TITLE 1

ADMINISTRATIVE LAW

CHAPTER 1

UNIFORM ADMINISTRATIVE PROCEDURE RULES

Authority

N.J.S.A. 52:14F-5(e), (f), and (g).

Source and Effective Date

R.2007 d.393, effective November 20, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1.c(2), Chapter 1, Uniform Administrative Procedure Rules, expires on May 19, 2015. See: 46 N.J.R. 2299(a).

Chapter Historical Note

Chapter 1, Uniform Administrative Procedure Rules of Practice, was adopted as R.1980 d.275, effective July 1, 1980, repealing the administrative hearing rules of the Division of Administrative Procedure at N.J.A.C. 15:15-10. See: 11 N.J.R. 479(a), 12 N.J.R. 234(a), 12 N.J.R. 362(a). Chapter 1 was amended by R.1981 d.55, effective February 17, 1981. See: 13 N.J.R. 3(b), 13 N.J.R. 114(a); R.1981 d.116, effective May 7, 1981. See: 13 N.J.R. 2(a), 13 N.J.R. 254(b); R.1981 d.443, effective November 16, 1981. See: 13 N.J.R. 254(c), 13 N.J.R. 842(a); R.1982 d.87, effective April 5, 1982. See: 14 N.J.R. 2(a), 14 N.J.R. 335(a); R.1982 d.150, effective May 17, 1982. See: 14 N.J.R. 4(a), 14 N.J.R. 471(a); R.1982 d.295, effective September 7, 1982. See: 14 N.J.R. 606(b), 14 N.J.R. 975(b); R.1982 d.467, effective January 3, 1983. See: 14 N.J.R. 486(a), 15 N.J.R. 23(a); R.1983 d.268, effective July 5, 1983. See: 15 N.J.R. 582(a), 15 N.J.R. 1093(a); R.1983 d.515, effective November 21, 1983. See: 15 N.J.R. 1399(a), 15 N.J.R. 1939(a); R.1983 d.550, effective December 5, 1983. See: 15 N.J.R. 1400(b), 15 N.J.R. 2032(a); R.1984 d.368, effective September 4, 1984. See: 16 N.J.R. 1413(a), 16 N.J.R. 2354(a); R.1984 d.445, effective October 1, 1984. See: 16 N.J.R. 1636(a), 16 N.J.R. 2518(a); R.1984 d.476, effective October 15, 1984 (operative November 14, 1984). See: 16 N.J.R. 1408(a), 16 N.J.R. 2777(a); R.1984 d.490, effective November 5, 1984. See: 16 N.J.R. 2320(a), 16 N.J.R. 3004(a); R.1984 d.587, effective December 7, 1984. See: 16 N.J.R. 2710(a), 16 N.J.R. 3426(a).

Pursuant to Executive Order No. 66(1978), Chapter 1, Uniform Administrative Procedure Rules of Practice, was readopted as R.1985 d.292, effective May 15, 1985. See: 17 N.J.R. 2(a), 17 N.J.R. 1403(a). Chapter 1 was amended by R.1985 d.368, effective July 15, 1985. See: 17 N.J.R. 1008(a), 17 N.J.R. 1754(a); R.1985 d.508, effective October 7, 1985. See: 17 N.J.R. 1820(a), 17 N.J.R. 2457(b); R.1986 d.79, effective April 7, 1986. See: 18 N.J.R. 130(a), 18 N.J.R. 634(a); R.1986 d.340, effective August 18, 1986. See: 18 N.J.R. 2(a), 18 N.J.R. 1699(a); R.1986 d.468, effective December 1, 1986. See: 18 N.J.R. 1020(a), 18 N.J.R. 1865(a), 18 N.J.R. 2381(a).

Chapter 1, Uniform Administrative Procedure Rules of Practice, was repealed and a new Chapter 1, Uniform Administrative Procedure Rules, was adopted as R.1987 d.200, effective May 4, 1987 (operative July 1, 1987). See: 18 N.J.R. 728(a), 18 N.J.R. 1728(a), 19 N.J.R. 715(a).

Pursuant to Executive Order No. 66(1978), Chapter 1, Uniform Administrative Procedure Rules, was readopted as R.1992 d.213, effective April 21, 1992. See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).

Pursuant to Executive Order No. 66(1978), Chapter 1, Uniform Administrative Procedure Rules, was readopted as R.1997 d.158, effective March 10, 1997. See: 29 N.J.R. 282(a), 29 N.J.R. 1295(a).

Chapter 1, Uniform Administrative Procedure Rules, was readopted as R.2002 d.198, effective May 30, 2002. See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).

Chapter 1, Uniform Administrative Procedure Rules, was readopted as R.2007 d.393, effective November 20, 2007. See: Source and Effective Date. See, also, section annotations.

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 1, Uniform Administrative Procedure Rules, was scheduled to expire on November 20, 2014. See: 43 N.J.R. 1203(a).

Cross References

Apparel industry registration, confiscation of apparel and equipment, requests for formal hearings, see N.J.A.C. 12:210-1.9.

Motorized wheelchair dispute resolution, notification and scheduling of contested case hearings, see N.J.A.C. 13:45A-26E.6.

Small, minority and female businesses, State contracts, contested case hearings as under this section, see N.J.A.C. 12A:10-2.2.

Law Review and Journal Commentaries

Administrative adjudications in New Jersey: Why not let the ALJ decide? Richard M. Hluchan, 180 N.J.Law. 28 (Mag.) (Oct./Nov. 1996).

Appeals and enforcement of agency decisions: Confessions of a general counsel. Robert E. Anderson, 180 N.J.Law. 25 (Mag.) (Oct./Nov. 1996).

Approaching hearsay at administrative hearings: Hearsay evidence and the Residuum Rule. Joseph R. Morano, 180 N.J.Law. 22 (Mag.) (Oct./Nov. 1996).

Introduction to administrative law, or what is this thing called administrative law? Barbara A. Harned, 180 N.J.Law. 9 (Mag.) (Oct./Nov. 1996).

Right to a hearing: Statutory rights, constitutional rights and "fundamental fairness". Robert H. Stoloff, 180 N.J.Law. 14 (Mag.) (Oct./Nov. 1996).

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SUBCHAPTER 1. APPLICABILITY, SCOPE, CITATION OF RULES, CONSTRUCTION AND RELAXATION; COMPUTATION OF TIME

1:1-1.1 Applicability; scope; special hearing rules

(a) Subject to any superseding Federal or State law, this chapter shall govern the procedural aspects pertaining to transmission, the conduct of the hearing and the rendering of the initial and final decisions in all contested cases in the Executive Branch of the State Government. N.J.S.A. 52:14F-5. This chapter governs the procedure whether the contested case is before the Office of Administrative Law, an agency head or any other administrative agency. Subchapter 21 governs the conduct of certain uncontested cases handled by the Office of Administrative Law under N.J.S.A. 52:14F-5(o).

(b) In the event of conflict between this chapter and any other agency rule, except agency rules which incorporate statutory requirements, this chapter shall prevail.

(c) No agency other than the Office of Administrative Law may hereafter propose any rules to regulate the conduct of contested cases and the rendering of administrative adjudications. N.J.S.A. 52:14F-5(e). Specific pleading and other pretransmittal requirements may be regulated by the agencies provided they are consistent with this chapter.

(d) In addition to those rules that specifically govern a transmitting agency's responsibilities and the jurisdiction of the Office of Administrative Law, the following Uniform Administrative Procedure rules are not intended to apply to contested cases heard in agencies exempt under N.J.S.A. 52:14F-8:

1. N.J.A.C. 1:1-11.1(c) (Subpoena forms);

2. N.J.A.C. 1:1-12.6 (Emergency relief);

3. N.J.A.C. 1:1-14.10 (Interlocutory review);

4. N.J.A.C. 1:1-16.2(b) and (c) (Time of motion to intervene);

5. N.J.A.C. 1:1-18.8 (Extensions of time limits for decisions and exceptions); and

6. N.J.A.C. 1:1-21 (Uncontested cases).

(e) This chapter is subject to special hearing rules applicable to particular agencies. Such rules may be adopted by the Office of Administrative Law after consultation with a transmitting agency or at the request of a transmitting agency when the transmitted cases involve unique hearing requirements that are not addressed by this chapter. Where required by Federal law, special hearing rules may be promulgated by a transmitting agency with the concurrence of the Office of Administrative Law.

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), deleted the last sentence.

Cross References

Women-owned and minority-owned businesses, false information supplied, contested case hearing as under this subchapter, see N.J.A.C. 17:46-1.10.

Case Notes

Disciplinary hearings by the Board are authorized by the Uniform Enforcement Act, N.J.S.A. 45:1-14 et seq., and are governed by the New Jersey Uniform Administrative Rules. Deck House, Inc. v. New Jersey State Bd. of Architects, 531 F.Supp. 633 (D.N.J.1982).

In an action challenging the decision of a state architecture board that a manufacturer of prefabricated houses violated N.J.S.A. 45:3-10, in the context of determining whether the Younger abstention doctrine demanded dismissal of the challenge, the court found that proceedings before the board were insufficiently adjudicatory in nature to vindicate federal claims because the procedural rules set forth in N.J.A.C. 1:1-1.1 et seq., allowed the inquisitorial, prosecutorial, and judicial power to be concentrated in the board. Deck House, Inc. v. New Jersey State Bd. of Architects, 531 F. Supp. 633, 1982 U.S. Dist. LEXIS 10633 (D.N.J. 1982).

In an appeal from a decision of the New Jersey Transit Corporation (NJT) denying an applicant eligibility for Access Link paratransit

services, the appellate court declined to consider fully the applicant's argument that the NJT administrative hearing should have been a contested case under New Jersey's Administrative Procedure Act (APA), N.J.S.A. 52:14B-2(b), because the issue was not raised below, as evidenced by the fact that the applicant did not seek to have the case referred to the Office of Administrative Law for a hearing under the APA pursuant to the procedures set forth in N.J.A.C. 1:1-1.1 through 1:1-21.6. Sell v. N.J. Transit Corp., 298 N.J. Super. 640, 689 A.2d 1386, 1997 N.J. Super. LEXIS 123 (App.Div. 1997).

Administrative agency cannot expand reach of statute. Rutgers University Legislative Affairs Council, Inc. v. Thompson, 12 N.J.Tax 642 (1992).

An administrative law judge is not automatically bound by an agency party's argument. This would frustrate the legislative intent of N.J.S.A. 52:14F-1 et seq. which tasked the OAL with providing due process hearings independently and impartially. Div. of Motor Vehicles v. Canova, 1 N.J.A.R. 7 (1980).

1:1-1.2 Citation of rules

This chapter shall be referred to as the "New Jersey Uniform Administrative Procedure Rules" and may be cited as, for example, N.J.A.C. 1:1-1.2.

1:1-1.3 Construction and relaxation

(a) This chapter shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. In the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes. Court rules regarding third party practices and class action designations may not be applied unless such procedures are specifically statutorily authorized in administrative hearings.

(b) Except as stated in (c) below, procedural rules may be relaxed or disregarded if the judge determines that adherence would result in unfairness or injustice. The judge shall make such determinations and state the reasons for doing so on the record.

(c) The burden of proof shall not be relaxed. Statutory procedural requirements shall not be relaxed or disregarded except when permitted by the controlling Federal or State statutes.

Amended by R.1992 d.213, effective May 18, 1992.
See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).
Revised (a).

Case Notes

It was proper for the ALJ to recommend converting a motion to dismiss into a motion for summary disposition, in the interests of administrative economy and as allowed by N.J. Ct. R. 4:6-2. K.L. & K.L. ex rel. M.L. v. Bd. of Educ. of Kinnelon, OAL Dkt. No. EDU 1191-08 & EDU 1192-08 (Consolidated), Final Decision (July 22, 2008).

Requests for adjournment granted as petitioner had retained counsel and needed time to conduct discovery and prepare appropriately for trial. Request was granted in order to secure a just determination and to avoid unfairness to the pro se complainant. White v. Public Service, 8 N.J.A.R. 335 (1984), approved Docket No. A-1496-84 (App.Div.1986).

Conduct of contested case hearing under former rulemaking regulations. Bally Manufacturing Corp. v. New Jersey Casino Control Commission, 85 N.J. 325, 426 A.2d 1000 (1981) appeal dismissed 102 S.Ct. 77, 454 U.S. 804, 70 L.Ed.2d 74.

Definitions of adjudication and contested case under former rulemaking regulation; conduct of hearings. In re Matter of Public Hearings, 142 N.J.Super. 136, 361 A.2d 30 (App.Div.1976), certification denied 72 N.J. 457, 371 A.2d 62 (1976).

A petition filed by School District 1 with the Commissioner of Education on November 26, 2013, with a copy sent overnight delivery to the Division of Finance (DOF) of the Department of Education on November 25, 2013, met the minimal requirements in N.J.A.C. 6A:23A-19.2 regarding filing of such a petition because the DOF received "written notification of a dispute" within thirty days from School District 1's receipt of a final decision dated October 31, 2013 that related to the residency status of an allegedly homeless family and the allocation of financial responsibility for the education of the family's children. All that was required of School District 1 was to submit "written notification" to the DOF within thirty days, which it did. The mere fact that the petition was addressed to the Commissioner of Education and only was copied to the DOF (all within thirty days) did not provide a basis for granting the motion to dismiss filed by School District 2 particularly when the allocation of residential property (school) taxes are at issue. Administrative practice and procedure called for informality or corrections of technical deficiencies in the interest of justice and fairness per N.J.A.C. 1:1-1.3 and N.J.A.C. 6A:3-1.16. Bd. of Educ. of the Town of Hammonton, Atlantic Cnty. v. Bd. of Educ. of the City of Gloucester, Camden Cnty., OAL DKT. NO. EDU 18575-13, AGENCY DKT. NO. 292-11/13, 2014 N.J. AGEN LEXIS 411, Initial Decision, June 17, 2014.

ALJ correctly reasoned that it could not compel the joinder of a utility company with a condominium association in an existing administrative proceeding challenging charges during a certain usage period under N.J.A.C. 1:1-1.3(a) because the Uniform Administrative Procedural Rules contained no procedural rule providing for the joinder of third parties. Washington Commons, LLC v. Public Service Electric and Gas Co., OAL Dkt. No. PUC 12746-08, 2013 N.J. PUC LEXIS 17, Final Decision (January 24, 2013).

Although the ALJ failed to hold the matter for a day before taking any action as required by N.J.A.C. 1:1-3.3(b) and N.J.A.C. 1:1-14.4(a) after petitioner who was disputing the accuracy of her utility bill failed to appear at the schedule proceeding, that oversight did not result in unfairness or injustice under N.J.A.C. 1:1-1.3. Petitioner was properly notified of the settlement conference, served with the Initial Decision and given ample opportunity to respond to the adverse ruling, but chose not to. Turner v. Public Service Electric and Gas Co., OAL Dkt. No. PUC 12137-12, 2013 N.J. PUC LEXIS 19, Final Decision (January 23, 2013).

Administrative law judge was without jurisdiction to compel joinder of third party in school district's placement dispute with parents. B.R. v. Woodbridge Board, 95 N.J.A.R.2d (EDS) 159.

Standard for reopening case has not been set forth by statute or rule. In the absence of standards, N.J.A.C. 1:1-1.3(a) states judge may proceed in any manner compatible with the purposes of administrative adjudication. In Re: White Bus Co., 6 N.J.A.R. 535 (1983).

Section incorporates generally into the uniform administrative rules only those portions of the court rules which govern the conduct of lawyers, judges, and agency personnel (cited former rule, N.J.A.C. 1:1-3.8). Div. of Motor Vehicles v. Festa, 6 N.J.A.R. 173 (1982).

1:1-1.4 Computation of time

In computing any period of time fixed by rule or judicial order, the day of the act or event from which the designated period begins to run is not to be included. The last day of the

period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or legal holiday. In computing a period of time of less than seven days, Saturday, Sunday and legal holidays shall be excluded.

1:1-1.5 Conduct of administrative law judges

The Code of Judicial Conduct for Administrative Law Judges, as incorporated herein by reference as the chapter Appendix, shall govern the conduct of administrative law judges.

New Rule, R.1992 d.430, effective November 2, 1992.
See: 24 N.J.R. 2755(a), 24 N.J.R. 4028(a).
Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).

SUBCHAPTER 2. DEFINITIONS

1:1-2.1 Definitions

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

"Adjournment" means postponement of the hearing until another time.

"Administrative law judge" means a person appointed pursuant to N.J.S.A. 52:14F-4 or N.J.S.A. 52:14F-5(m) and assigned by the Director of the Office of Administrative Law to preside over contested cases and other proceedings.

"Administrative rule" means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intra-agency and inter-agency statements; and (3) agency decisions and findings in contested cases. N.J.S.A. 52:14B-2(e).

"Affidavit" means a written statement that is signed and sworn or affirmed to be true in the presence of a notary public or other person authorized to administer an oath or affirmation.

"Agency" includes each of the principal departments in the executive branch of the State government, and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments now existing or hereafter established and authorized by statute to make, adopt or promulgate rules or adjudicate contested cases, except the office of the Governor. N.J.S.A. 52:14B-2(a).

"Agency head" means the person or body authorized by law to render final decisions in contested cases, except that in the Department of Education, the State Board of Education is the head of an agency but the Commissioner of Education is authorized by statute to render final decisions.

"Appellant" means the party who is requesting a reversal or modification of a prior result.

"Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a contrary decision or peremptory finding on a material issue of fact.

"Burden of proof" means the obligation of a party to meet the requirements of a rule of law that a fact be proved by a preponderance of the evidence or by clear and convincing evidence.

"Clerk" means the Clerk of the Office of Administrative Law or any such scheduling or docketing officer designated by the head of an agency to oversee the administration of contested cases.

"Close of the record" means that time when the record for a case closes and after which no subsequently submitted information may be considered by the judge.

"Complainant" means the party who requests action or relief by filing a complaint.

"Contested case" means an adversary proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing. N.J.S.A. 52:14B-2. The required hearing must be designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exist disputed questions of fact, law or disposition relating to past, current or proposed activities or interests. Contested cases are not informational nor intended to provide a forum for the expression of public sentiment on proposed agency action or broad policy issues affecting entire industries or large, undefined classes of people.

"Discovery" means the process by which a party is permitted on demand or upon motion granted by a judge to view, inspect or receive a copy of documents, and gain other information necessary to prepare a case for hearing.

"Docket number" means the number given to a case by the Office of Administrative Law, which contains the abbreviation of the agency that sent the case to the Office of Administrative Law, a sequence number and the year. Sample:

HPW	8831	82
agency	sequence no.	year

"Evidence" is the means from which inferences may be drawn as a basis of proof in the conduct of contested cases, and includes testimony in the form of opinion and hearsay.

"Filing" means receipt of an original or clear copy of a paper by the proper office or officer.

"Final decision" means a decision by an agency head that adopts, rejects or modifies an initial decision by an administrative law judge, an initial decision by an administrative law judge that becomes a final decision by operation of N.J.S.A. 52:14B-10 or a decision by an agency head after a hearing conducted in accordance with these rules.

"Finding of fact" means the determination from proof or official notice of the existence of a fact.

"Hearing" means a proceeding conducted by a judge for the purpose of determining disputed issues of fact, law or disposition.

"Initial decision" means the administrative law judge's recommended findings of fact, conclusions of law and disposition, based upon the evidence and arguments presented during the course of the hearing and made a part of the record which is sent to the agency head for a final decision.

"Intervention" means the process by which a non-party may, by motion, obtain all rights and obligations of a party in a case.

"Judge" means an administrative law judge of the State of New Jersey or any other person authorized by law to preside over a hearing in a contested case unless the context clearly indicates otherwise. The term includes the agency head when presiding over a contested case under N.J.S.A. 52:14F-8(b).

"Jurisdiction" means the legal power to hear or decide a case.

"Material fact" means a fact legally consequential to a determination of an issue in the case.

"Mediation" means a proceeding conducted after transmission in which an administrative law judge other than the judge assigned to preside over the hearing attempts to settle or compromise a dispute between opposing parties.

"Motion" means an application to a judge for a ruling or order.

"Official court reporter or official transcription firm" means the entity awarded the contract with the State of New Jersey utilized by the Office of Administrative Law for the provision of court reporting or transcription services.

