 (1996).

### 1:1-15.6 Authentication and content of writings

Any writing offered into evidence which has been disclosed to each other party at least 10 days prior to the hearing shall be presumed authentic. At the hearing any party may raise questions of authenticity. Where a genuine question of authenticity is raised the judge may require some authentication of the questioned document. For these purposes the judge may accept a submission of proof, in the form of an affidavit, certified document or other similar proof, no later than 10 days after the date of the hearing.

Amended by R.2007 d.393, effective December 17, 2007.

See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).

Substituted "10" for "five".

### 1:1-15.7 Exhibits

(a) The verbatim record of the proceedings shall include references to all exhibits and, as to each, the offering party, a brief description of the exhibit stated by the offering party or the judge, and the marking directed by the judge. The verbatim record shall also include a record of the exhibits retained by the judge at the end of the proceedings and of the disposition then made of the other exhibits.

(b) Parties shall provide each party to the case with a copy of any exhibit offered into evidence. Large exhibits that cannot be placed within the judge's file may be either photographed, attached to the file, or described in the record and committed to the safekeeping of a party. All other admitted exhibits shall be retained in the judge's file until certified to the agency head pursuant to N.J.A.C. 1:1-18.1.

(c) The standard marking for exhibits shall be:

1. P = petitioner;
2. R = respondent;
3. A = appellant;
4. J = joint;
5. C = judge;
6. I = intervenor; or

7. Such other additional markings required for clarity as the judge may direct.

Amended by R.2007 d.393, effective December 17, 2007.

See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).

In (b), substituted "shall" for "should, whenever practicable,".

**1:1-15.8 Witnesses; requirements for testifying;  
testifying by telephone**

(a) Except as otherwise provided by this subchapter, by statute or by rule establishing a privilege:

1. Every person is qualified to be a witness; and
2. No person has a privilege to refuse to be a witness; and
3. No person is disqualified to testify to any matter; and
4. No person has a privilege to refuse to disclose any matter or to produce any object or writing; and
5. No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing but the judge presiding at the hearing in a contested case may not testify as a witness.

(b) A person is disqualified to be a witness if the judge finds the proposed witness is incapable of expression concerning the matter so as to be understood by the judge directly or through interpretation by one who can understand the witness, or the proposed witness is manifestly incapable of understanding the duty of a witness to tell the truth. An interpreter is subject to all the provisions of these rules relating to witnesses.

(c) As a prerequisite for the testimony of a witness there must be evidence that the witness has personal knowledge of the matter, or has special experience, training or education, if such is required. Such evidence may be provided by the testimony of the witness. In exceptional circumstances, the judge may receive the testimony of a witness conditionally, subject to evidence of knowledge, experience, training or education being later supplied in the course of the proceedings. Personal knowledge may be obtained through hearsay.

(d) A witness may not testify without taking an oath or affirming to tell the truth under the penalty provided by law. No witness may be barred from testifying because of religion or lack of it.

(c) Upon transmitting the record, the agency with the predominant interest shall pursuant to N.J.A.C. 1:1-18.8 request an extension to permit the rendering of a final decision by the agency which does not have the predominant interest.

## SUBCHAPTER 18. INITIAL DECISION; EXCEPTIONS; FINAL DECISION; REMAND; EXTENSIONS OF TIME LIMITS

### 1:1-18.1 Initial decision in contested cases

(a) When a case is not heard directly by an agency head, the judge shall issue an initial decision which shall be based exclusively on:

1. The testimony, documents and arguments accepted by the judge for consideration in rendering a decision;
2. Stipulations; and
3. Matters officially noticed.

(b) The initial decision shall be final in form and fully dispositive of all issues in the case.

(c) No substantive finding of fact or conclusion of law, nor any concluding order or other disposition shall be binding upon the agency head, unless otherwise provided by statute.

(d) All initial decisions shall be issued and received by the agency head no later than 45 days after the hearing is concluded unless an earlier time frame is mandated by Federal or State law.

(e) In mediations successfully concluded by initial decision, the decision shall be issued and received by the agency head as soon as practicable after the mediation, but in no event later than 45 days thereafter.

(f) Within 10 days after the initial decision is filed with the agency head, the Clerk shall certify the entire record with original exhibits to the agency head.

(g) Upon filing of an initial decision with the transmitting agency, the Office of Administrative Law relinquishes jurisdiction over the case, except for matters referred to in N.J.A.C. 1:1-3.2(c)1 through 5.

Amended by R.1987 d.462, effective November 16, 1987.  
See: 19 N.J.R. 1592(a), 19 N.J.R. 2131(b).

Added text to (h) "except for matters ..."  
Amended by R.1992 d.46, effective February 3, 1992.  
See: 23 N.J.R. 3406(a), 24 N.J.R. 404(a).

Revised (d); deleted (e); redesignated existing (f)-(h) as (e)-(g).  
Amended by R.2007 d.393, effective December 17, 2007.  
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).  
In (d), deleted the last sentence.

#### Case Notes

Administrative Law Judge's finding of fact rejecting the conclusion of a witness, a firefighter for a local fire department and the team leader in the arson investigation unit, regarding the cause of the fire as "not

persuasive" and relying instead upon the ALJ's own involvement in fire investigations and teaching a course on fire investigation, was totally improper; the witness was an expert witness, he had specialized knowledge and experience in fire investigations, he was on the scene of the incident as "suppression efforts were just being completed," he was a firsthand witness to the damage which he carefully reviewed to determine the cause, he took pictures of the damage at that time and contemporaneously recorded his observations in a report, his presence at the fire scene was to determine the cause, and he made a determination after reviewing the fire scene that the improper use of an extension cord in the bedroom, which improperly ran under the bed caster and a rug, caused the fire and burnt away the rug in that area, proceeding in a "classic V-pattern" toward the outlet, window, and air conditioner. Div. of Developmental Disabilities v. Cruz, OAL Dkt. No. HDD 777-2005S, 2007 N.J. AGEN LEXIS 524, Final Decision (June 22, 2007).

### 1:1-18.2 Oral initial decision

(a) The judge may render the initial decision orally in any case where the judge determines that the circumstances appropriately permit an oral decision and the questions of fact or law are sufficiently non-complex.

(b) The decision shall be issued, transcribed, filed with the agency head and mailed to the parties with an indication of the date of receipt by the agency head.

(c) In an oral decision, the judge shall identify the case, the parties, and the issue or issues to be decided and shall analyze the facts as they relate to the applicable law, and make findings of fact, conclusions of law and an appropriate order or disposition of the case. The decision shall include the statement at N.J.A.C. 1:1-18.3(c)12, and the judge shall explain to the parties that the decision is being forwarded to the agency head for disposition pursuant to N.J.S.A. 52:14B-10, and that exceptions may be addressed to the agency head. The judge need not specifically include in the oral decision the other material required by N.J.A.C. 1:1-18.3(c) as long as it is otherwise contained in the record.

Amended by R.1996 d.57, effective February 5, 1996.  
See: 27 N.J.R. 4039(a), 28 N.J.R. 813(a).

In (a) deleted "on the record before the parties" following "orally", and in (b) substituted "the conclusion of the hearing" for "rendering an oral decision".

Amended by R.2007 d.393, effective December 17, 2007.  
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).

Rewrote (b).

### 1:1-18.3 Written initial decision

(a) If an oral decision is not issued, the judge shall issue a written initial decision.

(b) The written initial decision shall be filed with the agency head and shall be promptly served upon the parties with an indication of the date of receipt by the agency head.

(c) The written initial decision shall contain the following elements which may be combined and need not be separately discussed:

1. An appropriate caption;

2. The appearances of the parties and their representatives, if any;
3. A statement of the case;
4. A procedural history;
5. A statement of the issue(s);
6. A factual discussion;
7. Factual findings;
8. A legal discussion;
9. Conclusions of law;
10. A disposition;
11. A list of exhibits admitted into evidence; and

12. The following statement: "This recommended decision may be adopted, modified or rejected by (the head of the agency), who by law is empowered to make a final decision in this matter. However, if (the head of the agency) does not so act in 45 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10."

Amended by R.2007 d.393, effective December 17, 2007.  
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).  
Rewrote (b).