"Participation" means the process by which a non-party may, by motion, be permitted to take limited part in a proceeding.

"Party" means any person or entity directly involved in a case, including a petitioner, appellant, complainant, respondent, intervenor, or State agency proceeding in any such capacity.

"Petitioner" means the party who is requesting relief or action at the hearing.

"Pleadings" means written statements of the parties' respective claims and defenses. A pleading may be a petition, complaint, answer, order to show cause or any other form permitted by an agency's rules.

"Plenary hearing" means a complete and full proceeding conducted before a judge, providing the parties with discovery, the opportunity to present evidence, to give sworn testimony, to cross-examine witnesses and to make arguments.

"Prehearing conference" means a meeting that may be held in advance of the hearing between the judge, representatives of the parties and, sometimes, the parties to discuss and set out the issues to be decided in the case, how the case will be presented and any other special matters required by the judge to be discussed and resolved in advance of the hearing.

"Presumption" means a rebuttable assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the contested case.

"Principal of a close corporation" means either a substantial shareholder of a corporation that is not publicly owned or an officer or executive employee who is actively involved in managing the business of such a corporation.

"Proceeding on the papers" means a summary proceeding conducted without any personal appearance or confrontation of the parties before the judge. The hearing is conducted through the submission of pleadings, affidavits, records or documents to the Office of Administrative Law for a decision by an administrative law judge.

"Proof" means all of the evidence before the judge relevant to a fact in issue which tends to prove the existence or nonexistence of such fact.

"Pro se" means a person who acts on his or her own behalf without an attorney or other qualified non-lawyer representative.

"Record" means all decisions and rulings of the judge and all of the testimony, documents and arguments presented before, during and after the hearing and accepted by the judge for consideration in the rendering of a decision.

"Relevant evidence" means evidence having any tendency in reason to prove any material fact.

"Respondent" means the party who answers or responds to a request for relief or action.

"Service" means the delivery (by mail or in person) of a paper to a party or any other person or entity to whom the papers are required to be delivered.

"Settlement" means an agreement between parties which resolves disputed matters and may end all or part of the case.

Various methods may be utilized to help parties reach agreement, including:

1. Pre-transmission settlement efforts by an agency;

2. Pre-transmission settlement efforts by an administrative law judge at the request of an agency;

3. Mediation by an administrative law judge; and

4. Post-transmission settlement conferences by an administrative law judge or by a staff attorney employed by the Office of Administrative Law.

"Subpoena" means an official paper that requires a person to appear at a hearing to testify and/or bring documents.

"Telephone hearing" means a proceeding conducted by telephone conference call.

"Uncontested case" means any hearing offered by an agency for reasons not requiring a contested case proceeding under the statutory definition of contested case.

"Withdrawal" means a decision by a party voluntarily relinquishing a hearing request or a raised defense.

Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
Amended "Settlement".
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Added definition "Close of the record"; and deleted definitions "Conclusion of hearing" and "Conference hearing".
Amended by R.2011 d.179, effective July 5, 2011.
See: 43 N.J.R. 701(a), 43 N.J.R. 1523(a).
Added definition "Official court reporter or official transcription firm".

Case Notes

Resident of a continuing care retirement facility appealing his dismissal or discharge from such facility to Department of Community Affairs (DCA) is legally entitled to a plenary hearing, and such hearing must be conducted by either the Commissioner of the DCA or by Office of Administrative Law pursuant to the Commissioner's referral for adjudication. Seabrook Village v. Murphy, 853 A.2d 280, 371 N.J.Super. 319.

Agency had exclusive authority to decide contested cases. Application of County of Bergen, N.J., for Approval to Dissolve Bergen County Utilities Authority, 268 N.J.Super. 403, 633 A.2d 1017 (A.D.1993).

Utility dissolution proceeding was not "contested case". Application of County of Bergen, N.J., for Approval to Dissolve Bergen County Utilities Authority, 268 N.J.Super. 403, 633 A.2d 1017 (A.D.1993).

Local agency had authority to render final decision on application to dissolve county utilities authority. Application of County of Bergen, N.J., for Approval to Dissolve Bergen County Utilities Authority, 268 N.J.Super. 403, 633 A.2d 1017 (A.D.1993).

Limitations period for challenge to denial of tenure did not commence upon letter from college president agreeing with claim for tenure. Dugan v. Stockton State College, 245 N.J.Super. 567, 586 A.2d 322 (A.D.1991).

Shell fisherman did not have right to adjudicatory hearing on proposed coastal development by reason of his occupation. N.J.S.A. 12:5-1 et seq., 13:19-1 et seq., 52:14B-2(b), 52:14B-9. Spalt v. New Jersey Dept. of Environmental Protection, 237 N.J.Super. 206, 567 A.2d 264 (A.D.1989), certification denied 122 N.J. 140, 584 A.2d 213.

Lessees of shellfish bottoms were not entitled to adjudicatory hearing on proposed coastal development. N.J.S.A. 12:5-1 et seq., 13:19-1 et seq., 50:1-5 et seq., 52:14B-2(b), 52:14B-9. Spalt v. New Jersey Dept. of Environmental Protection, 237 N.J.Super. 206, 567 A.2d 264 (A.D.1989), certification denied 122 N.J. 140, 584 A.2d 213.

Residents near proposed coastal development did not have sufficient particularized property right to be entitled to adjudicatory hearing. N.J.S.A. 12:5-1 et seq., 13:19-1 et seq., 52:14B-2(b), 52:14B-9. Spalt v. New Jersey Dept. of Environmental Protection, 237 N.J.Super. 206, 567 A.2d 264 (A.D.1989), certification denied 122 N.J. 140, 584 A.2d 213.

Administrative Procedure Act does not establish right to hearing in those who otherwise do not have such right. N.J.S.A. 52:14B-9. Spalt v. New Jersey Dept. of Environmental Protection, 237 N.J.Super. 206, 567 A.2d 264 (A.D.1989), certification denied 122 N.J. 140, 584 A.2d 213.

Nonaggrieved third parties did not have right to challenge coastal development under Coastal Area Facility Review Act or Waterfront Development Act. N.J.S.A. 12:5-1 et seq., 13:19-1 et seq. Spalt v. New Jersey Dept. of Environmental Protection, 237 N.J.Super. 206, 567 A.2d 264 (A.D.1989), certification denied 122 N.J. 140, 584 A.2d 213.

Procedural mode choice (rulemaking v. adjudication) turns on which is best suited to achieve goals and fulfill responsibilities of an agency in a given case (citing former N.J.A.C. 1:1-1.6 as N.J.A.C. 1:11-1.6). State Dep't of Environmental Protection v. Stavola, 103 N.J. 425, 511 A.2d 622 (1986).

Public utility ratemaking procedures, although quasi-legislative in origin, are conducted like quasi-judicial proceedings (citing former N.J.A.C. 1:1-6(a)3). Mortgage Bankers Association v. New Jersey Real Estate Commission, 102 N.J. 176, 506 A.2d 733 (1986).

Public utility ratemaking procedures, although quasi-legislative in origin, are conducted like quasi-judicial proceedings (cites former N.J.A.C. 1:1-6(a)3). Adjudicatory proceedings often involve disputed factual issues and require adversary proceeding for proper resolution (citing former N.J.A.C. 1:1-1.5(a)3). Shapiro v. Albanese, 194 N.J.Super. 418, 477 A.2d 352 (App.Div.1984).

Former N.J.A.C. 1:1-1.6 and 1.7 did not usurp the agency head's authority to decide what constitutes a contested case. In Re: Uniform Administrative Procedure Rules, 90 N.J. 85, 447 A.2d 151 (1982).

Rate schedule approval hearing, as a non-adjudicative proceeding, does not require a plenary hearing. New Jersey Builders Assn. v. Sheeran, 168 N.J.Super. 237, 402 A.2d 956 (App.Div.1979), certification denied 81 N.J. 293, 405 A.2d 837 (1979).

Petitioners' exceptions could not be considered where the deadline for filing exceptions with the Department was September 1, 2009, petitioners' exceptions were postmarked two days after the deadline, on September 3, 2009, and were received a week after the deadline, on September 8, 2009. "Filing" was defined as "receipt." Fitting v. N.J. Dep't of Envtl. Prot., OAL Dkt. No. ESA 2714-07, 2009 N.J. AGEN LEXIS 753, Final Decision (September 25, 2009).

Denial of hearing in uncontested case affirmed. Camden County v. Board of Trustees of the Public Employees' Retirement System, 97 N.J.A.R.2d (TYP) 105.

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

SUBCHAPTER 3. COMMENCEMENT OF CONTESTED CASES; JURISDICTION OF THE OFFICE OF ADMINISTRATIVE LAW

1:1-3.1 Commencement of contested cases in the State agencies

(a) A contested case shall be commenced in the State agency with appropriate subject matter jurisdiction. A contested case may be commenced by the agency itself or by an individual or entity as provided in the rules and regulations of the agency.

(b) A request for a contested case hearing may not be filed with the Office of Administrative Law by the individual or entity requesting 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).
Inserted designation (a); and added (b).

Case Notes

New Jersey limitations for disputing individualized education plan did not bar reimbursement claim. Bernardsville Bd. of Educ. v. J.H., C.A.3 (N.J.)1994, 42 F.3d 149, rehearing and rehearing in banc denied.

1:1-3.2 Jurisdiction of the Office of Administrative Law

(a) The Office of Administrative Law shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law or as otherwise authorized by law, except as provided by N.J.A.C. 1:1-17. The Office of Administrative Law shall not receive, hear or consider any pleadings, motion papers, or documents of any kind relating to any matter until it has acquired jurisdiction over that matter, except as provided by N.J.A.C. 1:1-17.

(b) When the Office of Administrative Law acquires jurisdiction over a matter that arises from a State agency's rejection of a party's application, and at the hearing the party offers proofs that were not previously considered by the agency, the judge may either allow the party to amend the application to add new contentions, claims or defenses or, if considerations of expediency and efficiency so require, the judge shall order the matter returned to the State agency. If the matter is returned to the agency and thereafter transmitted for hearing, the agency's response to any new contentions, claims or defenses shall be attached to the transmittal form required by N.J.A.C. 1:1-8.2.

(c) Matters involving the administration of the Office of Administrative Law as a State agency are subject to the authority of the Director. In the following matters as they relate to proceedings before the Office of Administrative Law, the Director is the agency head for purposes of review:

1. Disqualification of a particular judge due to interest or any other reason which would preclude a fair and unbiased hearing, pursuant to N.J.A.C. 1:1-14.12;

2. Appearances of non-lawyer representatives, pursuant to N.J.A.C. 1:1-5.4;

3. Imposition of conditions and limitations upon non-lawyer representatives, pursuant to N.J.A.C. 1:1-5.5;

4. Sanctions under N.J.A.C. 1:1-14.4 or 14.14 and 14.15 consisting of the assessment of costs, expenses, or fines;

5. Disqualification of attorneys, pursuant to N.J.A.C. 1:1-5.3;

6. Establishment of a hearing location pursuant to N.J.A.C. 1:1-9.1(b); and

7. Appearance of attorneys pro hac vice pursuant to N.J.A.C. 1:1-5.2.

Amended by R.1991 d.34, effective January 22, 1991.
See: 22 N.J.R. 3278(a), 23 N.J.R. 194(a).
Added (c)6.
Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
In (c)4: revised N.J.A.C. citation.
Amended by R.1996 d.133, effective March 18, 1996.
See: 27 N.J.R. 609(a), 28 N.J.R. 1503(a).
In (c)4 added fines.
Amended by R.2001 d.180, effective June 4, 2001.
See: 33 N.J.R. 1040(a), 33 N.J.R. 1926(a).
In (c)4, inserted "or 14.14" following "1:1-14.4"; added (c)7.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (c)4, inserted "and 14.15".

Case Notes

State Department of Education, rather than administrative law judge, had jurisdiction to conduct due process review of responsibility for education of blind, retarded child. L.P. v. Edison Bd. of Educ., 265 N.J.Super. 266, 626 A.2d 473 (L.1993).

Agency, rather than Superior Court, was proper place for challenge to special education being provided to blind, retarded child. L.P. v. Edison Bd. of Educ., 265 N.J.Super. 266, 626 A.2d 473 (L.1993).

Administrative agencies enjoy a great deal of flexibility in selecting the proceedings most suitable to achieving their regulatory aims. A high degree of discretion in exercising that choice reposes in the administrative agency (citing former N.J.A.C. 1:1-2.2). Crema v. N.J. Dep't of Environmental Protection, 94 N.J. 286, 463 A.2d 910 (1983).

In petitioner's appeal from a denial of an instructional certification with endorsements in elementary and special education, the Commissioner and the Department of Education lacked jurisdiction over the college that declined to recommend her for certification; the college could not be ordered to recommend petitioner for certification because there was no statute, regulation, or case law to support such an action and, additionally, petitioner failed to show that the college acted in bad faith where she never satisfied the requirements for enrollment in the college. Glennon v. N.J. State Bd. of Examiners, OAL Dkt. No. EDU 7419-07, 2009 N.J. AGEN LEXIS 745, Final Decision (September 18, 2009).

Administrative Law Judge may only review an employee's discipline if the matter is transmitted by the Merit System Board; an ALJ does not have the authority to determine whether an appeal has been filed (adopting in part and rejecting in part 2006 N.J. AGEN LEXIS 734). In re Small, OAL Dkt. No. CSV 3331-03, 2007 N.J. AGEN LEXIS 1106, Final Decision (January 17, 2007).

Taxes paid to state, jurisdiction of the Office of Administrative Law. Linden Disposal, Inc., v. Edison Township, 94 N.J.A.R.2d (EPE) 1.

1:1-3.3 Return of transmitted cases

(a) A case that has been transmitted to the Office of Administrative Law shall be returned to the transmitting agency if the transmitting agency head so requests in written notice to the Office of Administrative Law and all parties. The notice shall state the reason for returning the case. Upon receipt of the notice, the Office of Administrative Law shall return the case.

(b) A case shall be returned to the transmitting agency by the Clerk of the Office of Administrative Law if, after appropriate notice, neither a party nor a representative of the party appears at a proceeding scheduled by the Clerk or a judge (see N.J.A.C. 1:1-14.4). Any explanations regarding the failure to appear must be in writing and received by the transmitting agency head within 13 days of the date of the Clerk's notice returning the case. A copy of the explanation shall be served on all other parties. If, based on such explanations, the agency head believes the matter should be rescheduled for hearing, the agency head may re-transmit the case to the Office of Administrative Law, pursuant to N.J.A.C. 1:1-8.2.

(c) Upon returning any matter to the transmitting agency, the Clerk shall issue an appropriate notice to the parties which shall advise the parties of the time limit and requirements for explanations as set forth in (b) above.

(d) The agency head may extend the time limit for receiving explanations regarding the failure to appear when good cause is shown.

Amended by R.1989 d.605, effective December 18, 1989.
See: 21 N.J.R. 3207(a), 21 N.J.R. 3914(a).
Deleted language stating that an initial decision shall be entered returning the case.
Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
Added new subsections (b) and (c), recodifying original rule text as subsection (a).
Amended by R.1991 d.513, effective October 21, 1991.
See: 23 N.J.R. 1728(a), 23 N.J.R. 3133(a).
Explanation for failure to appear to be submitted within 13 days.

Case Notes

Failure on the part of a pro se claimant to appear at a hearing on his claim against a utility or to respond to efforts by counsel to the utility to arrange for the claimant to execute a settlement agreement to which the claimant ostensibly had agreed resulted in dismissal, by an Administrative Law Judge (ALJ), of the claim on a finding that the claimant had failed to prosecute the action within the meaning of N.J.A.C. 1:1-14.4(a) and N.J.A.C. 1:1-3.3(b) and had not shown good cause for the same. Such facts afforded a sufficient basis for a Board order adopting the ALJ's decision as the decision of the agency. Carroll v. United Water of New Jersey, BPU Dkt. No. WC13040270U; OAL Dkt. No. PUC 09453-13, 2014 N.J. PUC LEXIS 13, Final Decision (January 29, 2014).

When a customer failed to appear at an in person prehearing conference relating to a bill dispute with a utility company and offered no good cause for the failure to appear, the administrative law judge dismissed the customer's petition for relief under N.J.A.C. 1:1-3.3(b) and (c), and the New Jersey Board of Public Utilities adopted that decision. Cheryl Hensle v. Pub. Serv. And Gas Co., OAL DKT. No. PUC 11156-13 (on remand from PUC 01097-13), 2013 N.J. PUC LEXIS 393 Final Decision (December 18, 2013).

Employee's request to reinstate her appeal of a 45-day suspension following sustained charges of chronic or excessive absenteeism was granted. Her attorney did present to the Civil Service Commission within the 13-day time frame of N.J.A.C. 1:1-3.3(b) his written explanation for failing to appear at a scheduled settlement conference. Moreover, it would have been unfair to deny the employee a hearing on the merits of her case based on her attorney's failure to appear at the scheduled settlement conference after he inadvertently informed the employee that her presence was not required. In re Telina Hairston, City of East Orange, Police Dep't., CSC Dkt. No. 2013-3157, 2013 N.J. CSC LEXIS 700, Final Decision (September 18, 2013).

Patrolman won reinstatement of his appeal from a 20-day suspension imposed on him following a determination by the appointing authority sustaining charges of incompetency, inefficiency or failure to perform duties, neglect of duty, violation of the rules and regulations, and other sufficient cause. Though the matter had been scheduled for a conference on May 14, 2013, it was undisputed that all of the parties thereto had agreed to reschedule the conference to June 25, 2013. Moreover, the record indicated that the parties did timely present their written explanation for their failures to appear and that there was a misunderstanding concerning the rescheduled settlement hearing conference. Because the requirements of N.J.A.C. 1:1-3.3(b) had been met, the appeal was properly reinstated on the docket. In re Pike, City of Camden, CSC Docket No. 2013-2345, 2013 N.J. CSC LEXIS 949, Agency Determination (August 15, 2013).

Civil Service Commission reinstated a sheriff officer's appeal of his suspension that was based on his failure to appear at his scheduled settlement conference. The officer's attorney presented a written explanation of his failure to appear within the timeframe required by N.J.A.C. 1:1-3.3(b), and the attorney provided a sworn certification indicating that there was no record of the office ever receiving the notice to appear. In re Michael Rouse, Gloucester Cnty. Sheriff's Dep't., CSC Dkt. No. 2013-287, 2013 N.J. CSC LEXIS 177 Civil Service Comm'n Decision (March 6, 2013).

Although the ALJ failed to hold the matter for a day before taking any action as required by N.J.A.C. 1:1-3.3(b) and N.J.A.C. 1:1-14.4(a) after petitioner who was disputing the accuracy of her utility bill failed to appear at the schedule proceeding, that oversight did not result in unfairness or injustice under N.J.A.C. 1:1-1.3. Petitioner was properly notified of the settlement conference, served with the Initial Decision and given ample opportunity to respond to the adverse ruling, but chose not to. Turner v. Public Service Electric and Gas Co., OAL Dkt. No. PUC 12137-12, 2013 N.J. PUC LEXIS 19, Final Decision (January 23, 2013).

Complainant's case did not warrant re-transmitting to the Office of Administrative Law where complainant failed to respond to a letter advising him that he could provide an explanation for his failure to appear within 13 days of the Clerk's notice of dismissal. Batchelor v. N.J. Transit, OAL Dkt. No. CRT 3062-2007N, 2009 N.J. AGEN LEXIS 618, Final Decision (February 27, 2009).

Case remanded from state superior court requires remand to Office of Administrative Law for determination of whether constitutional claims were within scope of remand order. R.D. v. Bernards Township Board of Education, 96 N.J.A.R.2d (EDU) 481.

SUBCHAPTER 4. AGENCY RESPONSIBILITY BEFORE TRANSMISSION TO THE OFFICE OF ADMINISTRATIVE LAW

1:1-4.1 Determination of contested case

(a) After an agency proceeding has commenced, the agency head shall promptly determine whether the matter is a contested case. If any party petitions the agency head to decide whether the matter is contested, the agency shall make such a determination within 30 days from receipt of the petition and inform all parties of its determination.

(b) When a question arises whether a particular matter is a contested case, legal advice shall be obtained from the Attorney General's office.