#### Case Notes

Evidence that failed to particularize foundation failed to support decision that sergeant was totally and permanently disabled. *Crain v. State Dept. of the Treasury, Div. of Pensions*, 245 N.J.Super. 229, 584 A.2d 863 (A.D.1991).

Administrative law judge delayed petitioner's application to the DEP for approval of construction of a mobile home park. Petitioner may meet with DEP to formulate method of testing for nitrates acceptable to both parties within 30 days of order. Normally, once an initial decision is rendered, it is returned in its entirety to the agency for final disposition. The OAL would retain sufficient jurisdiction, with the permission of the agency, to resolve disputes arising out of the development and implementation of the testing program (citing former N.J.A.C. 1:1-16.3 and 4). *Andover Mobile Home Park v. DEP*, 4 N.J.A.R. 420 (1981).

#### 1:1-18.4 Exceptions; replies

(a) Within 13 days from the date the judge's initial decision was mailed to the parties, any party may file written exceptions with the agency head. A copy of the exceptions shall be served on all other parties and the judge. Exceptions to orders issued under N.J.A.C. 1:1-3.2(c)4 shall be filed with the Director of the Office of Administrative Law.

(b) The exceptions shall:

1. Specify the findings of fact, conclusions of law or dispositions to which exception is taken;
2. Set out specific findings of fact, conclusions of law or dispositions proposed in lieu of or in addition to those reached by the judge;

3. Set forth supporting reasons. Exceptions to factual findings shall describe the witnesses' testimony or documentary or other evidence relied upon. Exceptions to conclusions of law shall set forth the authorities relied upon.

(c) Evidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions.

(d) Within five days from receipt of exceptions, any party may file a reply with the agency head, serving a copy thereof on all other parties and the judge. Such replies may address the issues raised in the exceptions filed by the other party or may include submissions in support of the initial decision.

(e) In all settlements, exceptions and cross-exceptions shall not be filed, unless permitted by the judge or agency head.

Amended by R.1987 d.462, effective November 16, 1987.  
See: 19 N.J.R. 1592(a), 19 N.J.R. 2131(b).

(a) substantially amended.

Amended by R.1990 d.483, effective September 17, 1990.  
See: 22 N.J.R. 2067(a), 22 N.J.R. 3003(b).

Change at (a) from ten to thirteen days.

Amended by R.1991 d.44, effective February 4, 1991.  
See: 22 N.J.R. 3278(b), 23 N.J.R. 293(a).

In (a) and (d): deleted filing of documents with the Clerk and added text indicating which documents shall be filed with the judge.

Amended by R.2007 d.393, effective December 17, 2007.  
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).

In (d), substituted "may address the issues raised in the exceptions filed by the other party or may include" for "may include cross-exceptions or".

#### Case Notes

State Interscholastic Athletic Association regulation excluding males from female athletic teams did not violate federal equal protection, State Constitution, or statute prohibiting sex discrimination in education. *B.C. v. Cumberland Regional School District*, 220 N.J.Super. 214, 531 A.2d 1059 (App.Div.1987).

Within 10 days from the receipt of the judge's initial decision, any party may file written exceptions with the agency head and with the clerk (citing former N.J.A.C. 1:1-16.4). *De Vitis v. New Jersey Racing Commission*, 202 N.J.Super. 484, 495 A.2d 457 (App.Div.1985), certification denied 102 N.J. 337, 508 A.2d 213 (1985).

Error in failing to serve jockey in administrative proceeding was harmless. *Moiseyev v. New Jersey Racing Com'n*, 239 N.J.Super. 1, 570 A.2d 988 (A.D.1989).

Because the Board did not file exceptions to the ALJ's June 6, 2007 decision until June 25, 2007, the exceptions were untimely and were not considered by the Commissioner. *Kohn v. Bd. of Educ. of Orange Twp.*, OAL Dkt. No. EDU 10582-06, 2007 N.J. AGEN LEXIS 532, Commissioner's Decision (July 19, 2007).

Because there was no indication that a letter to the Commissioner of Education "taking exception" to the Initial Decision was also served on either the Board of Examiners or the Administrative Law Judge, the Commissioner did not consider petitioner to have filed exceptions. *Muench v. N.J. Dep't of Educ., State Bd. of Examiners*, OAL Dkt. No. EDU 08369-06, 2007 N.J. AGEN LEXIS 96, Commissioner's Decision (January 9, 2007).

Exceptions are required to be filed within 13 days after the Initial Decision, including partial summary decisions, and although an end-date for filing exceptions was not specified in the order for extension, it was

not reasonable to assume that the exception period could run until the date established for the Final Decision on the matter; in addition, the bases for many of licensee's exceptions were improper. *Bakke v. Prime Ins. Syndicate*, OAL Dkt. No. BKI 1168-05, 2006 N.J. AGEN LEXIS 985, Final Decision (May 24, 2006).

Respondent's Exceptions to the Initial Decision did not even come close to meeting statutory requirements where: (1) its motion to compel and for sanctions was heard by the ALJ on three separate occasions, but each time the respondent was warned that it should provide more complete discovery and was given additional time to comply, but each time it failed to do so; (2) the ALJ did not merely accept petitioner's representations about the inadequacy of respondent's discovery responses, but reviewed the interrogatory responses himself and thus did not reach his conclusion that the discovery provided was inadequate based on de minimis and conclusory data, as respondent suggested; (3) respondent failed to provide complete discovery although ordered by the ALJ to do so and its former counsel fully understood the consequences of a failure to do so; and (4) although respondent raised certain substantive claims, they became irrelevant due to respondent's own failure to comply with the ALJ's orders. *Absolut Spirits Co., Inc. v. Monsieur Touton Selection, Ltd.*, OAL DKT. NO. ABC 4217-04, 2006 N.J. AGEN LEXIS 508, Final Decision (May 10, 2006).

Exceptions were not timely filed when they were addressed and directed to the Administrative Law Judge but not filed with the Commissioner of Education; instructions for the filing of exceptions were clearly set forth on the last page of the Initial Decision, and this was not a case of clerical error, where the exceptions were simply placed in an incorrect envelope. *D.B.R. ex rel. N.R.L. v. Bd. of Educ. of Morris*, OAL Dkt. No. EDU 12060-04, 2005 N.J. AGEN LEXIS 1147, Commissioner's Decision (August 18, 2005).

### 1:1-18.5 Motions to reconsider and reopen

(a) Motions to reconsider an initial decision are not permitted.

(b) Motions to reopen a hearing after an initial decision has been filed must be addressed to the agency head.

(c) Motions to reopen the record before an initial decision is filed must be addressed to the judge and may be granted only for extraordinary circumstances.

#### Case Notes

Commissioner's adoption of the administrative law judge's recommended decision had the effect of denying the request to reopen the record (citing former N.J.A.C. 1:1-16.4(e)). *Dep't. of Labor v. Titan Construction Co.*, 102 N.J. 1, 504 A.2d 7 (1985).

Motion to reopen Lemon Law hearing at which respondent failed to appear was denied; respondent did not satisfy its burden of proving that it did not have actual notice of the hearing. *Mitchell v. Hillside Auto Mall*, OAL Dkt. No. CMA 05407-05, 2005 N.J. AGEN LEXIS 1125, Final Decision (October 14, 2005).

### 1:1-18.6 Final decision; stay of implementation

(a) Within 45 days after the receipt of the initial decision, or sooner if an earlier time frame is mandated by Federal or State law, the agency head may enter an order or a final decision adopting, rejecting or modifying the initial decision. Such an order or final decision shall be served upon the parties and the Clerk forthwith.

(b) The agency head may reject or modify conclusions of law, interpretations of agency policy, or findings of fact not

relating to issues of credibility of lay witness testimony, but shall clearly state the reasons for so doing. The order or final decision rejecting or modifying the initial decision shall state in clear and sufficient detail the nature of the rejection or modification, the reasons for it, the specific evidence at hearing and interpretation of law upon which it is based and precise changes in result or disposition caused by the rejection or modification.

(c) The agency head may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record.

(d) An order or final decision rejecting or modifying the findings of fact in an initial decision shall be based upon substantial evidence in the record and shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent and credible evidence in the record.