1:1-4.2 Settlement by agencies prior to transmittal to the Office of Administrative Law

If an agency attempts settlement prior to transmitting the matter to the Office of Administrative Law, settlement efforts may be conducted in any manner the agency believes may be appropriate and productive. The agency may utilize its own personnel or may request in writing to the Director of the Office of Administrative Law the services of an administrative law judge. An administrative law judge who conducts pre-transmission settlement efforts at the request of an agency will not thereafter be assigned to hear the case if settlement efforts are unsuccessful and the case is transmitted.

SUBCHAPTER 5. REPRESENTATION

1:1-5.1 Representation

A party may represent him or herself, be represented by an attorney authorized to practice law in this State, or, subject to N.J.A.C. 1:1-5.4 and 1:1-5.5, be represented or assisted by a non-lawyer permitted to make an appearance in a contested case by New Jersey Court Rule R. 1:21-1(e) or be represented by a law graduate or student pursuant to R. 1:21-3(b). Except as provided by N.J.A.C. 1:1-5.4 and 1:1-5.6, a corporation must be represented by an attorney.

Case Notes

Though the record did not contain any evidence that an individual who appeared to challenge an electric bill rendered to a corporation by a utility had standing to represent the corporation, as required by N.J.A.C. 1:1-5.1, the utility did not raise the issue nor was there any prejudice flowing from that irregularity that prejudiced the Board's ultimate decision. Gaspare Campisi of Gaspare's Gourmet v. Atlantic City Elec. Co., BPU Docket No. EC13020175U; OAL Docket No. PUC 05301-13, 2014 N.J. PUC LEXIS 109, Order Affirming Initial Decision (April 24, 2014).

The Board of Public Utilities affirmed a finding made by an Administrative Law Judge (ALJ) that N.J.A.C. 1:1-5.1 did not authorize the adult son of an 83-year old utility customer to represent his mother in prosecuting claims that she was receiving poor telephone service from a regulated utility. That meant that dismissal of the petition was required as a matter of law. Olander Peters v. AT&T, BPU Dkt. No. TC13O10013U; OAL Dkt. No. PUC 0742-13, 2014 N.J. PUC LEXIS 1, Final Decision (January 29, 2014).

An Administrative Law Judge concluded that, per N.J.A.C. 1:1-5.1, the adult son of an 83-year old customer of a utility was not authorized to represent his mother in a matter in the Office of Administrative Law (OAL) relative to her complaints that she was receiving poor telephone service from a regulated utility. Moreover, even if the matter was properly before the OAL, the OAL could not issue an order requiring specific performance, which was the remedy that the son had demanded. Olander Peters v. AT&T, OAL Dkt. No. PUC 07042-13, Agency Dkt. No. TC13010013U, 2013 N.J. AGEN LEXIS 319, Initial Decision (November 7, 2013).

Attorney was properly disqualified from representing a public employee against a public employer. Point Pleasant Borough v. Block, 94 N.J.A.R.2d (OAL) 7.

Disabled child challenging school placement could not be represented by non-attorney. T.W. v. Division of Developmental Disabilities, 94 N.J.A.R.2d (OAL) 1.

Appellant, removed from employment and later reinstated with back pay, denied counsel fee; appellant entitled to award of 30 vacation days. Harrington v. Dep't of Human Services, 11 N.J.A.R. 537 (1989).

Board of Education ordered to pay reasonable counsel fees and costs incurred in the filing of petition which was filed by petitioner in order to carry out mandatory statutory duties. Ross v. Jersey City Bd. of Educ., 5 N.J.A.R. 393 (1981).

1:1-5.2 Out-of-State attorneys; admission procedures

(a) An attorney from any other jurisdiction, of good standing there, or an attorney admitted in this State, of good standing, who does not maintain a bona fide office for the practice of law, may, at the discretion of the judge, be admitted pro hac vice for the one occasion to participate in the proceeding in the same manner as an attorney authorized to practice in this State pursuant to New Jersey Court Rule R. 1:21-1 by complying with the following procedure:

1. Admission pro hac vice shall be by motion of an attorney authorized to practice in New Jersey. Forms are available from the Office of Administrative Law for this purpose.

2. Each motion seeking admission for the one occasion shall be served on all parties and have attached a supporting affidavit, signed by the attorney seeking admission, which, except for attorneys who are employees of and are representing the United States of America or a sister state, shall state that payment has been made to the New Jersey Lawyers Fund for Client Protection. The affidavit shall state how he or she satisfies each of the conditions for admission, including good cause, set forth in R. 1:21-2(a). He or she shall also agree in the affidavit to comply with the dictates of R. 1:21-2(b).

3. An annual payment made to the Client's Security Fund and Ethics Financial Committee shall entitle the attorney to appear in subsequent matters during the payment year, provided the attorney otherwise qualifies for admission.

4. An order granting admission shall set forth the limitations upon admission established in R. 1:21-2(b).

5. A judge may, at any time during the proceeding and for good cause shown, revoke permission for the attorney to appear.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Section was "Out-of-state attorneys; admission procedures". In (a), deleted "in this State" following "maintain"; and in (a)2, inserted ", except for attorneys who are employees of and are representing the United States of America or a sister state,", and substituted "New Jersey Lawyers Fund for Client Protection" for "Client's Security Fund and Ethics Financial Committee".

1:1-5.3 Conduct of lawyers

In any case where the issue of an attorney's ethical or professional conduct is raised, the judge before whom the issue has been presented shall consider the merits of the issue raised and make a ruling as to whether the attorney may appear or continue representation in the matter. The judge may disqualify an attorney from participating in a particular case when disqualification is required by the Rules of Professional Conduct or the New Jersey Conflict of Interest Law. If disciplinary action against the attorney is indicated, the matter shall be referred to the appropriate disciplinary body.

Case Notes

Contested case hearing before administrative law judge was hearing before "state agency" for purposes conflicts of interest law. Wood v. Department of Community Affairs, Bureau of Regulatory Affairs, 243 N.J.Super. 187, 578 A.2d 1257 (A.D.1990).

Office of Administrative Law that conducted administrative hearing on behalf of Department of Community Affairs had authority derivative of Department's authority. Wood v. Department of Community Affairs, Bureau of Regulatory Affairs, 243 N.J.Super. 187, 578 A.2d 1257 (A.D.1990).

Office of Administrative Law could properly reach different decision from that reached by Joint Committee on Legislative Ethics. Wood v. Department of Community Affairs, Bureau of Regulatory Affairs, 243 N.J.Super. 187, 578 A.2d 1257 (A.D.1990).

Office of Administrative Law has authority to regulate qualifications of persons appearing before its courts; administrative law judge authorized to rule on attorney disqualification in a contested case; Code of Judicial Conduct and Rules of Professional Conduct incorporated by reference (decision on former rule). In the Matter of Tenure Hearing of Onorevale, 103 N.J. 548, 511 A.2d 1171 (1986).

The OAL may initially determine issues relating to possible attorney disqualification on ethics grounds appearing before administrative law judges in contested cases (citing former N.J.A.C. 1:1-3.8). In the Matter of Tenure Hearing of Onorevale, 103 N.J. 548, 511 A.2d 1171 (1986).

Legislator-attorney was disqualified from representing party in administrative proceeding. Wood v. Department of Community Affairs, Bureau of Regulatory Affairs, 92 N.J.A.R.2d (OAL) 1.

Respondent moved to bar counsel for petitioner because of alleged conflict of interest due to rule that prohibits members of the Legislature and their partners and employees from representing any person other than the State in connection with any cause or matter pending before a State agency. Cited N.J.A.C. 1:1-5.1 and 1:1-14.6(p), which authorize an administrative law judge to rule on the propriety of appearance of counsel. Held counsel was barred (citing former N.J.A.C. 1:1-3.7 and 3.9). Stone Harbor v. Dir. of Coastal Resources, 4 N.J.A.R. 101 (1980).

1:1-5.4 Representation by non-lawyers; authorized situations, applications, approval procedures

(a) In conformity with New Jersey Court Rule R.1:21-1(f), the following non-lawyers may apply for permission to represent a party at a contested case hearing:

1. Persons whose appearance is required by Federal law;

2. State agency employees;

3. County or municipal welfare agency employees;

4. Legal service paralegals or assistants;

5. Close corporation principals;

6. Union representatives in Civil Service and Public Employment Relations Commission cases;

7. Individuals representing parents or children in special education proceedings;

8. County or local government employees in Civil Service cases; and

9. Individuals representing claimants or employers before the Appeal Tribunal or Board of Review of the Department of Labor and Workforce Development.

(b) The non-lawyer applicants in (a) above may apply for permission to appear by supplying the following information and by complying with the following procedures:

1. Oral applications at the hearing may be made in Division of Family Development, Division of Medical Assistance and Health Services, Division of Youth and Family Services and Department of Labor Vocational Rehabilitation cases.

i. At the hearing, the non-lawyer applicant shall certify that he or she is not a suspended or disbarred attorney and that he or she is not receiving a fee for the appearance.

ii. At the hearing, the judge shall determine that the non-lawyer applicant seeking to represent a recipient or applicant for services fulfills the appearance requirements of Federal law.

iii. At the hearing, the non-lawyer applicant seeking to represent a county or municipal welfare agency shall certify that he or she is an agency staff person with knowledge of the matter in controversy, has been assigned to represent the agency in the case and that the county or municipal counsel is not providing representation in the particular matter. The non-lawyer applicant shall also state his or her position at the agency and the name, title, business address and telephone number of his or her supervisor.

iv. At the hearing, a non-lawyer applicant seeking to represent the Division of Economic Assistance, the Division of Medical Assistance and Health Services or the Division of Youth and Family Services shall certify that he or she is an employee of the agency he or she seeks to represent; his or her position at the agency; his or her supervisor at the agency; his or her supervisor's position, business address and telephone number; an explanation of his or her special expertise or experience in the matter in controversy; and that he or she has been assigned to represent the agency in the case and the Attorney General will not provide legal representation.

2. Oral application at the hearing may be made in public employment relations proceedings. At the hearing, the non-lawyer applicant shall certify that he or she is not a suspended or disbarred attorney and that he or she is not receiving a fee for the appearance.

3. Oral application at the hearing may be made in cases before the Appeals Tribunal or Board of Review of the Department of Labor and Workforce Development. At the hearing, the non-lawyer applicant shall certify that he or she is not a suspended or disbarred attorney and that he or she is not receiving a fee for the appearance.

4. A written Notice of Appearance/Application on forms supplied by the Office of Administrative Law shall be required in cases where a non-lawyer employee seeks to represent a State agency; in Civil Service cases, where a union representative seeks to represent a State, county or local government employee; where a county or local government employee seeks to represent the appointing authority; where a non-lawyer seeks to represent a party in a special education hearing; where a principal seeks to represent a close corporation; and where a non-lawyer from a legal services program seeks to represent an indigent. A non-lawyer from a legal services program seeking to represent a recipient or applicant for services in Division of Economic Assistance, Division of Medical Assistance and Health Services and Division of Youth and Family Services cases may make oral application to represent the recipient or applicant by complying with the requirements of (b)1 above. Forms may be obtained from the Clerk of the Office of Administrative Law or through the State of New Jersey Office of Administrative Law website www.state.nj.us/oal/.

i. For non-lawyer employees seeking to represent a State agency, the Notice shall include a certification that the non-lawyer is an employee of the State agency he or she seeks to represent; his or her position at the agency; his or her supervisor at the agency; his or her supervisor's position, business address and telephone number; and an explanation of his or her special expertise or experience in the matter in controversy. The Notice shall also contain a certification, indicating that the employee has been assigned to represent the agency in the case and that the Attorney General will not provide legal representation.

ii. For non-lawyers from legal services programs, the Notice shall include a certification that he or she is a paralegal or legal assistant; the name and address of the Legal Services Program of which he or she is a part; and the name, business address, telephone number and signed authorization of a Legal Services attorney who supervises the applicant.

iii. The non-lawyer union representative shall include in his or her Notice a certification that he or she is an authorized representative of a labor organization; that the labor organization is the duly authorized representative of the represented employee's collective bargaining unit; and the name, title, business address and telephone number of his or her supervisor.

iv. In special education hearings, the non-lawyer applicant shall include in his or her Notice an explanation certifying how he or she has knowledge or training with respect to handicapped pupils and their educational needs so as to facilitate the presentation of the claims or defenses of the parent or child. The applicant shall describe his or her relevant education, work experience or other qualifications.

v. For non-lawyer employees seeking to represent a county or local government appointing authority in a Civil Service case, the notice shall include a certification that the non-lawyer is an employee of the county or local government appointing authority; his or her position with the appointing authority; his or her supervisor's position; business address and telephone number; and an explanation of his or her special expertise or experience in the matter in controversy. The notice shall also contain a certification indicating that the employee has been assigned to represent the appointing authority in the case and that the legal representative for the county or locality does not provide representation in the matter.

vi. In cases where principal seeks to represent a close corporation, the non-lawyer applicant shall demonstrate in his or her notice how he or she qualifies as a principal of a close corporation as defined in N.J.A.C. 1:1-2.1.

vii. Any non-lawyer applicant filing a Notice of Appearance/Application shall submit a certification with the Notice stating that he or she is not a disbarred or suspended attorney and is not receiving a fee for the appearance.

viii. The Notice of Appearance/Application must be signed by the non-lawyer applicant. Notices shall be filed with the Clerk if a judge has not yet been assigned to the matter and shall be filed with the judge if a judge has been assigned and shall be served on all parties no later than 10 days prior to the scheduled hearing date. In Special Education cases, the Notice of Appearance/

Application shall be filed with the Clerk and served on all parties no later than five days prior to the scheduled hearing date.

ix. The judge may require the applicant to supply additional information or explanation of the items specified above as applicable, or may require the applicant to supply evidence of the statements contained in the Notice.

Amended by R.1991 d.296, effective June 17, 1991.
See: 23 N.J.R. 1053(a), 23 N.J.R. 1919(a).
Eliminated provision that a DAG had to "sign off" on agency non-lawyer representation; delegated authority to agencies.
Amended by R.1992 d.213, effective May 18, 1992.
See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).
Revised text.
Amended by R.1997 d.158, effective April 7, 1997.
See: 29 N.J.R. 282(a), 29 N.J.R. 1295(a).
In (a)6, inserted reference to Public Employment Relations Commission; inserted (a)8; in (b)1iv, amended subsection reference; inserted new (b)2; recodified former (b)2 as (b)3; in (b)3, inserted "where a county or local government employee seeks to represent the appointing authority"; inserted (b)3v; and recodified former (b)3v through (b)3viii as (b)3vi through (b)3ix.
Amended by R.1997 d.474, effective November 3, 1997.
See: 29 N.J.R. 3758(a), 29 N.J.R. 4677(a).
In (b)1, substituted "Family Development" for "Economic Assistance", and added "and Department of Labor Vocational Rehabilitation cases".
Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
In (b)3, added the second sentence in the introductory paragraph, and added an N.J.A.C reference in vi.
Amended by R.2005 d.106, effective April 4, 2005.
See: 36 N.J.R. 3956(a), 37 N.J.R. 1015(a).
In (a), added 9; in (b), substituted "(b)4i" for "(b)3i" following "set forth in" in 1iv, added new 3, recodified former 3 as 4.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In the introductory paragraph of (a), substituted "(f)" for "(e)"; in (b)1i, (b)1iii, (b)2, and (b)3, substituted "certify" for "state"; rewrote (b)1iv; in (b)4, transferred the former second sentence to the end; in (b)4i, (b)4ii, (b)4iii, and (b)4v, substituted "certification" for "statement" throughout; in (b)4iv, inserted a comma following "hearings", substituted "certifying" for the first occurrence of "of" and deleted "related to the child's condition" from the end; in (b)4viii, inserted "if a judge has not yet been assigned to the matter and shall be filed with the judge if a judge has been assigned" and "shall be" preceding "served", and inserted the last sentence; and in (b)4ix, substituted "judge" for "Clerk", and deleted the final two sentences.

Case Notes

Testimony by lay advocate for parents was only arguably relevant under federal discovery rules. Woods on Behalf of T.W. v. New Jersey Dept. of Educ., D.N.J.1993, 858 F.Supp. 51.

Attorney-client privilege extended to lay advocate. Woods on Behalf of T.W. v. New Jersey Dept. of Educ., D.N.J.1993, 858 F.Supp. 51.

Property owner and her daughter were ineligible to appear and represent the customer of record, who was another daughter of the property owner, in a billing dispute pursuant to N.J.A.C. 1:1-5.4(a) because neither fit the criteria for non-lawyer representation. Cheryl Hensle, OAL Dkt. No. PUC01097-13, 2013 N.J. PUC LEXIS 234, Adopting initial decision in part and remanding (July 24, 2013).

Attorney licensed in foreign jurisdiction could not represent party as a non-lawyer. Thompson and Pavlick v. Department of Community Affairs, 92 N.J.A.R.2d (OAL) 9.

Nursing home not authorized representative for patients. Bridgeton Nursing Center v. Division of Medical Assistance and Health Services, 92 N.J.A.R.2d (DMA) 1.

Allowed representation by non-lawyer representative in matters in which such appearances were permitted prior to the establishment of the OAL. Dep't of Community Affairs v. The Buckingham, 6 N.J.A.R. 81 (1982).

1:1-5.5 Conduct of non-lawyer representatives; limitations on practice

(a) The presiding judge, unless precluded by Federal law, may determine at any time during the proceeding that a specific case is not appropriate for representation by a non-lawyer representative. The judge's determination may be based either on the lack of appropriate experience or expertise of the particular non-lawyer representative, or the complexity of the legal issues or other factors which make the particular case inappropriate for a non-lawyer representative. The judge shall implement a determination to preclude non-lawyer representation by informing the parties of the decision and the reasons therefor. With respect to a county, local or State agency or a close corporation, the judge may require the party to obtain legal representation. With respect to an individual, the judge may require the individual either to obtain a new non-lawyer, to represent himself or herself or to obtain legal representation.

(b) The presiding judge may revoke any non-lawyer's right to appear in a case if and when the judge determines that a material statement is incorrect in any Notice of Appearance/Application or in any oral application by a non-lawyer.

(c) Non-lawyer representatives shall be subject to the Uniform Administrative Procedure Rules, including the sanctions provided in N.J.A.C. 1:1-14.14 and 14.15. If the judge determines that an incorrect statement in an oral application or Notice of Appearance/Application was an intentional misstatement, or that the non-lawyer representative has unreasonably failed to comply with any order of a judge or with any requirement of this chapter, the judge may impose the sanctions provided under N.J.A.C. 1:1-14.14 and 14.15, which may include:

1. In the case of a State, county or local agency employee, reporting any inappropriate behavior to the agency for possible disciplinary action;

2. A determination by the presiding judge that the non-lawyer representative shall be excluded from a particular hearing; and,

3. A recommendation by the presiding judge to the agency head that a particular non-lawyer representative be permanently excluded from administrative hearings before that agency.

(d) A non-lawyer may not be precluded from providing representational services solely because the non-lawyer is also appearing as a witness in the matter.

(e) In general, a non-lawyer representative shall be permitted at the hearing to submit evidence, speak for the party, make oral arguments, and conduct direct examinations and cross-examinations of witnesses.

1. In the interest of a full, fair, orderly and speedy hearing, the judge may at any time condition, limit or delineate the type or extent of representation which may be rendered by a non-lawyer. Conditions or limits may include:

i. Requiring any examination and cross-examination by the non-lawyer to be conducted through the judge;

ii. Requiring questions from the non-lawyer to be presented to the judge prior to asking;

iii. Requiring the party to speak for him or herself; or

iv. Revoking the right of the non-lawyer to appear if the judge finds that the proceedings are being unreasonably disrupted or unduly delayed because of the non-lawyer's participation.

(f) In settlements, a non-lawyer may not sign a consent order or stipulation for a party, except that non-lawyer representatives of State agencies, county or municipal welfare agencies or close corporations who have been authorized to agree to the terms of a particular settlement by the represented entity may sign consent orders or stipulations.

(g) Non-lawyer representatives are expected to be guided in their behavior by appropriate standards of conduct, such as contained in the following Rules of Professional Conduct for attorneys: RPC 1.2 (Scope of Representation); RPC 1.3 (Diligence); RPC 1.4 (Communication); RPC 3.2 (Expediting Litigation); RPC 3.3 (Candor Towards the Tribunal); RPC 3.4 (Fairness to Opposing Party and Counsel); RPC 3.5 (Impartiality and Decorum of the Tribunal); and RPC 4.1 (Truthfulness in Statements to Others). Non-lawyer representatives who are state officers or employees must also comply with the requirements of the New Jersey Conflicts of Interest Law, in particular N.J.S.A. 52:13D-16. For failure to comply with

these standards, the judge may revoke a non-lawyer representative's right to appear in a case or may order sanctions as provided in (c) above.

Amended by R.1989 d.158, effective March 20, 1989.
See: 20 N.J.R. 2845(a), 21 N.J.R. 749(a).
Exceptions allowing non-lawyer representatives to sign consent orders or stipulations, added at (f).
Correction in (c): changed 1:11-4.4 to 1:1-14.4.
Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
In (c): revised N.J.A.C. citation.
Amended by R.1992 d.213, effective May 18, 1992.
See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).
Added (g).
Amended by R.1997 d.158, effective April 7, 1997.
See: 29 N.J.R. 282(a), 29 N.J.R. 1295(a).
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (c), inserted "and 14.15" twice.

Case Notes

Testimony by lay advocate for parents was only arguably relevant under federal discovery rules. Woods on Behalf of T.W. v. New Jersey Dept. of Educ., D.N.J.1993, 858 F.Supp. 51.

Attorney-client privilege extended to lay advocate. Woods on Behalf of T.W. v. New Jersey Dept. of Educ., D.N.J.1993, 858 F.Supp. 51.

1:1-5.6 Appearance without representation: State agencies

(a) In those cases where a State agency does not send a representative who has been approved under N.J.A.C. 1:1-5.4 to a hearing, but merely rests its case on papers presented to the judge:

1. The agency shall include in the transmittal form a statement which verifies the agency's intention to proceed without a representative qualified under N.J.A.C. 1:1-5.4 and lists the papers upon which the agency intends to rely.

2. The judge shall, where appropriate, accept into the hearing record the agency's papers.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Section was "Appearance without representation: State agencies or county or municipal welfare agencies; corporations". In the introductory paragraph of (a), deleted "or a county or municipal welfare agency" following "State agency" and "and/or on witnesses" preceding "presented to the judge:"; in (a)1, deleted "and/or witnesses" preceding "upon which"; rewrote (a)2; and deleted (b).

SUBCHAPTER 6. PLEADINGS

1:1-6.1 Pleading requirements

(a) Specific pleading requirements are governed by the agency with subject matter jurisdiction over the case. Except as otherwise provided by this subchapter, parties in contested cases should refer to the rules of the appropriate agency for guidance.

(b) Pleadings shall be filed as required by the rules of the agency with subject matter jurisdiction over the case.

(c) Pleadings shall be served in the manner permitted by N.J.A.C. 1:1-7.1(a) on all parties and on any other person required by the rules of the agency with subject matter jurisdiction over the case.

Case Notes

Thirty day period in which the Commissioner of Education was required to determine whether to retain case filed by local school board challenging amount of state aid school district received, or transfer case to Office of Administrative Law (OAL), was never triggered, where Department of Education never filed an answer to school board's petition and Commissioner never determined that school board's petition presented a contested case. Sloan v. Klagholtz, 776 A.2d 894 (2001).

Notice of appeal or cross-appeal is deemed complaint and tolls running of statute of limitations when aggrieved party in state administrative proceeding elects not to file complaint in state court alleging federal civil rights claims but raises such claims in notice of appeal or cross-appeal from the decision of the agency. Maisonet v. New Jersey Dept. of Human Services, Div. of Family Development, 140 N.J. 214, 657 A.2d 1209 (1995).

The "letter report" also serves as the "first pleading" in the administrative hearing process. The significance of the letter report at this stage of the administrative process is to put the applicant on notice of the affirmative qualification criteria which he or she is obligated to prove by clear and convincing evidence. Davis v. Div. of Gaming Enforcement, 8 N.J.A.R. 301 (1985).

1:1-6.2 Amendment of pleadings

(a) Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice.

(b) A judge in granting pleading amendments may permit a brief continuance to allow an opposing party additional preparation time.

Case Notes

Initial Decision (2008 N.J. AGEN LEXIS 770) adopted, which permitted the appointing authority to amend its pleadings to conform to the proofs established at the disciplinary hearing. Although the original pleading charged the employee with being absent from work without permission and without giving proper notice, the essence of the charge against her was not whether she gave notice of her absences, but whether she was absent without permission; the wording of the original pleading addressed her placement on medical verification, her call outs as sick on the dates in question, and her failure to submit the proper medical documentation to support her sick leave usage, rendering the fact that she called in the absences inconsequential. In re Bailey, OAL Dkt. No. CSV 8805-07, 2008 N.J. AGEN LEXIS 1065, Final Decision (September 24, 2008).

Where parents challenged a school board's decision to deny their daughter transportation services, and the daughter had completed middle school during the course of the appeal, no reasonable purpose would have been served by requiring the parents to file an entirely new petition to substitute their younger daughter; irrespective that delays in the movement of the appeal were attributable to the parents' own dilatoriness, in light of the stage of record development and given that all of the underlying facts of the matter, other than the name of the specific child involved, were identical, amendment was permitted. T.F.S. ex rel. C.M.S. v. Bd. of Educ., South Brunswick Twnshp., OAL Dkt. No. EDU 6674-02, 2005 N.J. AGEN LEXIS 1285, Commissioner's Decision (November 2, 2005).

First pleading may be amended anytime, even after presentation of proofs (citing former N.J.A.C. 1:1-6.3). Roberts v. Keansburg Bd. of Educ., 5 N.J.A.R. 208 (1983).

1:1-6.3 Public officers; death or separation from office

When any public officer who is a party to a contested case, whether or not mentioned by name in the pleadings, dies, resigns or for any reason ceases to hold office, his or her successor in office shall be deemed to have been substituted in his or her place. However, on motion, the judge may otherwise order or may specifically order the retention as a party of the predecessor in office.

SUBCHAPTER 7. SERVICE AND FILING OF PAPERS; FORMAT

1:1-7.1 Service; when required; manner

(a) Service shall be made in person; by certified mail, return receipt requested; by ordinary mail; or in any manner which is designed to provide actual notice to the party or person being served.

(b) Any paper filed shall be served in the manner provided by (a) above upon all attorneys or other representatives and upon all parties appearing pro se, either before filing or promptly thereafter unless otherwise provided by order.

(c) Service by mail shall be complete upon mailing.

(d) The standards of personal service contained in R. 4:4-4 of the New Jersey Court Rules shall apply to contested cases when personal service is required and this section is inapplicable.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a), deleted "or" preceding "by certified mail" and preceding "by ordinary mail".

1:1-7.2 Proof of publication and service

(a) Whenever these rules or the applicable rules of any agency provide for publication, mailing or posting of public notices in contested cases, proofs thereof shall be filed within 20 days after the publication, mailing or posting.

(b) Except for service by publication or as otherwise required by this chapter or by State or Federal statute, proof of service shall not be necessary unless a question of notice arises.

(c) Where necessary to prove service, proof may be made by an acknowledgment of service signed by the attorney, any other representative or party, or by an affidavit of the person making service, or by a certificate of service appended to the paper to be filed and signed by the attorney or other representative for the party making service. Where appropriate, other competent proof that actual and timely notice existed of the contents of the paper may be considered as a substitute for service.

1:1-7.3 Filing; copies

(a) A paper shall be filed with the Clerk if the matter has not been assigned to a judge, or, if a judge has been assigned, with the judge assigned to the case.

(b) The Clerk or the judge, upon receiving papers for filing that do not conform to the requirements of these rules, may either return the papers with instructions for refiling or cure the defects and accept the papers for filing.

(c) The filer shall submit the original of all papers with the Office of Administrative Law. If the filer submits an additional copy of the paper to be filed with a self-addressed, stamped envelope, the Clerk or judge will return the paper to the filer marked with the date of filing. No additional copies of any paper shall be filed.

(d) Evidence of filing shall be a notation showing the date of filing. When a paper is filed with a judge, the notation shall also identify the judge. A copy of such papers shall be forwarded by the filing party to the Clerk immediately.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Rewrote (a); in (c), inserted "or judge"; and added (d).
Amended by R.2012 d.121, effective July 2, 2012.
See: 44 N.J.R. 541(a), 44 N.J.R. 1879(a).
In (c), rewrote the first sentence and inserted the last sentence.

1:1-7.4 Format of papers

(a) Every paper filed shall contain:

1. The Office of Administrative Law docket number of the proceeding or, if the case has not been transmitted, the agency docket number;

2. The name, address and telephone number of the person who prepared the paper; and

3. A caption setting forth the title of the proceeding and a brief designation describing the paper filed.

(b) All papers shall be on 8 1/2″ x 11″ stock of customary weight and quality insofar as is practicable.

1:1-7.5 Filing by facsimile transmission

(a) A paper may be filed by facsimile transmission unless prohibited by the judge.

(b) Facsimile transmissions must comply with all requirements of this subchapter except N.J.A.C. 1:1-7.3(c) and 1:1-7.4(b).

(c) The party filing a document by facsimile transmission must include a certification indicating the method of service upon each party and stating that the original document is available for filing if requested by court or a party.

(d) Facsimile transmittals are filed as of the date of receipt by the Clerk or the judge, provided that the complete transmittal is received by 5:00 P.M. Facsimile transmittals received after 5:00 P.M. shall be deemed to be filed as of the next business day.

(e) A party requesting a facsimile transmittal from the Clerk or the judge shall be assessed a charge at the rate provided in the Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

New Rule, R.1992 d.213, effective May 18, 1992.
See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a), substituted "unless prohibited by the judge." for "if:"; deleted (a)1 and (a)2; and in (e), substituted "Open Public Records Act" for "Right to Know Law".

SUBCHAPTER 8. FILING AND TRANSMISSION OF CONTESTED CASES IN THE OFFICE OF ADMINISTRATIVE LAW

1:1-8.1 Agency filing with the Office of Administrative Law; settlement efforts

(a) After the parties have complied with all pleading requirements, the agency shall within 30 days either file the case with the Clerk of the Office of Administrative Law in the manner provided by N.J.A.C. 1:1-8.2 or retain it under the provisions of N.J.S.A. 52:14F-8 and notify all parties of the decision to retain.

(b) During the 30-day period in (a) above, an agency may attempt settlement in accordance with N.J.A.C. 1:1-4.2. At the conclusion of the 30-day period, unless all parties agree to continue the settlement efforts, the matter shall be either filed with the Office of Administrative Law or further retained under the provisions of N.J.S.A. 52:14F-8. After the 30th day of an agency's settlement efforts, any party may request that the agency transmit the matter to the Office of Administrative Law, provided that the agency does not intend to retain the case under N.J.S.A. 52:14F-8.

(c) An agency may file a contested case with the Office of Administrative Law immediately if the agency determines that settlement efforts would be inappropriate or unproductive.

Case Notes

Agency may retain contested case and must notify all parties of decision to retain (citing former N.J.A.C. 1:1-5.1 and 5.4). Deck House, Inc. v. New Jersey State Bd. of Architects, 531 F.Supp. 633 (D.N.J.1982).

In an action challenging the decision of a state architecture board that a manufacturer of prefabricated houses violated N.J.S.A. 45:3-10, in the context of determining whether the Younger abstention doctrine demanded dismissal of the challenge, the court found that proceedings before the board were insufficiently adjudicatory in nature to vindicate federal claims because the procedural rules set forth in N.J.A.C. 1:1-1.1 et seq., allowed the inquisitorial, prosecutorial, and judicial power to be concentrated in the board. Deck House, Inc. v. New Jersey State Bd. of Architects, 531 F. Supp. 633, 1982 U.S. Dist. LEXIS 10633 (D.N.J. 1982).

Thirty day period in which the Commissioner of Education was required to determine whether to retain case filed by local school board challenging amount of state aid school district received, or transfer case to Office of Administrative Law (OAL), was never triggered, where Department of Education never filed an answer to school board's petition and Commissioner never determined that school board's petition presented a contested case. Sloan v. Klagholtz, 776 A.2d 894 (2001).

An agency head may postpone the transfer of a contested case while the parties negotiate; however, no such delay is allowed where it would be inappropriate or unproductive (citing former N.J.A.C. 1:1-5.1 and 5.4). Abbott v. Burke, 100 N.J. 269, 495 A.2d 376 (1985).

1:1-8.2 Transmission of contested cases to the Office of Administrative Law

(a) In every proceeding to be filed in the Office of Administrative Law, the agency shall complete a transmittal form, furnished by the Clerk of the Office of Administrative Law, containing the following information:

1. The name of the agency transmitting the case;

2. The name, address and telephone number of the agency's transmitting officer;

3. The name or title of the proceeding, including the designation petitioner/respondent or appellant/appellee when appropriate;

4. The agency docket or reference number;

5. A description of the nature of the case, including a statement of the legal authority and jurisdiction upon which the agency action is based or under which the hearing is to be held, a reference to particular statutes and rules involved as well as a brief summary of the matters of fact and law asserted. If this information is included in a pleading that is attached to the transmittal form pursuant to (b) below, the agency may refer to the pleading in order to satisfy this requirement;

6. An indication as to whether the agency has attempted settlement;

7. An estimate of the total time required for the hearing;

8. Whether a court stenographer is requested. If a stenographer is not requested, the Office of Administrative Law will provide an audiotape recording for the hearing. When a stenographer is requested by the transmitting agency, the appearance fee shall be paid by the transmitting agency. When the transmitting agency notifies the Clerk that a court stenographer is required because a party so requests, the appearance fee shall be paid by that party;

9. Anticipated special features or requirements, including the need for emergent relief, discovery, motions, prehearing conference or conference hearing and whether the case is a remand;

10. The names, addresses and telephone numbers, and e-mail addresses if available, of all parties and their attorneys or other representatives, with each person clearly designated as either party or representative. For any party that is a corporation, the transmitting agency shall provide the name, address and telephone number, and e-mail address if available, of the corporation's attorney or non-lawyer representative qualified under N.J.A.C. 1:1-5.4(b)2v.

11. A request for a barrier-free hearing location if it is known that a handicapped person will be present; and

12. The names of any other agencies claiming jurisdiction over either the entire or any portion of the factual dispute presented in the transmitted contested case.

13. The transmitting agency may provide the name and address of one additional person other than a party or representative to receive a copy of all Clerk's notices in the case. If no person is designated, the OAL shall send an informational copy of notices to the agency's transmitting officer.

(b) The agency shall attach all pleadings to the transmittal form.

(c) The agency may affix to the completed transmittal form only documents which have been exchanged between the parties prior to transmission of the case to the Office of Administrative Law. If the agency affixes to the transmittal form documents that have not been exchanged between the parties, the agency shall either serve these documents upon the parties or offer them to the parties and shall inform the Clerk of such action in the transmittal form.

(d) If there was a previous hearing in a matter which upon appeal is subject to de novo review, the agency shall not transmit the record of the previous hearing to the Office of Administrative Law.

(e) If an agency has transmitted a case to the Office of Administrative Law, any party or agency aware that another agency is claiming jurisdiction over any part of the transmitted case shall immediately notify the Office of Administrative Law, the other parties and affected agencies of the second jurisdictional claim.

(f) The completed transmittal form and two copies of any attachments shall be filed with the Clerk of the Office of Administrative Law.

Amended by R.1987 d.519, effective December 21, 1987.
See: 19 N.J.R. 1761(a), 19 N.J.R. 2388(a).
New (d) added; old (d)-(e) renumbered (e)-(f).
Amended by R.1989 d.395, effective July 17, 1989.
See: 21 N.J.R. 1181(a), 21 N.J.R. 2019(a).
In (f): added "in duplicate" regarding transmittal documents.
Amended by R.1990 d.484, effective September 17, 1990.
See: 22 N.J.R. 2066(a), 22 N.J.R. 3003(a).
At (a), added requirement for specific information about parties and their representatives on the form used to transmit cases and added 13 regarding making copy available to one additional designated party.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a)8, substituted "will provide" for "may provide at its expense either" and deleted "or a court stenographer" following "recording"; and in (f), deleted "at 185 Washington Street, Newark, New Jersey 07102".
Amended by R.2009 d.325, effective November 2, 2009.
See: 41 N.J.R. 2365(a), 41 N.J.R. 4071(a).
In (a)10, inserted ", and e-mail addresses if available," twice.

1:1-8.3 Receipt by Office of Administrative Law of transmitted contested case; filing; return of improperly transmitted cases

(a) Upon receipt of a properly transmitted contested case the Clerk shall mark the case as having been received and filed as of a particular date and time. Upon filing, the Clerk shall assign an Office of Administrative Law docket number to the contested case.

(b) The Clerk upon receiving a contested case that has not been transmitted in accordance with this subchapter may either return the case with instructions to the agency for retransmission or cure the transmission defects and accept the matter for filing.

SUBCHAPTER 9. SCHEDULING; CLERK'S NOTICES; ADJOURNMENTS; INACTIVE LIST

1:1-9.1 Scheduling of proceedings

(a) When a contested case is filed, it may be scheduled for mediation, settlement conference, prehearing conference, proceeding on the papers, telephone hearing, plenary hearing or other proceeding.

(b) To schedule a proceeding, the Clerk or the judge's secretary may contact the parties to arrange a convenient date, time and place or may prepare and serve notice without first contacting the parties. Proceedings shall be scheduled for suitable locations, taking into consideration the convenience of the witnesses and the parties, as well as the nature of the case and proceedings.

(c) The Clerk may schedule a settlement conference whenever such a proceeding may be appropriate and productive. The Clerk may schedule mediation whenever all parties concur.

(d) A prehearing conference may be scheduled in any case whenever necessary to foster an efficient and expeditious proceeding.

(e) A proceeding on the papers may be scheduled in accordance with N.J.A.C. 1:1-14.8 for:

1. Division of Motor Vehicles cases dealing with excessive points and surcharges, pursuant to N.J.A.C. 1:13;

2. Department of Environmental Protection cases involving emergency water supply allocation plan exemptions, pursuant to N.J.A.C. 1:7; and

3. Any other class of suitable cases which the Director of the Office of Administrative Law and the transmitting agency agree could be lawfully decided on the papers.

(f) A telephone hearing may be scheduled for any case when the judge so directs, subject to the requirements of N.J.A.C. 1:1-15.8(e).

Amended by R.1987 d.463, effective November 16, 1987.
See: 19 N.J.R. 1591(a), 19 N.J.R. 2131(a).
Deleted text (d)1.-3. because those specifications had been found to be superfluous.
Amended by R.1992 d.213, effective May 18, 1992.
See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).
Revised (a).
Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
In (f), deleted 2 through 4 and recodified existing 5 and 6 as 2 and 3.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a), deleted "conference hearing," preceding "telephone hearing"; in (b), inserted "or the judge's secretary"; in (d), deleted ", other than one requiring a conference hearing," preceding "whenever"; deleted former (f); recodified former (g) as (f); and rewrote (f).

1:1-9.2 Cases commenced by order to show cause

When an agency head commences an action by order to show cause, the agency head may, prior to service and filing of the order to show cause, contact the Clerk, who will assign a judge and establish the time, place and date for a hearing on the matter. The agency shall insert in the pleading the information provided by the Clerk and promptly serve and file it in accordance with N.J.A.C. 1:1-7.

Case Notes

Even if order to show cause mechanism for bringing compliance issues before Board of Public Movers and Warehousemen, in license revocation proceeding, was required to be established in an Administrative Procedure Act (APA) rule promulgation, administrative code provision governing cases commenced by order to show cause would have satisfied that requirement. Matter of A-1 Moving and Storage, Inc., 706 A.2d 752, 309 N.J.Super. 33 (A.D. 1998).

1:1-9.3 Priority scheduling

Priority in scheduling shall be given where requirements of law impose expedited time frames for disposition of a case. In all other cases, the transmitting agency or any party may make special scheduling requests to the Clerk.

1:1-9.4 Accelerated proceedings

(a) Any party may apply for accelerated disposition of a case. The application shall be in writing, on notice to all parties, and shall include the reasons for the request and a statement that all parties consent to acceleration.

(b) Applications for acceleration shall be filed as soon as circumstances meriting such action are discovered. Whenever possible, applications for acceleration by a transmitting agency shall be filed upon transmittal of the case and applications for acceleration by any other party shall be filed with the pleadings in the case.