(e) If an agency head does not reject or modify the initial decision within 45 days and unless the period is extended as provided by N.J.A.C. 1:1-18.8, the initial decision shall become a final decision.

(f) When a stay of the final decision is requested, the agency shall respond to the request within 10 days.

Amended by R.2001 d.180, effective June 4, 2001 (operative July 1, 2001).

See: 33 N.J.R. 1040(a), 33 N.J.R. 1926(a).

Rewrote (b); added new (c) and (d), and recodified existing (c) and (d) as (e) and (f).

#### Case Notes

Refusal to grant nursing home an open-ended lease pass-through was protected by qualified immunity. *Stratford Nursing and Convalescent Center, Inc. v. Kilstein*, 802 F.Supp. 1158 (D.N.J. 1991), affirmed 972 F.2d 1332 (3rd Cir. 1992).

Exercise of quasi-judicial function in application of state appellate court decision to specific years encompassed therein; judicial immunity from civil rights liability. *Stratford Nursing and Convalescent Center, Inc. v. Kilstein*, 802 F.Supp. 1158 (D.N.J. 1991), affirmed 972 F.2d 1332 (3rd Cir. 1992).

Commissioner has 45 days to affirm, modify or reverse an administrative law judge's decision (citing former N.J.A.C. 1:1-16.5(a)). *Wichert v. Walter*, 606 F.Supp. 1516 (D.N.J.1985).

The over one-year delay between the issuance of Commissioner of the Department of Environmental Protection's (DEP) summary order and the final decision in action seeking compensation for an under recovery incurred by solid waste utility due to use of interim rates was not in bad faith, or was inexcusably negligent, or grossly indifferent so as to automatically required the administrative law judge's initial decision to be deemed approved, where the subject matter of the administrative proceeding was very complex, involving many days of complicated testimony, and there was a voluminous record, which was made even more problematical by the utility ending its relationship with county utilities authority after the hearings. *Penpac, Inc. v. Passaic County Utilities Authority*, 367 N.J.Super. 487, 843 A.2d 1153 (App. Div. 2004).

Three month delay in providing findings and legal conclusions for decision itself untimely; equitable factor against reconsideration of administrative law judge's (ALJ) decision. *Mastro v. Board of Trustees, Public Employees' Retirement System*, 266 N.J.Super. 445, 630 A.2d 289 (A.D.1993).

Inherent power to reconsider decision. *Mastro v. Board of Trustees, Public Employees' Retirement System*, 266 N.J.Super. 445, 630 A.2d 289 (A.D.1993).

Initial decision of administrative law judge (ALJ) shall be "deemed adopted". *Mastro v. Board of Trustees, Public Employees' Retirement System*, 266 N.J.Super. 445, 630 A.2d 289 (A.D.1993).

Board of Trustees of Public Employee Retirement System failed to make showing justifying setting aside decision. *Mastro v. Board of Trustees, Public Employees' Retirement System*, 266 N.J.Super. 445, 630 A.2d 289 (A.D.1993).

Evidence that failed to particularize foundation failed to support decision that sergeant was totally and permanently disabled. *Crain v. State Dept. of the Treasury, Div. of Pensions*, 245 N.J.Super. 229, 584 A.2d 863 (A.D.1991).

Agency decision was not invalid for failure to include findings and conclusions within 45 day limit. *DiMaria v. Board of Trustees of Public Employees' Retirement System*, 225 N.J.Super. 341, 542 A.2d 498 (A.D.1988), certification denied 113 N.J. 638, 552 A.2d 164.

Civil Service Commission had no duty to review findings of administrative law judge prior to acceptance or rejection of judge's findings and recommendations (citing N.J.A.C. 4:1-5.4). In the Matter of *Morrison*, 216 N.J.Super. 143, 523 A.2d 238 (App.Div.1987).

Decision was affirmed despite the absence of findings in support of determination as required by N.J.A.C. 1:1-18.6 (citing former N.J.A.C. 1:1-16.5(b)). *O'Toole v. Forestal*, 211 N.J.Super. 394, 511 A.2d 1236 (App.Div.1986).