(c) Applications for acceleration shall be made to the Director until such time as a party has appeared before a judge in person, by telephone, or in writing for a motion, prehearing or hearing. The Director may decide the request for acceleration or may assign the motion to a judge for determination. If a party has appeared before a judge in person, by telephone, or in writing for a motion, prehearing, or hearing, applications for acceleration shall be made to the judge.

(d) If the transmitting agency is a party and the agency either requests accelerated proceedings or concurs in a request for acceleration, the agency will be deemed to have agreed to abide by the 15-day decision deadline in (e)8 below. If the transmitting agency is not a party, the party requesting acceleration must secure from the transmitting agency agreement to render its final decision within 15 days as provided in (e)8 below.

(e) If the transmitting agency agrees to the 15-day decision deadline, all parties consent and the Director or the judge assigned to the case then finds that there is good cause for accelerating the proceedings, the judge shall schedule an accelerated hearing date and the case shall proceed in the following manner:

1. Formal discovery shall not be permitted, although parties may voluntarily exchange information, provided it does not delay the accelerated disposition of the case.

2. No mediation, prehearing conference or settlement conference shall be scheduled or conducted unless directed by the presiding judge.

3. Except for extraordinary circumstances establishing good cause, no adjournments shall be granted.

4. Prehearing motions shall not be permitted unless requested by the presiding judge.

5. Post-hearing submissions shall not be accepted except for the purpose of expressing the terms of a settlement or when requested by the presiding judge.

6. Initial decisions shall be issued within 15 days after the hearing is concluded.

7. Exceptions to the initial decision must be filed with the agency no later than six days after the initial decision was mailed to the parties. No replies or cross-exceptions are permitted.

8. Final decisions shall be entered within 15 days after receipt of the initial decision.

Amended by R.1990 d.483, effective September 17, 1990.
See: 22 N.J.R. 2067(a), 22 N.J.R. 3003(b).
At (c)7, changed filing time from three days to six days after the initial decision was mailed to the parties.
Amended by R.1994 d.173, effective April 4, 1994.
See: 26 N.J.R. 284(a), 26 N.J.R. 1493(a).

1:1-9.5 Notices

(a) Upon acceptance of a contested case for filing, the Office of Administrative Law shall notify the transmitting agency and all parties of the case's filing date and the Office of Administrative Law docket number. This notice shall include a description of the nature of the proceeding, a reference to the controlling hearing procedures, including discovery, and a reference to the right of persons to represent themselves or to be represented by any attorney or a qualified non-lawyer in certain situations. The Office of Administrative Law may also include in this notice any information deemed instructive or helpful to the parties and may combine this notice with any other notice, including the notice of hearing.

(b) The Office of Administrative Law shall provide all parties with timely notice of any mediation, settlement conference, prehearing conference, proceeding on the papers, telephone hearing, plenary hearing or other proceeding, except that in emergency relief proceedings pursuant to N.J.A.C. 1:1-12.6 the Office of Administrative Law may require the moving party to provide appropriate notice. Each notice shall apprise the parties of the presiding judge and the date, time and place of the proceeding. The Office of Administrative Law may also include in any proceeding notice any information deemed instructive or helpful to the parties.

(c) Notice shall be by regular mail, except that when emergent needs so require and the law permits, notice of proceedings may be by telephone or any other method reasonably certain to provide actual notice to the parties.

(d) All notices shall be written in plain language. See generally, N.J.S.A. 56:12-1 et seq.

(e) Each notice shall prominently display a telephone number where parties can obtain further assistance.

(f) All parties shall receive subsequent notices of all proceedings in any contested case. Subsequent notices shall apprise the parties of the date, time, place and nature of a proceeding and may be either written or effected by a statement made on the record.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Section was "Clerk's notices". In (a) and (b), substituted "Office of Administrative Law" for "Clerk" throughout and "deemed" for "he or she deems"; rewrote (c); and in (d), deleted "Clerk's" following "All".

1:1-9.6 Adjournments

(a) In the following matters, applications for adjournments shall be made to the Clerk until such time as a party has appeared before the judge in person, by telephone or in writing for a motion, prehearing or hearing; thereafter, applications for adjournments shall be made to the judge:

1. Hearings in Human Services (except Medical Assistance provider and rate); Motor Vehicle; Consumer Affairs Lemon Law cases;

2. Settlement conferences in Alcoholic Beverage Control, Department of Personnel civil service and Community Affairs cases.

(b) In all cases other than those specified in (a) above, applications for adjournments shall be made to the Clerk until such time as a judge has been assigned. Thereafter, applications for adjournments shall be made to the judge.

(c) Applications may be made in writing or by telephone. Telephone applications for adjournments which are granted must be confirmed in writing by the party requesting the adjournment. All adjournments that are granted will be granted for the shortest period possible and to a definite date.

(d) Adjournments will be granted only for good cause.

(e) Adjournments will not be granted to complete discovery if parties have not timely complied with N.J.A.C. 1:1-10.4.

(f) The fact that a party obtains the consent to an adjournment of his or her adversary will not always result in the granting of the adjournment.

(g) An attorney with a conflicting engagement in a court shall call the Clerk or judge as soon as the conflict is discovered. Attorneys should not assume that such conflicts will always result in an adjournment.

(h) When the judge or the Clerk requests, a party obtaining an adjournment will be responsible for securing from his or her adversary consent to a new date.

(i) All parties to an adjournment will be responsible for giving prompt notice to their witnesses as to the adjournment and the new scheduled date.

(j) When granting an adjournment after an untimely application, a judge may order any of the sanctions contained in N.J.A.C. 1:1-14.14 and 14.15.

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): added introductory text specifying special cases.
Added new subsection (b), recodifying (b)-(f) as (d)-(h) with no change in text.
Recodified (g) as (i), deleting text referring to Clerk's confirmation of new date.
Recodified (h) as (j), revising N.J.A.C. reference.
Administrative Correction to (j).
See: 23 N.J.R. 687(a).
Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
In (j): revised N.J.A.C. citation.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Rewrote (a); in (c), substituted ". Telephone" for "; telephone"; in (d), substituted "for good cause" for "in exceptional situations which could not have been reasonably foreseen or prevented"; and in (j), inserted "and 14.15".

Case Notes

Administrative law judge (ALJ) properly denied a non-governmental, private entity's motion for an adjournment in an action against an electric company seeking the cost of relocating utility poles. The entity sought the adjournment to obtain a bid package from the electric company, but the Board of Public Utilities agreed with the ALJ that the entity had sufficient information to prepare its own cost estimate for presentation at the hearing without the electric company's bid package. Pennsville Travel Ctr., Inc. v. Atlantic City Electric Co, OAK Dkt. No. PUC 434-10, 2013 N.J. PUC LEXIS 276, Order on Initial Decision (August 26, 2013).

1:1-9.7 Inactive list

(a) Where a party to a pending case demonstrates good cause, that party or his or her representative may move to place the case on the inactive list. A judge, as a condition to placing a matter on the inactive list, shall consider the public interest in the matter and may impose conditions appropriate to the case.

1. Upon affidavit or other adequate proof, the judge may determine to place the case on the inactive list for as brief a period as possible not to exceed six months.

2. The Clerk shall maintain the inactive list and shall return the case to an active status after the specified period has expired unless, upon motion and further proof, the judge determines that the party is still with just excuse unable to proceed.

3. A judge may order a case to continue on the inactive list for successive brief periods, each not to exceed six months.

4. All parties and the agency shall be notified of any action taken under this section.

(b) Cases may not be placed on the inactive list to await an appellate court decision involving other parties unless the appellate decision is so imminent and directly relevant to the matter under dispute so that some reasonable delay would be justified.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a), substituted "demonstrates good cause" for "is mentally or physically incapable of proceeding or is with other just excuse unable to proceed without substantial inconvenience or inordinate expense"; in (a)4, substituted "All parties and the agency shall be notified" for "The Clerk shall notify all parties and the agency"; and in (b), inserted "so" preceding "that".

Cross References

Placement on inactive list pending disposition of charges. See, N.J.A.C. 1:19-9.1.

SUBCHAPTER 10. DISCOVERY

1:1-10.1 Purpose and function; policy considerations; public documents not discoverable

(a) The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary.

(b) It is not ground for denial of a request for discovery that the information to be produced may be inadmissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) In considering a discovery motion, the judge shall weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness. Except where so proceeding would be unduly prejudicial to the party seeking discovery, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought.

(d) Discovery shall generally not be available against a State agency that is neither a party to the proceeding nor asserting a position in respect of the outcome but is solely providing the forum for the dispute's resolution.

Amended by R.2004 d.287, effective August 2, 2004.
See: 36 N.J.R. 1857(a), 36 N.J.R. 3523(a).
Deleted former (d) and recodified former (e) as new (d).

Case Notes

Parents of mentally retarded individual were entitled to discovery of all information from Division of Developmental Disabilities concerning placement of individual. Mr. and Mrs. J.E. on Behalf of G.E. v. State Dept. of Human Services, Div. of Development Disabilities, 253 N.J.Super. 459, 602 A.2d 279 (A.D.1992), certification granted 130 N.J. 12, 611 A.2d 651, reversed 131 N.J. 552, 622 A.2d 227.

Disclosure of identity of purported "confidential source" who provided certain information which led to the filing of a complaint against respondent ordered by OAL judge. Div. of Gaming Enforcement v. Boardwalk Regency, 9 N.J.A.R. 274 (1986).

Parties are obliged to exhaust all less-formal opportunities to obtain discoverable material before invoking provisions for discovery practice (citing former N.J.A.C. 1:1-11.4). Div. of Consumer Affairs v. Acme Markets, 3 N.J.A.R. 210 (1981).

1:1-10.2 Discovery by notice or motion; depositions; physical and mental examinations

(a) Any party may notify another party to provide discovery by one or more of the following methods:

1. Written interrogatories;

2. Production of documents or things, including electronically stored information provided that a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party from whom discovery is sought shall demonstrate that the electronically stored information is not reasonably accessible because of undue burden or cost;

3. Permission to enter upon land or other property for inspection or other purposes; and

4. Requests for admissions.

(b) Any party may request an informal, nontranscribed meeting with witnesses for another party in order to facilitate the purposes of discovery as described in N.J.A.C. 1:1-10.1. The other party and his or her representative must be given notice and the opportunity to be present. Such meetings are voluntary and cannot be compelled. Failure to agree to such meetings will not be considered good cause for permitting depositions pursuant to (c) below.

(c) Depositions upon oral examination or written questions and physical and mental examinations are available only on motion for good cause. In deciding any such motion, the judge shall consider the policy governing discovery as stated in N.J.A.C. 1:1-10.1 and shall weigh the specific need for the deposition or examination; the extent to which the information sought cannot be obtained in other ways; the requested location and time for the deposition or examination; undue hardship; and matters of expense, privilege, trade secret or oppressiveness. An order granting a deposition or an examination shall specify a reasonable time during which the deposition or examination shall be concluded. The parties may agree to conduct depositions without the necessity of filing a motion; however, the taking of any depositions shall not interfere with the scheduled hearing date.

(d) A party taking a deposition or having an examination conducted who orders a transcript or a report shall promptly,

without charge, furnish a copy of the transcript or report to the witness deposed or examined, if an adverse party, and, if not, to any adverse party. The copy so furnished shall be made available to all other parties for their inspection and copying.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Rewrote (a)2; and in (c), inserted the final sentence.

Case Notes

Initial Decision (2009 N.J. AGEN LEXIS 765) adopted, which found that an employee who refused to answer interrogatories and produce certain documents on the grounds of self-incrimination was prohibited from testifying about the matters on which he refused to disclose information and documentation. If the employee was going to defend his actions based on the Internal Revenue Code, the City had the right to review tax returns, to receive responses regarding the ex-wife's employment and income after the divorce, to learn if the employee claimed his former wife on other documents, and to review other relevant documents that would have been used in defending the case. In re Peterson, OAL Dkt. No. CSV 01472-09, 2009 N.J. CSC LEXIS 1494, Final Decision (December 2, 2009).

Under N.J.A.C. 1:1-10.2(c), there was good cause for compelling the deposition of a witness who had made allegations against a school principal and caused an Order to Show Cause to be issued by the Board of Examiners against the principal. Because the witness was not a party to the proceeding and the witness was unable to comply with the principal's counsel's request for an informal meeting, the deposition of the witness was warranted. In re Certificates of Kandell, OAL Dkt. No. EDE 09266-2005N; SBE No. 09266-05; SB No. 9-06, 2006 N.J. AGEN LEXIS 637, State Board of Education Decision (May 3, 2006).

Administrative agency discovery practice limits available methods of discovery on notice to written interrogatories, production of documents or things, property inspection, physical and mental examinations and requests for admissions (citing former N.J.A.C. 1:1-11.2). Depositions upon oral examination are available on motion for good cause shown (citing former N.J.A.C. 1:1-11.3). Div. of Consumer Affairs v. Acme Markets, Inc., 3 N.J.A.R. 210 (1981).

1:1-10.3 Costs of discovery

(a) The party seeking discovery shall pay for all reasonable expenses caused by the discovery request.

(b) Where a proponent of any notice or motion for discovery or a party taking a deposition is a State agency, and the party or person from whom such discovery or deposition is sought is entitled by law to recover in connection with such case the costs thereof from others, such State agency shall not be required to pay the cost of such discovery or deposition.

1:1-10.4 Time for discovery; relief from discovery; motions to compel

(a) The parties in any contested case shall commence immediately to exchange information voluntarily, to seek access as provided by law to public documents and to exhaust other informal means of obtaining discoverable material.

(b) Parties shall immediately serve discovery requests.

(c) No later than 15 days from receipt of a notice requesting discovery, the receiving party shall provide the requested information, material or access or offer a schedule for reasonable compliance with the notice; or, in the case of a notice requesting admissions, each matter therein shall be admitted unless within the 15 days the receiving party answers, admits or denies the request or objects to it pursuant to N.J.A.C. 1:1-10.4(d).

(d) A party who wishes to object to a discovery request or to compel discovery shall, prior to the filing of any motion regarding discovery, place a telephone conference call to the judge and to all other parties no later than 10 days of receipt of the discovery request or the response to a discovery request. If a party fails without good reason to place a timely telephone call, the judge may deny that party's objection or decline to compel the discovery.

(e) The parties shall complete all discovery no later than 10 days before the first scheduled evidentiary hearing or by such date ordered by the judge.

Amended by R.1989 d.190, effective April 3, 1989.
See: 20 N.J.R. 2845(b), 21 N.J.R. 889(a).
In (c), clear specifications added on the result of a failure to respond to a request for admissions.
Petition for Rulemaking.
See: 35 N.J.R. 3965(a), 4331(a).
Amended by R.2004 d.95, effective March 15, 2004 (operative April 15, 2004).
See: 35 N.J.R. 4349(a), 36 N.J.R. 1355(a).
In (e), substituted "10 days" for "five days" following "no later than".
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), deleted "and notices and make discovery motions" from the end; rewrote (d); and in (e), deleted "at the prehearing conference" from the end.

Case Notes

Petitioners' claim seeking a home-based program for their child was dismissed due to petitioners' delays and failures to respond which deprived the school district with an opportunity to address the substantive issues, properly prepare and present a defense, and otherwise present a meaningful evidentiary hearing. J.G. ex rel. J.G. and J.G. v. Paramus Bd. of Educ., OAL DKT. EDS 7551-06 and 7553-06, 2006 N.J. AGEN LEXIS 1001, Final Decision (November 28, 2006), aff'd, 2008 U.S. Dist. LEXIS 30030 (D.N.J. April 11, 2008).

1:1-10.5 Sanctions

By motion of a party or on his or her own motion, a judge may impose sanctions pursuant to N.J.A.C. 1:1-14.14 and 14.15 for failure to comply with the requirements of this subchapter. Before imposing sanctions, the judge shall provide an opportunity to be heard.

Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
Revised N.J.A.C. citation in rule text.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Inserted "and 14.15".

Case Notes

Administrative law judge has power to impose reasonable monetary sanctions on attorneys as representatives of parties. In re Timofai Sani-

tation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

Before administrative law judge could impose sanctions for violating discovery order, court was required to conduct evidentiary hearing and make findings of fact. In re Timofai Sanitation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

Administrative Law Judge was within her right to dismiss complainant's case where complainant repeatedly failed to reply to respondent's discovery, failed to participate in a settlement conference, and failed to attend scheduling conferences. While complainant's attorney suffered from health issues, there was nothing in the record that would have excused counsel's failure to respect judge-ordered deadlines or his unwillingness to make the necessary arrangements to ensure this case was properly handled; additionally, counsel's difficulty in communicating his client did not justify a more than one year delay in providing discovery. Campbell v. Quest Diagnostics, OAL Dkt. No. CRT 05381-2008N, 2009 N.J. AGEN LEXIS 741, Final Decision (October 2, 2009), aff'd per curiam, No. A-1287-09T3, 2010 N.J. Super. Unpub. LEXIS 2608 (App.Div. October 28, 2010).

Sanctions; failure to comply with administrative discovery orders. In the Matter of Timofai Sanitation Co., 92 N.J.A.R.2d (OAL) 6.

Development application denied to petitioners for failure to meet minimum standards for seasonal high water table and wetlands buffer; waiver of strict compliance denied for failure to offer information to establish an extraordinary hardship, citing N.J.A.C. 1:1-11.2 (recodified as N.J.A.C. 1:11-8.3)-(Final Decision by the Pinelands Commission). Lavecchia v. Pinelands Commission, 10 N.J.A.R. 63 (1987).

Administrative law judge held to have discretion with regards to sanctions following a motion to compel discovery (cited former N.J.A.C. 1:1-11.6). 7 N.J.A.R. 206 (1984), reversed Docket No. A-3886-84 (App.Div.1986).

1:1-10.6 (Reserved)

Repealed by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Section was "Discovery in conference hearings; no discovery in mediation".

SUBCHAPTER 11. SUBPOENAS

1:1-11.1 Subpoenas for attendance of witnesses; production of documentary evidence; issuance; contents

(a) Subpoenas may be issued by the Clerk, any judge, or by pro se parties, attorneys-at-law or non-lawyer representatives, in the name of the Clerk, to compel the attendance of a person to testify or to produce books, papers, documents, electronically stored information or other objects at a hearing, provided, however, that a subpoena to compel the attendance of the Governor, an agency head, Assistant Commissioner, Deputy Commissioner, or Division Director may be issued only by a judge. A subpoena for the Governor, an agency head, Assistant Commissioner, Deputy Commissioner, or Division Director shall be issued only if the requesting party makes a showing that the subpoenaed individual has firsthand knowledge of, or direct involvement in, the events giving rise to the contested case, or that the testimony is essential to prevent injustice.

(b) The subpoena shall contain the title and docket number of the case, the name of the person to whom it has been issued, the time and place at which the person subpoenaed must appear, the name and telephone number of the party who has requested the subpoena and a statement that all inquiries concerning the subpoena should be directed to the requesting party. The subpoena shall command the person to whom it is directed to attend and give testimony or to produce books, papers, documents or other designated objects at the time and place specified therein and on any continued dates.

(c) Subpoenas to compel the attendance of a person to testify at a deposition may be issued by a judge pursuant to N.J.A.C. 1:1-10.2(c).

(d) A subpoena which requires production of books, papers, documents or other objects designated therein shall not be used as a discovery device in place of discovery procedures otherwise available under this chapter, nor as a means of avoiding discovery deadlines established by this chapter or by the judge in a particular case.

(e) Subpoena forms shall be available free of charge from the Office of Administrative Law. Subpoena forms may be obtained from the Clerk of the Office of Administrative Law or on the State of New Jersey Office of Administrative Law website www.state.nj.us/oal/.

(f) Upon request by a party, subpoena issued by the Clerk or by a judge may be forwarded to that party by facsimile transmission. Facsimile transmitted subpoenas shall be served in the same manner and shall have the same force and effect as any other subpoena pursuant to this subchapter. A party requesting a facsimile transmittal shall be charged for such transmittal pursuant to N.J.A.C. 1:1-7.5(e).