Within 45 days after the receipt of the initial decision, the agency head may enter an order or final decision adopting, rejecting or modifying the initial decision (former rule cited N.J.A.C. 1:16.4 and 16.5). *De Vitis v. New Jersey Racing Commission*, 202 N.J.Super. 484, 495 A.2d 457 (App.Div.1985), certification denied 102 N.J. 337, 508 A.2d 213 (1985).

Agency head may reject the Administrative Law Judge's determination to accord greater weight to one party's expert. *ZRB, LLC v. N.J. Dep't of Env'tl. Prot., Land Use Regulation*, OAL Dkt. No. ESA 6180-04, 2007 N.J. AGEN LEXIS 921, Final Decision (July 2, 2007).

Commissioner overturned credibility determinations and legal findings of the ALJ and found that an applicant was disqualified from receiving certification as a nurse aide where the applicant provided a false answer on the criminal background investigation application. *Pruette v. Dep't of Health & Senior Services*, OAL Dkt. No. HLT 2118-06, 2006 N.J. AGEN LEXIS 783, Final Decision (August 17, 2006).

After an initial decision by administrative law judge, the agency head may enter an order or a final decision adopting, rejecting or modifying the initial decision (citing former N.J.A.C. 1:1-16.5). *Kurman v. Fairmount Realty Corp.*, 8 N.J.A.R. 110 (1985).

Granting of partial summary judgement is not effective until a final agency review has been rendered on an issue, either upon interlocutory review pursuant to a request by respondent or at end of the contested case (citing former N.J.A.C. 1:1-9.7 and 1:1-16.5). *Kurman v. Fairmount Realty Corp.*, 8 N.J.A.R. 110 (1985).

### 1:1-18.7 Remand; procedure

(a) An agency head may enter an order remanding a contested case to the Office of Administrative Law for further

action on issues or arguments not previously raised or incompletely considered. The order of remand shall specifically state the reason and necessity for the remand and the issues or arguments to be considered. The remand order shall be attached to a N.J.A.C. 1:1-8.2 transmittal form and returned to the Clerk of the Office of Administrative Law along with the case record.

(b) The judge shall hear the remanded matter and render an initial decision.

### Case Notes

Administrative law judge without authority to refuse to comply with an order of remand of an agency head (citing former N.J.A.C. 1:1-16.5(c)). In *Re Kallen*, 92 N.J. 14, 455 A.2d 460 (1983).

Order of remand signed by assistant director; valid. *O.F. v. Hudson County Welfare Agency*, 92 N.J.A.R.2d (DEA) 57.

Order for remand by Director of agency rejected by administrative law judge since Department had ample opportunity to develop proofs at prior hearing; Director rejected ALJ's decision and reopened case (citing former N.J.A.C. 1:1-16.5). *Cash Services, Inc., v. Dep't of Banking*, 5 N.J.A.R. 103 (1981).

### 1:1-18.8 Extensions of time limits

(a) Time limits for filing an initial decision, filing exceptions and replies and issuing a final decision may be extended for good cause.

(b) A request for extension of any time period must be submitted no later than the day on which that time period is to expire. This requirement may be waived only in case of emergency or other unforeseeable circumstances.

(c) Requests to extend the time limit for initial decisions shall be submitted in writing to the Director of the Office of Administrative Law. If the Director concurs in the request, he or she shall sign a proposed order no later than the date the time limit for the initial decision is due to expire and shall forward the proposed order to the transmitting agency head and serve copies on all parties. If the agency head approves the request, he or she shall within 10 days of receipt of the proposed order sign the proposed order and return it to the Director, who shall issue the order and cause it to be served on all parties.

(d) Requests to extend the time limit for exceptions and replies shall be submitted in writing to the transmitting agency head and served on all parties. If the agency head approves the request, he or she shall within 10 days sign and issue the order and cause it to be served on all parties. If the extended time limit necessitates an extension of the deadline for the final decision, the requirements of (e) below apply.

(e) If the agency head requests an extension of the time limit for filing a final decision, he or she shall sign and forward a proposed order to the Director of the Office of Administrative Law and serve copies on all parties. If the Director approves the request, he or she shall within ten days of receipt of the proposed order sign the proposed order and return it to