Amended by R.1992 d.213, effective May 18, 1992.
See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).
Added (d).
Amended by R.1994 d.293, effective June 6, 1994.
See: 26 N.J.R. 1276(a), 26 N.J.R. 2255(a).
Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
In (e), added the second sentence.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a), inserted ", electronically stored information".

1:1-11.2 Service; fees

(a) A subpoena shall be served by the requesting party by delivering a copy either in person or by certified mail return receipt requested to the person named in the subpoena, together with the appropriate fee, at a reasonable time in advance of the hearing.

(b) Witnesses required to attend shall be entitled to payment by the requesting party at a rate of $2.00 per day of attendance if the witness is a resident of the county in which the hearing is held and an additional allowance of $2.00 for every 30 miles of travel in going to the place of hearing from his or her residence and in returning if the witness is not a resident of the county in which the hearing is held.

Case Notes

Counsel who represented a police officer who prevailed on his claim that he had been wrongly removed from his position was entitled to compensation at the hourly rate of $175, not at his billed rate of $375, because counsel provided insufficient information to justify an award at the billed rate. Specifically, the certification did not elaborate as to the specific nature or subject matter of cases for which he was paid at the $375 hourly rate nor any basis on which it could be concluded that he has particular expertise in labor or employment law. In the absence of such a showing, an award based on an hourly rate of $175 was proper under N.J.A.C. 4A:2-2.12. As for the related claim for costs, because subpoenas were not required to be served by process servers, the cost thereof was not reimbursable per N.J.A.C. 1:1-11.2, while the $20 appeal processing fee was also nonreimbursable per N.J.A.C. 4A:2-1.8(f). In re Hulse, Newark, CSC Docket No. 2013-3505, 2013 N.J. CSC LEXIS 1151, Final Administrative Action, December 6, 2013.

1:1-11.3 Motions to quash

The judge on motion may quash or modify any subpoena for good cause shown. If compliance with a subpoena for the production of documentary evidence would be unreasonable or oppressive, the judge may condition denial of the motion upon the advancement by the requesting party of the reasonable cost of producing the objects subpoenaed. The judge may direct that the objects designated in the subpoena be produced before the judge at a time prior to the hearing or prior to the time when they are to be offered in evidence and may upon their production permit them or portions of them to be inspected by the parties and their attorneys.

1:1-11.4 Failure to obey subpoena

A party who refuses to obey a subpoena may be subject to sanctions under N.J.A.C. 1:1-14.4 or may suffer an inference that the documentary or physical evidence or testimony that the party fails to produce is unfavorable.

1:1-11.5 Enforcement

A party who has requested issuance of a subpoena may seek enforcement of the subpoena by bringing an action in the Superior Court pursuant to the New Jersey Court Rules.

SUBCHAPTER 12. MOTIONS

1:1-12.1 When and how made; generally

(a) Where a party seeks an order of a judge, the party shall apply by motion.

1. A party shall make each motion in writing, unless it is made orally during a hearing or unless the judge otherwise permits it to be made orally.

2. No technical forms of motion are required. In a motion, a party shall state the grounds upon which the motion is made and the relief or order being sought.

(b) A party shall file each motion with the judge. If a case has not yet been assigned to a judge, motions may be filed with the Clerk.

(c) In a motion for substantially the same relief as that previously denied, a party shall specifically identify the previous proceeding and its disposition.

Amended by R.1991 d.44, effective February 4, 1991.
See: 22 N.J.R. 3278(b), 23 N.J.R. 293(a).
In (b): deleted text explaining Clerk's procedures regarding motions. Added text: "If a case . . . with the Clerk."
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a)2, substituted "and" for the comma following "made", deleted "and the date when the matter shall be submitted to the judge for disposition" following "sought" and deleted the last sentence; and deleted (d). Administrative correction.
See: 40 N.J.R. 6957(a).

1:1-12.2 Motions in writing; time limits

(a) Proof of service shall be filed with all moving and responsive papers.

(b) With the exception of emergency relief applications made pursuant to N.J.A.C. 1:1-12.6, summary decision motions made pursuant to N.J.A.C. 1:1-12.5, and when a motion is expedited pursuant to (f) below, the opposing parties shall file and serve responsive papers no later than 10 days after receiving the moving papers.

(c) The moving party may file and serve further papers responding to any matter raised by the opposing party and shall do so no later than five days after receiving the responsive papers.

(d) All motions in writing shall be decided on the papers unless oral argument is directed by the judge.

(e) With the exception of motions for summary decision under N.J.A.C. 1:1-12.5, motions concerning predominant interest in consolidated cases under N.J.A.C. 1:1-17.6, and motions for emergency relief pursuant to N.J.A.C. 1:1-12.6, all motions shall be decided within 30 days of service of the last permitted response.

(f) A party may request an expedited schedule for disposition of a motion by arranging a telephone conference between the judge and all parties. If the judge agrees to expedite, he or she must establish a schedule for responsive papers, submission and decision.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Section was "Motions in writing; generally, no oral argument; time limits". Deleted former (a), recodified former (b) through (g) as (a) through (f); in (a), deleted the former first sentence and substituted "all moving and responsive" for "the moving"; rewrote (b); in (d), substituted "decided" for "submitted for disposition"; and in (e), substituted a comma for "and" following the first N.J.A.C. reference and "30 days of service of the last permitted response" for "10 days after they are submitted for disposition", and inserted "and motions for emergency relief pursuant to N.J.A.C. 1:1-12.6,".

1:1-12.3 Procedure when oral argument is directed

All motions for which oral argument has been directed shall be heard by telephone conference unless otherwise directed by the judge. All arguments on motions shall be sound recorded.

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

1:1-12.4 Affidavits; briefs and supporting statements; evidence on motions

(a) Motions and answering papers shall be accompanied by all necessary supporting affidavits and briefs or supporting statements. All motions and answering papers shall be supported by affidavits for facts relied upon which are not of record or which are not the subject of official notice. Such affidavits shall set forth only facts which are admissible in evidence under N.J.A.C. 1:1-15, and to which affiants are competent to testify. Properly verified copies of all papers or parts of papers referred to in such affidavits may be annexed thereto.

(b) In the discretion of the judge, a party or parties may be required to submit briefs or supporting statements pursuant to the schedule established in N.J.A.C. 1:1-12.2 or as ordered by the judge.

(c) The judge may hear the matter wholly or partly on affidavits or on depositions, and may direct any affiant to submit to cross-examination and may permit supplemental or clarifying testimony.

Case Notes

Initial Decision (2008 N.J. AGEN LEXIS 634) adopted, which concluded that a teacher failed to present any documents from a neurosurgeon or any other medical expert that raised the question of a material fact, as required by N.J.A.C. 1:1-12.4(a), regarding the correlation between the teacher's Tarlov cyst and a lower back strain, which occurred while the teacher was taking a Yoga class that was required as part of her Professional Growth Requirement. Under N.J.S.A. 18A:30-2.1 the teacher was required to demonstrate a causal connection between the cyst and the work-related incident in order to recover sick leave injury benefits. Ford v. Bd. of Educ. of Mansfield, OAL Dkt. No. EDU 3169-06, 2008 N.J. AGEN LEXIS 1182, Final Decision (August 21, 2008).

1:1-12.5 Motion for summary decision; when and how made; partial summary decision

(a) A party may move for summary decision upon all or any of the substantive issues in a contested case. Such motion must be filed no later than 30 days prior to the first scheduled hearing date or by such date as ordered by the judge.

(b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. Such response must be filed within 20 days of service of the motion. A reply, if any, must be filed no later than 10 days thereafter. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

(c) Motions for summary decision shall be decided within 45 days from the due date of the last permitted responsive filing. Any motion for summary decision not decided by an agency head which fully disposes of the case shall be treated as an initial decision under N.J.A.C. 1:1-18. Any partial summary decision shall be treated as required by (e) and (f) below.

(d) If, on motion under this section, a decision is not rendered upon all the substantive issues in the contested case and a hearing is necessary, the judge at the time of ruling on the motion, by examining the papers on file in the case as well as the motion papers, and by interrogating counsel, if necessary, shall, if practicable, ascertain what material facts exist without substantial controversy and shall thereupon enter an order specifying those facts and directing such further proceedings in the contested case as are appropriate. At the hearing in the contested case, the facts so specified shall be deemed established.

(e) A partial summary decision order shall by its terms not be effective until a final agency decision has been rendered on the issue, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6. However, at the discretion of the judge, for the purpose of avoiding unnecessary litigation or expense by the parties, the order may be submitted to the agency head for immediate review as an initial decision, pursuant to N.J.A.C. 1:1-18.3(c)12. If the agency head concludes that immediate review of the order will not avoid unnecessary litigation or expense, the agency head may return the matter to the judge and indicate that the order will be reviewed at the end of the contested case. Within 10 days after a partial summary decision order is filed with the agency head, the Clerk shall certify a copy of pertinent portions of the record to the agency head.

(f) Review by the agency head of any partial summary decision shall not cause delay in scheduling hearing dates or result in a postponement of any scheduled hearing dates unless the judge assigned to the case orders that a postponement is necessary because of special requirements, possible prejudice, unproductive effort or other good cause.

Amended by R.1990 d.368, effective August, 6, 1990.
See: 22 N.J.R. 3(a), 22 N.J.R. 2262(a).
In (e): added text to provide for an agency head to remand partial summary decisions to judge when deemed appropriate that decision will be reviewed at the end of contested case.
Amended by R.2008 d.151, effective June 16, 2008.
See: 40 N.J.R. 915(a), 40 N.J.R. 3617(a).

Rewrote (a); in (b), added the fourth and fifth sentences; and in (c), substituted "due date of the last permitted responsive filing" for "date of submission".

Case Notes

Commissioner of Education was not required to conduct evidentiary hearing before removing local school board and ordering creation of state-operated school district, where there were no disputed issues of fact material to proposed administrative action. Contini v. Board of Educ. of Newark, 286 N.J.Super. 106, 668 A.2d 434 (A.D.1995).

Limitations period for challenge to denial of tenure did not begin to run when president of college advised employee by letter that he agreed employee should have tenure. Dugan v. Stockton State College, 245 N.J.Super. 567, 586 A.2d 322 (A.D.1991).

Evidential hearing in contested case is not needed if there are no disputed issues of fact. Frank v. Ivy Club, 120 N.J. 73, 576 A.2d 241 (1990), certiorari denied 111 S.Ct. 799, 498 U.S. 1073, 112 L.Ed.2d 860.

Fact-finding conference conducted by state Division on Civil Rights could serve as basis for resolution of claim that eating clubs practiced gender discrimination. Frank v. Ivy Club, 120 N.J. 73, 576 A.2d 241 (1990), certiorari denied 111 S.Ct. 799, 498 U.S. 1073, 112 L.Ed.2d 860.

Validity of partial summary decision rule upheld; reversed summary decisions in sex discrimination case re: men's eating clubs on jurisdiction and liability, final hearing necessary to resolve disputed fact (cited former N.J.A.C. 1:1-13.1—13.4). Frank v. Ivy Club, 228 N.J.Super. 40, 548 A.2d 1142 (App.Div.1988).

Administrative official could not resolve disputed facts without trial-type hearing. Frank v. Ivy Club, 228 N.J.Super. 40, 548 A.2d 1142 (A.D.1988), certification granted 117 N.J. 627, 569 A.2d 1330, reversed 120 N.J. 73, 576 A.2d 241, certiorari denied 111 S.Ct. 799, 498 U.S. 1073, 112 L.Ed.2d 860.

Plenary hearing is necessary for consideration of petition for issuance of a certificate of public convenience and necessity in this case to consider mitigating circumstances and permit fuller development of all relevant factors. Matter of Robros Recycling Corp., 226 N.J.Super. 343, 544 A.2d 411 (App.Div.1988), certification denied 113 N.J. 638, 552 A.2d 164 (1988).

Summary disposition by administrative law judge is permissible if undisputed facts indicate that particular disposition is required. Matter of Robros Recycling Corp., 226 N.J.Super. 343, 544 A.2d 411 (A.D.1988), certification denied 113 N.J. 638, 552 A.2d 164.

Former N.J.A.C. 1:1-13.1 through 13.4 cited regarding summary decision; rules held valid. In Re: Uniform Administrative Procedure Rules, 90 N.J. 85, 447 A.2d 151 (1982).

Failure on the part of an applicant for accidental disability retirement benefits to adduce any evidence on the issue of his entitlement to a pension despite numerous extensions of time granted by an administrative law judge afforded grounds for an order granting the pension system's motion to dismiss, which was properly converted into a motion for summary judgment per N.J.A.C. 1:1-12.5. Thigpen v. Public Employees' Retirement System, OAL DKT. NO. TYP 12347-13, AGENCY DKT. NO. 2-10-279051, 2014 N.J. AGEN LEXIS 249, Initial Decision (May 28, 2014).

ALJ erred in granting summary judgment to an employee in a disciplinary proceeding against the employee for failure to return state-owned property when he was dismissed from employment. Although the employee had been removed from employment, the appointing authority continued to have the ability to remove the officer on the basis of insubordination for failing to return the items. The employee was technically still an employee when the order to return property was issued; further, the removal in the primary matter was still under appeal (rejecting 2010 N.J. AGEN LEXIS 641). In re Beatty, OAL Dkt. No. CSR 9025-10, 2011 N.J. CSC LEXIS 340, Remand Decision (April 8, 2011).

Initial Decision (2010 N.J. AGEN LEXIS 315) adopted, which found that a senior correction officer was entitled to summary judgment in a disciplinary action against her because, although the appointing authority claimed that the officer lied during a prior administrative proceeding, the record from that proceeding conclusively established that the officer did not testify as the appointing authority purported. In re Griffin, OAL Dkt. No. CSR 2342-10, 2010 N.J. CSC LEXIS 886, Final Decision (August 19, 2010).

Initial Decision (2010 N.J. AGEN LEXIS 96) adopted, which found that summary disposition for the employer was appropriate in a senior correction officer's appeal from his removal as a result of a positive random drug test. Even though a second specimen submitted by the officer for independent confirmatory testing had been accidentally lost or destroyed, the second test was only potentially exculpatory and the independent laboratory chosen by the officer, not the employer, was solely responsible for the loss of the specimen. In re Pettey, OAL Dkt. No. CSV 481-09, 2010 N.J. CSC LEXIS 590, Final Decision (March 10, 2010).

Non-tenured English teacher who was terminated mid-year for misconduct improperly filed an action before the Commissioner of Education, who lacked jurisdiction where the teacher made no claim that her termination violated any constitutional or legislatively-conferred rights, but was based solely on her claim that the Board improperly terminated her when it lacked just cause; the teacher's contention that just cause was required prior to termination was derived from the collective bargaining agreement and the Commissioner did not have jurisdiction over contractual disputes. Therefore, although the Board committed a procedural error in reporting the teacher's dismissal prematurely, there was no evidence that she pursued her grievance in an appropriate forum, and the error had no impact on her rights. Hudson v. Bd. of Educ. of Mount Olive, OAL Dkt. No. EDU 9142-08, 2009 N.J. AGEN LEXIS 747, Final Decision (September 24, 2009).

Initial Decision (2008 N.J. AGEN LEXIS 969) adopted, which found that a non-tenured transportation supervisor's dispute over her non-renewal for the 2007-08 school year was properly dismissed at the close of her proofs where the Board had broad discretion in determining whether to renew the contract of a non-tenured employee. The test regarding the legality of the Board's decision not to renew was not whether the employee did a good job, but whether there existed any reasonable grounds for deciding that she should not be brought back; such reasons existed based on the employee's evaluation, which indicated that she needed some improvement in her interpersonal relationships with parents and staff. Davidson v. Bd. of Educ. of Trenton, OAL Dkt. No. EDU 8236-07, 2009 N.J. AGEN LEXIS 644, Final Decision (January 5, 2009).

Initial Decision (2008 N.J. AGEN LEXIS 972) adopted, which concluded that there was no genuine issue as to a material fact in mother's action challenging, under the No Child Left Behind Act, 20 U.S.C.A. 6301 et seq., a school district's placement of her child. Since the NCLB Act provides no private right of action for any individual and enforcement authority under the NCLB Act rests solely with the Secretary of Education, the school district was entitled to prevail as a matter of law and its motion for summary decision was granted. F.R.P. ex rel. A.D.P. v. Bd. of Educ. of East Orange, OAL Dkt. No. EDU 9951-08, 2008 N.J. AGEN LEXIS 1097, Final Decision (December 8, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 806) adopted, which concluded that a teacher's case was moot, where the teacher alleged that her tenure and seniority rights were violated by the board's notice that her employment would be reduced from full-time to 60% but she had been reinstated with no loss of compensation or benefits and thus suffered no loss of position or damage; the board's motion to dismiss on mootness grounds was controlled by N.J.A.C. 1:1-12.5. Price v. Bd. of Educ. of Washington, OAL Dkt. No. EDU 6121-07, 2008 N.J. AGEN LEXIS 259, Commissioner's Decision (January 23, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 703) adopted, which concluded that police officer's appeals of his termination were moot, because the officer voluntarily terminated his employment relationship with the City before the City terminated him. In re Santiago, OAL Dkt. No. CSV 03850-06, 2007 N.J. AGEN LEXIS 1031, Final Decision (December 19, 2007).

When confronted in a disciplinary action with a motion that seeks summary decision both on the issue of liability for the alleged violations and on the quantum of sanctions to be imposed, an opposing party is required to establish the existence of a genuine issue of material disputed fact and, if the opposing party fails to do so, summary decision may be entered without the need for a further hearing on the issue of penalties. Goldman v. Nicolo, OAL Dkt. No. BKI 10722-04, 2006 N.J. AGEN LEXIS 943, Final Decision (October 12, 2006).

While N.J.A.C. 1:1-12.5(b) states that a motion for summary decision may be filed "with or without supporting affidavits," licensees had to file an affidavit or certification denying some or all of the facts set forth by the Commissioner in order to create an issue of material fact. Bakke v. Binn-Graham, OAL Dkt. No. BKI 483-05, 2006 N.J. AGEN LEXIS 60, Initial Decision (February 17, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 440) adopted, which concluded that where Racing Commission suspended horse trainer for 30 days as a result of positive drug test of horse (for Ketorolac) and disqualified horse from sharing purse, summary decision in favor of Commission was appropriate where, following a stay of his suspension, horse trainer failed to respond to certifications by the Commission; summary decision is the administrative counterpart to summary judgment in the judicial arena. Carter v. N.J. Racing Comm'n, OAL Dkt. No. RAC 629-05, 2005 N.J. AGEN LEXIS 1477, Final Decision (November 16, 2005).

Initial Decision (2005 N.J. AGEN LEXIS 439) adopted, which found that where an employee who had sustained a work-related injury alleged that his employer had fabricated charges of insubordination in order to show that the employee had been discharged from his employment for just cause, the employer was entitled to summary decision because the provisions of the collective bargaining agreement governed; claims of employee insubordination fell within the collective bargaining grievance process and, therefore, the Labor Management Relations Act preempted state law claims and required that they be addressed in accordance with the terms of the collective bargaining agreement. Gouge v. Siegfried, Inc., OAL Dkt. No. LID 4100-05, 2005 N.J. AGEN LEXIS 1324, Final Decision (October 26, 2005 (Issued)).

Initial Decision (2005 N.J. AGEN LEXIS 403) adopted, which found summary decision against a senior correction officer was appropriate where a default judgment had been entered against the officer in superior court, disqualifying him from holding public employment following his conviction for possession of a counterfeit motor vehicle insurance card, a crime involving dishonesty; the officer's appeal was moot since he was disqualified from holding any public office or position. In re Cook, OAL Dkt. No. CSV 2441-03, 2005 N.J. AGEN LEXIS 1184, Final Decision (September 21, 2005).

Initial Decision (2005 N.J. AGEN LEXIS 590) adopted, which found that the Department was entitled to summary judgment in its action against respondents — a gas station and its owner — for their failure to perform a proper remedial investigation because the Department presented proper and detailed evidence of the facts upon which it relied to establish the failure of respondents to properly comply with his obligations under the law, including a series of detailed exhibits, whereas, in response to the motion, respondents' brief was not accompanied by any affidavit, certification, or supporting documentation; respondents simply made bald assertions of errors in the Department's position without any documentary support. N.J. Dep't of Envtl. Prot. v. Hammonton Gulf Station, OAL Dkt. No. EHW 08927-03S, 2005 N.J. AGEN LEXIS 1298, Final Decision (August 23, 2005).

Motion for summary decision granted on grounds that doctrines of res judicata and collateral estoppel barred re-litigation of issues (citing former N.J.A.C. 1:1-13.1). Lukas v. Dep't of Human Services, 5 N.J.A.R. 81 (1982), appeal decided 103 N.J. 206, 510 A.2d 1123 (1986).

1:1-12.6 Emergency relief

(a) Where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon the application of a party.

(b) Applications for emergency relief shall be made directly to the agency head and may not be made to the Office of Administrative Law.

(c) An agency head receiving an application for emergency relief may either hear the application or forward the matter to the Office of Administrative Law for hearing on the application for emergency relief. When forwarded to the Office of Administrative Law, the application shall proceed in accordance with (i) through (k) below. All applications for emergency relief shall be heard on an expedited basis.

(d) The moving party must serve notice of the request for emergency relief on all parties. Proof of service will be required if the adequacy of notice is challenged. Opposing parties shall be given ample opportunity under the circumstances to respond to an application for emergency relief.

(e) Where circumstances require some immediate action by the agency head to preserve the subject matter of the application pending the expedited hearing, or where a party applies for emergency relief under circumstances which do not permit an opposing party to be fully heard, the agency head may issue an order granting temporary relief. Temporary relief may continue until the agency head issues a decision on the application for emergency relief.

(f) When temporary relief is granted by an agency head under circumstances which do not permit an opposing party to be fully heard, temporary relief shall:

1. Be based upon specific facts shown by affidavit or oral testimony, that the moving party has made an adequate, good faith effort to provide notice to the opposing party, or that notice would defeat the purpose of the application for relief;

2. Include a finding that immediate and irreparable harm will probably result before adequate notice can be given;

3. Be based on the likelihood that the moving party will prevail when the application is fully argued by all parties;

4. Be as limited in scope and temporary as is possible to allow the opposing party to be given notice and to be fully heard on the application; and

5. Contain a provision for serving and notifying all parties and for scheduling a hearing before the agency head

or for transmitting the application to Office of Administrative Law.

(g) Upon determining any application for emergency relief, the agency head shall forthwith issue and immediately serve upon the parties a written order on the application. If the application is related to a contested case that has been transmitted to Office of Administrative Law, the agency head shall also serve the Clerk of Office of Administrative Law with a copy of the order.

(h) Applications to an agency head for emergent relief in matters previously transmitted to the Office of Administrative Law shall not delay the scheduling or conduct of hearings, unless the presiding judge determines that a postponement is necessary due to special requirements of the case, because of probable prejudice or for other good cause.

(i) Upon determining an application for emergency relief, the judge forthwith shall issue to the parties, the agency head and the Clerk a written order on the application. The Clerk shall file with the agency head any papers in support of or opposition to the application which were not previously filed with the agency and a sound recording of the oral argument on the application, if any oral argument has occurred.

(j) The agency head's review of the judge's order shall be completed without undue delay but no later than 45 days from entry of the judge's order, except when, for good cause shown and upon notice to the parties, the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head. Where the agency head does not act on review of the judge's order within 45 days, the judge's order shall be deemed adopted.

(k) Review by an agency head of a judge's order for emergency relief shall not delay the scheduling or conduct of hearings in the Office of Administrative Law, unless the presiding judge determines that a postponement is necessary due to special requirements of the case, because of probable prejudice or for other good cause.

Case Notes

An EMT-Paramedic (EMT) was denied emergency relief per N.J.A.C. 8:41A-5.3 and N.J.A.C. 1:1-12.6 from an order of the Department of Health suspending his certifications as a result of his conduct during an assignment in which a patient died. Though the suspension meant that the EMT could not render services in New Jersey during the pendency of the proceedings, the EMT was licensed in both Pennsylvania and Delaware and held a full-time paramedic position in Delaware that was not affected by the N.J. suspension. That being so, the EMT did not show irreparable harm arising out of the N.J. suspension. Next, it was not clear that the EMT had a likelihood of success on the merits. Finally, the Department had established reasonable grounds to believe that the charges against the EMT were true. Katz v. N.J. Dep't of Health, OAL DKT. NO. HLT 08747-14, AGENCY DKT. 2014-0049, 2014 N.J. AGEN LEXIS 452, Initial Decision on Request for Emergency Relief, July 31, 2014.

Student who was precluded from participating in graduation ceremonies following his suspension for possession of illegal drugs was not entitled to emergent relief because, although the student could show that he would be irreparably harmed by not participating, he failed to also show that he had the legal right to participate, that he had a likelihood of success on the merits of his underlying appeal, or that the balance of interests and equities under the circumstances rested in his favor (modifying 2009 N.J. AGEN LEXIS 470). Nabel v. Bd. of Educ. of Hazlet, OAL Dkt. No. EDU 8026-09, 2009 N.J. AGEN LEXIS 841, Emergent Relief Decision (June 24, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 464) adopted, which found that, while denial of attendance at graduation exercises generally did not constitute irreparable harm, the student may suffer irreparable harm if, after a plenary hearing, it was subsequently determined that he had, in fact, earned a passing grade in his eleventh-grade English class, as he contended. The Board did not deny that the student's class folder was missing, nor did it introduce the school's attendance records or so much as an affidavit or certification from the teacher or any other witness addressing the student's contentions; therefore, since it may yet be proven that the teacher made a promise to the student and/or that the student did earn a final passing grade, the denial of attendance would have, under the facts of this case, caused irreparable harm. Tomlin v. Bd. of Educ. of Lower Cape May Reg'l School Dist., OAL Dkt. No. EDU 4952-09, 2009 N.J. AGEN LEXIS 921, Emergent Relief Decision (June 22, 2009).

Parents of an autistic child, with severe language disorder and classified as preschool disabled, failed to satisfy all of the criteria for the granting of emergent relief relative to the change in speech therapy; however, as the board of education admitted that it had not provided the occupational therapy required by the child's IEP, the motion for emergent relief was granted as to those services. J.W. and E.W. ex rel. B.W. v. Tinton Falls Bd. of Educ., OAL DKT. NO. EDS 2200-08, 2008 N.J. AGEN LEXIS 165, Emergent Relief Decision (March 24, 2008).

Parents were unable to demonstrate that they were entitled to emergent relief in the form of an order requiring their three-year-old daughter to remain in her current placement where there were material issues of fact regarding the least restrictive environment for the child that were inappropriate for resolution in an emergent application; the issue of the appropriate least restrictive environment was one that was normally decided at a plenary hearing C.L. ex rel. P.L. v. Middletown Twp. Bd. of Educ., OAL DKT. EDS 6679-07, 2007 N.J. AGEN LEXIS 648, Final Decision (September 6, 2007).

Adult classified special education student with disciplinary problems was precluded from attending Senior Prom. P.P. v. Westwood Board, 95 N.J.A.R.2d (EDS) 165.

1:1-12.7 Disposition of motions

Disposition of motions which completely conclude a case shall be by initial decision. Disposition of all other motions shall be by order.

SUBCHAPTER 13. PREHEARING CONFERENCES AND PROCEDURES

1:1-13.1 Prehearing conferences

(a) A prehearing conference shall be scheduled in accordance with the criteria established in N.J.A.C. 1:1-9.1(d).

(b) The prehearing notice shall advise the parties, their attorneys or other representatives that a prehearing conference will cover those matters listed in N.J.A.C. 1:1-13.2 and that discovery should have already been commenced. At the time of the prehearing conference, the participants shall be prepared to discuss one or more alternate dates when the parties and witnesses will be available for the evidentiary

hearing. The judge may advise the parties that other special matters will be discussed at the prehearing conference.

(c) In exceptional circumstances, the judge may, upon no less than 10 days' notice, require the parties to file with the judge and serve upon all other parties no later than three days before the scheduled prehearing conference, prehearing memoranda stating their respective positions on any or all of the matters specified in N.J.A.C. 1:1-13.2 set forth in the same sequence and with corresponding numbers or on other special matters specifically designated.

(d) A prehearing conference shall be held by telephone conference call unless the judge otherwise directs.

1:1-13.2 Prehearing order; amendment

(a) Within 10 days after the conclusion of the prehearing conference, the judge shall enter a written order addressing the appropriate items listed in (a)1 through 14 below and shall cause the same to be served upon all parties.

1. The nature of the proceeding and the issue or issues to be resolved including special evidence problems;

2. The parties and their status, for example, petitioner, complainant, appellant, respondent, intervenor, etc., and their attorneys or other representatives of record. In the event that a particular member or associate of a firm is to try a case, or if outside trial counsel is to try the case, the name must be specifically set forth at the prehearing. No change in such designated trial counsel shall be made without leave of the judge if such change will interfere with the date for hearing. If the name of a specific trial counsel is not set forth, the judge and opposing parties shall have the right to expect any partner or associate to proceed with the trial on the date of hearing;

3. Any special legal requirements as to notice of hearing;

4. The schedule of hearing dates and the time and place of hearing;

5. Stipulations as to facts and issues;

6. Any partial settlement agreements and their terms and conditions;

7. Any amendments to the pleadings contemplated or granted;

8. Discovery matters remaining to be completed and the date when discovery shall be completed for each mode of discovery to be utilized;

9. Order of proofs;

10. A list of exhibits marked for identification;

11. A list of exhibits marked in evidence by consent;

12. Estimated number of fact and expert witnesses;

13. Any motions contemplated, pending and granted;

14. Other special matters determined at the conference.

(b) Any party may, upon written motion filed no later than five days after receiving the prehearing order, request that the order be amended to correct errors.

(c) The prehearing order may be amended by the judge to accommodate circumstances occurring after its entry date. Unless precluded by law, a prehearing order may also be amended by the judge to conform the order with the proofs.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In the introductory paragraph of (a), substituted "enter" for "prepare" and "addressing the appropriate items listed in (a)1" for "specifically setting out the matters listed in 1".

SUBCHAPTER 14. CONDUCT OF CASES

1:1-14.1 Public hearings; records as public; sealing a record; media coverage

(a) All evidentiary hearings, proceedings on motions and other applications shall be conducted as public hearings unless otherwise provided by statute, rule or regulation, or on order of a judge for good cause shown. Prehearing conferences and informal discussions immediately preceding the hearing or during the hearing to facilitate the orderly and expeditious conduct of the case may, at the judge's discretion, be conducted in public or in closed session and may or may not be recorded. Mediations and settlement conferences shall be held in closed session but may be recorded. All other proceedings in the presence of a judge shall be recorded verbatim either by a stenographic reporter or by sound recording devices. All discussions off the record, no matter how brief, except settlement discussions and mediations, shall be summarized generally for the record. The record of all hearings shall be open to public inspection, but the judge may, for good cause shown, order the sealing of the record or any part thereof.

(b) In considering whether to close a hearing and/or seal a record, the judge shall consider the requirements of due process of law, other constitutional and statutory standards and matters of public policy. The judge shall consider the need to protect against unwarranted disclosure of sensitive financial information or trade secrets, to protect parties or witnesses from undue embarrassment or deprivations of privacy, or to promote or protect other equally important rights or interests.

(c) When sealing a record, the judge must specify the consequences of such an order to all material in the case file including any evidence, the stenographic notes or audiotapes and the initial decision. The treatment of testimony or exhibits shall be on such terms as are appropriate to balance public and private rights or interests and to preserve the record for purposes of review. The judge shall also indicate what safeguards shall be imposed upon the preparation and disclosure of any transcript of the proceedings.

(d) All public hearings may be filmed, photographed and recorded, subject to reasonable restrictions established by the judge to avoid disruption of the hearing process. The number of cameras and lights in the hearing room at any one time may be limited. Technical crews and equipment may be prohibited from moving except during recesses and after the proceedings are concluded for the day. To protect the attorney/client privilege and the effective right to counsel, there shall be no recording of conferences between attorneys and their clients or between counsel and the judge at the bench.

Amended by R.1988 d.115, effective March 21, 1988.
See: 20 N.J.R. 127(a), 20 N.J.R. 642(a).
Added text to (d) "and the effective right to counsel".

Case Notes

Newspaper was entitled to a redacted copy of the ALJ's order in case involving teacher who allegedly committed sexual abuse against her students. Division of Youth and Family Services v. M.S., 73 A.2d 1191 (2001).

State Board of Examiners, Department of Education was required to balance the interests of protecting victims from potential harm and embarrassment against the press' access to public records and proceedings, when determining whether to release redacted copy of sealed order to newspaper. Division of Youth and Family Services v. M.S., 73 A.2d 1191 (2001).

Casino Control Commission is required to balance interests on application to seal a record. Petition of Nigris, 242 N.J.Super. 623, 577 A.2d 1292 (A.D.1990).

Regardless of the terms of the parties' settlement agreement in a tenure proceeding, the underlying records in tenure matters were public documents unless sealed for good cause shown, and any determination by the Commissioner not to refer a matter to the Board of Examiners did not act to circumscribe the authority of that body to act independent of such referral, should it so wish, nor did it relieve the district of its responsibility to cooperate with the Board of Examiners in that eventuality. In re Tenure Hearing of Alvarez, OAL Dkt. No. EDU 736-09, 2009 N.J. AGEN LEXIS 839, Remand Order (September 4, 2009).

ALJ should have first considered sealing the record and ordering the parties not to disclose an informant's identity before finding that there was no way to safely protect the informant's identity. In re Smith, OAL Dkt. No. CSV 782-08 (CSV 4528-07 On Remand), 2008 N.J. AGEN LEXIS 1234, Remand Decision (October 8, 2008).

Public disclosure required of electric utility's settlement agreement. In Matter of Westinghouse Electric Corporation Motion for Protective Order. 92 N.J.A.R.2d (BRC) 73.

There is a presumption that all adjudicative proceedings were open to the public and that any deviation from this norm must be tested by a standard of strict and inescapable necessity. A case involving allegations of sexual misconduct could not, on its own, be sufficient to create the compelling circumstances necessary to seal the record (citing former N.J.A.C. 1:1-3.1). Sananman v. Bd. of Medical Examiners, 5 N.J.A.R. 310 (1981).

1:1-14.2 Expedition

(a) Hearings and other proceedings shall proceed with all reasonable expedition and, to the greatest extent possible, shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded.

(b) The parties shall promptly advise the Clerk and the judge of any event which will probably delay the conduct of the case.

Case Notes

Hearings required to proceed with all reasonable expedition (citing former N.J.A.C. 1:1-3.2). Deck House, Inc. v. New Jersey State Bd. of Architects, 531 F.Supp. 633 (D.N.J.1982).

1:1-14.3 Interpreters; payment

(a) Except as provided in (d) below, any party at his or her own cost may obtain an interpreter if the judge determines that interpretation is necessary.

(b) Taking into consideration the complexity of the issues and communications involved, the judge may require that an interpreter be taken from an official registry of interpreters or otherwise be assured that the proposed interpreter can adequately aid and enable the witness in conveying information to the judge.

(c) The judge may accept as an interpreter a friend or relative of a party or witness, any employee of a State or local agency, or other person who can provide acceptable interpreter assistance.

(d) In cases requiring the appointment of a qualified interpreter for a hearing impaired person pursuant to N.J.S.A. 34:1-69.7 et seq., the administrative law judge shall appoint an interpreter from the official registry of interpreters. The fee for the interpreter shall be paid by the transmitting agency.

Amended by R.1989 d.159, effective March 20, 1989.
See: 20 N.J.R. 2845(c), 21 N.J.R. 749(b).
(d) added requiring appointment of interpreter for hearing impaired, transmitting agency to pay fee.
Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
In (c), substituted "The" for "If all parties consent, the".

1:1-14.4 Failure to appear; sanctions for failure to appear

(a) If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

(b) If the nonappearing party submits an explanation in writing, a copy must be served on all other parties and the other parties shall be given an opportunity to respond.

(c) If the judge receives an explanation:

1. If the judge concludes that there was good cause for the failure to appear, the judge shall reschedule the matter for hearing; or

2. If the judge concludes that there was no good cause for the failure to appear, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for that conclusion, or may reschedule the matter and, at his or her discretion, order any of the following:

i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the State of New Jersey or the aggrieved person;

ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees, to an aggrieved representative or party; or

iii. Such other case-related action as the judge deems appropriate.

(d) If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

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 in (a) "The judge may . . . the requested relief."
Amended by R.1987 d.506, effective December 21, 1987.
See: 19 N.J.R. 1591(b), 19 N.J.R. 2388(b).
Substituted may for shall in (a).
Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
Amended failure to appear rules; recodified provisions of original subsection (c) as new rule, N.J.A.C. 1:1-14.14.
Recodified original subsection to subsections (a) and (b), deleting original subsection (b). In (a), changed "10" to "one" day for time limit of receipt of an explanation for nonappearance. Added additional text to (a) and new (b)2. Added new subsection (c).
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a), substituted "shall, unless proceeding pursuant to (d) below" for "may, pursuant to N.J.A.C. 1:1-3.3(b) and (c)", and inserted "pursuant to N.J.A.C. 1:1-3.3(b) and (c)"; recodified (b)1 as (c); in the introductory paragraph of (c), deleted ", the judge shall reschedule the matter and may, at his or her discretion, order any of the following" from the end; added (c)1 and (c)2; deleted former (b)2; recodified former (c) as (d), and in (d), deleted "because of the failure to appear" preceding ", the party shall ask".

Case Notes

Administrative Law Judge was within her right to dismiss complainant's case where complainant repeatedly failed to reply to respondent's discovery, failed to participate in a settlement conference, and failed to attend scheduling conferences. While complainant's attorney suffered from health issues, there was nothing in the record that would have excused counsel's failure to respect judge-ordered deadlines or his unwillingness to make the necessary arrangements to ensure this case was properly handled; additionally, counsel's difficulty in communicating his client did not justify a more than one year delay in providing discovery. Campbell v. Quest Diagnostics, OAL Dkt. No. CRT 05381-2008N, 2009 N.J. AGEN LEXIS 741, Final Decision (October 2, 2009), aff'd per curiam, No. A-1287-09T3, 2010 N.J. Super. Unpub. LEXIS 2608 (App.Div. October 28, 2010).

An Administrative Law Judge refused to reschedule the hearing and recommended dismissal with prejudice of a consumer's Lemon Law claim because the consumer failed to show that there was "good cause" within the meaning of N.J.A.C. 1:1-14.4(c) for his failure to appear at the hearing. Not only did the consumer wait until an hour prior to the time at which the hearing was to convene to submit a written request for an adjournment but his explanation, which was that there was "severe weather" in New York City by reason of which his work schedule had changed, was belied by a National Weather Service report indicating that it was sunny in New York City. Osvaldo Melendez v. TSJ Auto Brokers, OAL DKT. NO. CMA 524-14, 2014 N.J. AGEN LEXIS 65, Initial Decision (January 31, 2014).

Failure on the part of a pro se claimant to appear at a hearing on his claim against a utility or to respond to efforts by counsel to the utility to arrange for the claimant to execute a settlement agreement to which the claimant ostensibly had agreed resulted in dismissal, by an Administrative Law Judge (ALJ), of the claim on a finding that the claimant had failed to prosecute the action within the meaning of N.J.A.C. 1:1-14.4(a) and N.J.A.C. 1:1-3.3(b) and had not shown good cause for the same. Such facts afforded a sufficient basis for a Board order adopting the ALJ's decision as the decision of the agency. Carroll v. United Water of New Jersey, BPU Dkt. No. WC13040270U; OAL Dkt. No. PUC 09453-13, 2014 N.J. PUC LEXIS 13, Final Decision (January 29, 2014).

Employee's appeal of his termination was properly dismissed for lack of prosecution pursuant to N.J.A.C. 1:1-14.4(a) because he abandoned the matter. Despite multiple contacts with the employee advising him of the hearing date, he neither appeared at the hearing nor notified anyone of his reason for not appearing. The employee had received appropriate notice of the hearing. Ferris Brown City of Newark, Dep't. of Water and Sewer, OAL Dkt. No. CSV 03800-13, 2013 N.J. CSC LEXIS 981, Final Decision (October 2, 2013).

When a terminated custodial worker failed to appear at an in-person pre-hearing conference as required by N.J.A.C. 1:1-14.4(a), his appeal was dismissed without prejudice based on lack of prosecution and failure to appear. James L. Bellinger, Newark Sch. Dist., OAL Dkt. No. CSB 08117-13, 2013 N.J. CSC LEXIS 760, Final Decision (October 2, 2013).

Challenge by two environmental organizations to a sole commissioner's determination that they were not entitled to intervene in proceedings convened to consider upgrades to New Jersey's utility infrastructure in response to large scale weather events but were properly accorded "participant" status per N.J.A.C. 1:1-16.6 was subject to interlocutory review by the New Jersey Board of Public Utilities per N.J.A.C. 1:14-14.4(a), which was a rule of special applicability that supplemented N.J.A.C. 1:1-14.10, because review was in the interest of justice or for good cause shown. On the merits, while it was not improper for the organizations to be denied intervenor status, the scope of their involvement as "participants" that were entitled to submit briefs, was properly expanded to authorize the organizations to participate in oral arguments held in the proceedings. In re Petition of Public Service Electric and Gas Company for Approval of the Energy Strong Program, BPU Dkt. Nos: EO13020155; GO13020156, 2013 N.J. PUC LEXIS 279, Final Decision (September 18, 2013).

Although the ALJ failed to hold the matter for a day before taking any action as required by N.J.A.C. 1:1-3.3(b) and N.J.A.C. 1:1-14.4(a) after petitioner who was disputing the accuracy of her utility bill failed to appear at the schedule proceeding, that oversight did not result in unfairness or injustice under N.J.A.C. 1:1-1.3. Petitioner was properly notified of the settlement conference, served with the Initial Decision and given ample opportunity to respond to the adverse ruling, but chose

not to. Turner v. Public Service Electric and Gas Co., OAL Dkt. No. PUC 12137-12, 2013 N.J. PUC LEXIS 19, Final Decision (January 23, 2013).

Senior correction officer who arrived over two hours late at the scheduled disciplinary hearing should not have been sanctioned where there was a misunderstanding regarding the start time and where he arrived at the hearing site as soon as possible upon being notified of his error. The record did not indicate that the officer had a pattern of previously failing to appear on time or that his tardiness prevented the commencement and conclusion of his hearing. In re Smith, OAL Dkt. No. CSV 10108-07, 2009 N.J. CSC LEXIS 1439, Civil Service Comm'n Decision (October 7, 2009).

Although the parent failed to appear at an OAL hearing to determine whether her child was entitled to remain in the school district following allegations that the family no longer met the residency requirements, an order dismissing the parent's appeal and granting the district tuition costs for educating the child was reversed and the matter was remanded, especially in light of the parent's assertion — however incredible — that she did not receive notice of the scheduled hearing, as well as the suggestion that the student may have been the child of a homeless family and, consequently, entitled to attend school in the Board's district. L.E.H. ex rel. Z.H. v. Bd. of Educ. of West Orange, OAL Dkt. No. EDU 3787-09, 2009 N.J. AGEN LEXIS 919, Remand Decision (July 2, 2009).

ALJ did not abuse its discretion when it awarded a correction sergeant $800 in attorney's fees after the appointing authority failed to produce its witnesses at a scheduled hearing because, although the non-appearance was unintentional and due to an administrative error, there was technically "no good cause" for the failure to appear (adopting 2008 N.J. AGEN LEXIS 1258). In re Ross, OAL Dkt. No. CSV 8839-07, 2009 N.J. AGEN LEXIS 1001, Civil Service Comm'n Decision (April 15, 2009).

Complainant's case did not warrant re-transmitting to the Office of Administrative Law where complainant failed to respond to a letter advising him that he could provide an explanation for his failure to appear within 13 days of the Clerk's notice of dismissal. Batchelor v. N.J. Transit, OAL Dkt. No. CRT 3062-2007N, 2009 N.J. AGEN LEXIS 618, Final Decision (February 27, 2009).

Initial Decision (2007 N.J. AGEN LEXIS 656) adopted, which sanctioned a former police officer for failure to appear at two hearings in the amount of $1,513.46 for costs and attorney's fees; the appellant's failures to appear plus his abandoning another hearing constituted a failure to prosecute warranting dismissal. The ALJ had previously denied the appellant's request to place the matter on the inactive list pending disposition of his related federal civil rights case. In re Thompson, OAL Dkt. No. CSV 05511-06, 2007 N.J. AGEN LEXIS 1138, Final Decision (October 24, 2007).

Initial Decision (2006 N.J. AGEN LEXIS 702) adopted, in which an employee's appeal was dismissed as a sanction for the employee's failure to appear for a scheduled hearing without good cause; it was reasonable to conclude that continuation of the matter would have resulted in additional expense and delay. In re Pearson, OAL Dkt. No. CSV 3949-03, 2006 N.J. AGEN LEXIS 772, Final Decision (August 23, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 551) adopted, which concluded that dismissal of an senior correction officer's sexual harassment claim was necessary because the officer failed to appear at the scheduled hearing and the evidence demonstrated that, after the officer's complaint was made regarding the procedure and thoroughness of the harassment investigation, remedial actions had been taken to assure proper investigation of complaints, rendering the officer's complaint moot. In re Easley, OAL Dkt. No. CSV 4869-04, 2005 N.J. AGEN LEXIS 1198, Final Decision (November 22, 2005).

Mother's due process claim that a school district should provide her child with an extended school year program was denied where evidence demonstrated that the mother failed to cooperate in the evaluations of her son and in the development of an IEP and also failed to appear for the administrative hearing on the case. L.T. ex rel. E.T. v. Middletown Twp. Bd. of Educ., OAL DKT. EDS 6818-05, 2005 N.J. AGEN LEXIS 1139, Final Decision (September 29, 2005).

Initial Decision (2005 N.J. AGEN LEXIS 394) adopted, which explained that the decision to permit an ex parte presentation of evidence is within the judge's discretion. Sheddan v. N.J. Racing Comm'n, OAL Dkt. No. RAC 2400-04, 2005 N.J. AGEN LEXIS 1476, Final Decision (September 19, 2005).

Decision to permit an ex parte presentation of evidence in matter of State employee's removal was not arbitrary. White v. Department of Transportation, 95 N.J.A.R.2d (ETH) 1.

Salesperson's failure to file answer to order to show cause or to make appearance before New Jersey Real Estate Commission warranted license suspension. New Jersey Real Estate Commission v. Grennor. 92 N.J.A.R.2d (REC) 29.

1:1-14.5 Ex parte communications

(a) Except as specifically permitted by law or this chapter, a judge may not initiate or consider ex parte any evidence or communications concerning issues of fact or law in a pending or impending proceeding. Where ex parte communications are unavoidable, the judge shall advise all parties of the communications as soon as possible thereafter.

(b) The ex parte communications preclusion shall not encompass scheduling discussions or other practical administrative matters.

(c) Ex parte discussions relating to possible settlement may be conducted in the course of settlement conferences or mediations when all parties agree in advance.

(d) Where an agency or agency staff is a party to a contested case, the legal representative appearing and acting for the agency in the case may not engage in ex parte communications concerning that case with the transmitting agency head, except for purposes of conferring settlement authority on the representative or as necessary to keep the agency head as a client informed of the status of the case, provided that no information may be disclosed ex parte if it would compromise the agency head's ability to adjudicate the case impartially. In no event may the legal representative participate in making or preparing the final decision in the case.

Amended by R.1988 d.78, effective February 16, 1988.
See: 19 N.J.R. 1761(b), 20 N.J.R. 385(a).
Adopted the codifying of the Supreme Court's ruling in In Re Opinion No. 583 of the Advisory Committee on Professional Ethics, 107 N.J. 230 (1987).

Case Notes

In case construing N.J.A.C. 1:1-3.8(c), court held that while an administrative case is being heard at the OAL, the prosecuting DAG may consult ex parte with the head of the administrative agency to the extent necessary to keep the agency head, the client, reasonably informed. In the Matter of Opinion No. 583 of Advisory Committee on Professional Ethics, 107 N.J. 230, 526 A.2d 692 (1987)

1:1-14.6 Judge's powers in presiding over prehearing activities, conducting hearings, developing records and rendering initial decisions

(a) The judge may schedule any form of hearing or proceeding and establish appropriate location areas and instruct the Clerk to issue all appropriate notices.

(b) When required in individual cases, the judge may supersede any notice issued by the Clerk by informing the parties and the Clerk of this action.

(c) Depending on the needs of the case, the judge may schedule additional hearing dates, declare scheduled hearing dates unnecessary, or schedule any number of in-person conferences or telephone conferences.

(d) When required in individual cases, the judge at any time of the proceeding may convert any form of proceeding into another, whether more or less formal or whether in-person or by telephone.

(e) The judge may bifurcate hearings whenever there are multiple parties, issues or claims, and the nature of the case is such that a hearing of all issues in one proceeding may be complex and confusing, or whenever a substantial saving of time would result from conducting separate hearings or whenever bifurcation might eliminate the need for further hearings.

(f) The judge may establish special accelerated or decelerated schedules to meet the special needs of the parties or the particular case.

(g) The judge may administer any oaths or affirmations required or may direct a certified court reporter to perform this function.

(h) The judge may render any ruling or order necessary to decide any matter presented to him or her which is within the jurisdiction of the transmitting agency or the agency conducting the hearing.

(i) The judge shall control the presentation of the evidence and the development of the record and shall determine admissibility of all evidence produced. The judge may permit narrative testimony whenever appropriate.

(j) The judge may utilize his or her sanction powers to ensure the proper conduct of the parties and their representatives appearing in the matter.

(k) The judge may limit the presentation of oral or documentary evidence, the submission of rebuttal evidence and the conduct of cross-examination.

(*l*) The judge may determine that the party with the burden of proof shall not begin the presentation of evidence and may require another party to proceed first.

(m) The judge may make such rulings as are necessary to prevent argumentative, repetitive or irrelevant questioning and to expedite the cross-examination to an extent consistent with disclosure of all relevant testimony and information.

(n) The judge may compel production of relevant materials, files, records and documents and may issue subpoenas to compel the appearance of any witness when he or she believes that the witness or produced materials may assist in a full and true disclosure of the facts.

(*o*) The judge may require any party at any time to clarify confusion or gaps in the proofs. The judge may question any witness to further develop the record.

(p) The judge may take such other actions as are necessary for the proper, expeditious and fair conduct of the hearing or other proceeding, development of the record and rendering of a decision.

Case Notes

Though N.J.A.C. 1:1-14.6 vested an administrative law judge (ALJ) with significant discretion over the conduct of a hearing into the removal of a county sheriff's officer after a random drug test administered by the N.J. National Guard unit of which the officer was a member was positive for cocaine, the Civil Service Commission concluded that because scheduling conflicts had prevented the appointing authority from presenting the testimony of a National Guard colonel who was familiar with the National Guard's drug testing protocol, including chain of custody procedures, justice required that the matter be remanded to the ALJ so that the colonel might be called as a witness, either by the appointing authority or by the ALJ as permitted by N.J.A.C. 1:1-14.6. In the Matter of Michael Rios, Passaic County, CSC Dkt. No. 2013-187, OAL Dkt. No. CSR 10456-12, 2013 N.J. CSC LEXIS 71 (February 6, 2013).

While the appellant in a licensing dispute carried the burden of proof throughout the hearing, the ALJ properly ordered that the issuing authority provide the initial burden of production to explain the basis for its denial on the record. Notwithstanding appellant's burden of proof that respondent's action was arbitrary, capricious, or unreasonable, respondent was properly asked to assume the burden of going forward with clear and competent evidence to support its decision to deny the place-to-place transfer of the license (adopting 2009 N.J. AGEN LEXIS 761). Rooster Bar v. Governing Body of Cliffside Park, OAL Dkt. No. ABC 11895-08, 2009 N.J. AGEN LEXIS 1203, Final Decision (October 28, 2009).

Administrative Law Judge was within her right to dismiss complainant's case where complainant repeatedly failed to reply to respondent's discovery, failed to participate in a settlement conference, and failed to attend scheduling conferences. While complainant's attorney suffered from health issues, there was nothing in the record that would have excused counsel's failure to respect judge-ordered deadlines or his unwillingness to make the necessary arrangements to ensure this case was properly handled; additionally, counsel's difficulty in communicating his client did not justify a more than one year delay in providing discovery. Campbell v. Quest Diagnostics, OAL Dkt. No. CRT 05381-2008N, 2009 N.J. AGEN LEXIS 741, Final Decision (October 2, 2009), aff'd per curiam, No. A-1287-09T3, 2010 N.J. Super. Unpub. LEXIS 2608 (App.Div. October 28, 2010).

Where a confidential informant's statements served as evidence in a disciplinary action against a correction officer for engaging in an inappropriate relationship with an inmate, but the informant was not called as a witness during the hearing, the matter was remanded to allow the appointing authority to call the confidential informant as a witness; if the appointing authority did not call the confidential informant, the ALJ was authorized to act in its stead to take the testimony. In re Smith, OAL Dkt. No. CSV 4528-07, 2008 N.J. AGEN LEXIS 136, Remand Decision (January 30, 2008).

Record needed to be developed to facilitate review of ALJ's determination that a senior correction officer was improperly dismissed after he tested positive for marijuana because the expert's testimony was not transcribed and the parties offered conflicting interpretations of what the testimony was; the ALJ was authorized to take the expert's testimony to clarify the urine testing process, including appropriate cut-off levels, and the margin of error associated with such testing (remanding 2007 N.J. AGEN LEXIS 140). In re Fuller, OAL Dkt. No. CSV 439-06, 2007 N.J. AGEN LEXIS 1124, Remand Decision (November 8, 2007).

ALJ properly limited the evidence to whether a police officer was successfully re-trained, as required by a settlement agreement between the officer and the appointing authority arising out of a prior disciplinary matter; the allegations giving rise to the prior disciplinary proceeding did not need to be considered in determining whether the officer had fulfilled his obligations under the agreement (adopting 2007 N.J. AGEN LEXIS 242). In re MacDonald, OAL Dkt. No. CSV 474-05, 2007 N.J. AGEN LEXIS 1133, Merit System Board Decision (August 29, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 246) adopted, in which an employee's appeal was dismissed as a sanction for the employee's failure to appear for a scheduled hearing without good cause; it was reasonable to conclude that continuation of the matter would have resulted in additional expense and delay. In re Thompson, OAL Dkt. No. CSV 3859-05, 2007 N.J. AGEN LEXIS 1109, Final Decision (June 20, 2007).

In a dispute in which the appointing authority claimed that an employee lied about his education and military service, the Merit System Board remanded the matter and ordered the Administrative Law Judge to use its powers under N.J.A.C. 1:1-14.6 to take the testimony of witnesses, if necessary, in order to determine whether the documentary evidence offered by the appointing authority could be properly authenticated; the Board also stated that the employee should be compelled to testify and/or present evidence on remand to refute the charges. In re Anderson, OAL Dkt. No. CSV 2101-05 (CSV 4698-04 On Remand), 2006 N.J. AGEN LEXIS 1099, Merit System Board Decision (December 20, 2006).

Merit System Board authorized ALJ on remand to identify and take testimony of witnesses regarding chain of custody of drug specimen in the event the appointing authority did not call those witnesses. In re Brown, OAL Dkt. No. CSV 8874-04, 2006 N.J. AGEN LEXIS 892, Merit System Board Decision (October 20, 2006).

Initial Decision (2006 N.J. AGEN LEXIS 848) adopted, which determined that under N.J.A.C. 1:1-14.6 an administrative law judge properly dismissed a public employee's action seeking accidental disability retirement benefits because the employee had ample opportunity to litigate his case. It was reasonable to conclude that continuation of the current matter would result in additional expense and delay where the matter had been on the inactive list from April 2005 until January 2006, at the employee's request, because he was incarcerated, and the employee's counsel represented that he was unable to locate the employee after March 2006. In re Schnitzer, OAL Dkt. No. 1005-2003N, 2006 N.J. AGEN LEXIS 939, Final Decision (October 19, 2006).

Given the serious allegations against a Human Services Assistant that she pushed a patient into a chair and then struck the patient with a hairbrush, the Merit System Board ordered that it could not make a definitive decision as to whether removal was warranted without further testimony and ordered the appointing authority to call an additional witness; if the appointing authority failed to do so, the Administrative Law Judge was authorized to use her power to take additional testimony (remanding 2005 N.J. AGEN LEXIS 951). In re Woart, OAL Dkt. No. CSV 4709-05, 2006 N.J. AGEN LEXIS 536, Remand Decision (April 26, 2006).

Although an appellant failed to timely comply with the ALJ's discovery schedule, the failure did not unduly prejudice the appointing authority since it received the appellant's answers to its interrogatories; consequently, the remedy of dismissing the appellant's appeal for his untimely submission was unduly harsh and the ALJ should have considered other possible sanctions, such as the counsel fees incurred by the appointing authority as a result of its motion to dismiss. In re Zorn, OAL Dkt. No. CSV 8501-05, 2006 N.J. AGEN LEXIS 633, Remand Decision (April 5, 2006).

Remand was necessary in order to allow a correction officer to provide the ALJ with documentary evidence that his absences from work were due to his daughter's illness; although it appeared that the appointing authority acted harshly in removing the officer, the ALJ's reversal of the appointing authority's penalty without the officer being requested to submit medical documentation was troubling. In re Bailey, OAL Dkt. No. CSV 4696-04, 2005 N.J. AGEN LEXIS 1196, Remand Decision (July 27, 2005).

Respondent moved to bar counsel for petitioner because of alleged conflict of interest due to N.J.S.A. 52:13D-16(b) that prohibits members of the Legislature and their partner and employees from representing any person other than the State in connection with any cause or matter pending before a State agency. Cited N.J.A.C. 1:1-5.1 and 14.6(p), which authorize an administrative law judge to rule on the propriety of appearance of counsel. Held counsel was barred (citing former N.J.A.C. 1:1-3.7 and 3.9). Stone Harbor v. Div. of Coastal Resources, 4 N.J.A.R. 101 (1980).

1:1-14.7 Conduct of hearings

(a) The judge shall commence hearings by stating the case title and the docket number, asking the representatives or parties present to state their names for the record and describing briefly the matter in dispute. The judge shall also, unless all parties are represented by counsel or otherwise familiar with the procedures, state the procedural rules for the hearing. The judge may also permit any stipulations, settlement agreements or consent orders entered into by any of the parties prior to the hearing to be entered into the record at this time.

(b) The party with the burden of proof may make an opening statement. All other parties may make statements in a sequence determined by the judge.

(c) After opening statements, the party with the burden of proof shall begin the presentation of evidence unless the judge has determined otherwise. The other parties may present their evidence in a sequence determined by the judge.

(d) Cross-examination of witnesses shall be conducted in a sequence and in a manner determined by the judge to expedite the hearing while ensuring a fair hearing.

(e) When all parties and witnesses have been heard, opportunity shall be offered to present oral final argument, in a sequence determined by the judge.

(f) Unless permitted or requested by the judge, there shall be no proposed findings of fact, conclusions of law, briefs, forms of order or other dispositions permitted after the final argument. Whenever possible, proposed findings or other submissions should be offered at the hearing in lieu of or in conjunction with the final argument.

1. When proposed findings or other submissions are permitted or requested by the judge, the parties shall conform to a schedule that may not exceed 30 days after the last day of testimony or the final argument or as otherwise directed by the judge.

2. When the judge permits proposed findings or other submissions to be prepared with the aid of a transcript, the transcript must be ordered immediately. The submission time frame shall commence upon receipt of the transcript.

3. Any proposed findings of fact submitted by a party shall not be considered unless they are based on facts proved in the hearing.

4. Any reference in briefs or other such submissions to initial and final decisions shall include sufficient information to enable the judge to locate the initial decision. This shall include either the Office of Administrative Law docket number, or a reference to New Jersey Administrative Reports or another published and indexed compilation or to the Rutgers Camden Law School website at http://lawlibrary.rutgers.edu/oal. A copy of any cited decision shall be supplied if it is not located in any published compilation or on the foregoing website.

(g) A telephone hearing is begun by the judge placing a conference call on a designated date and time to the parties in the case. In all other respects, the procedures applicable to hearings shall apply.

Amended by R.1991 d.44, effective February 4, 1991.
See: 22 N.J.R. 3278(b), 23 N.J.R. 293(a).
In (h): deleted text ", or when the last such item has been received by the judge, whichever is earlier," describing filing of submissions.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Section was "Conduct of conference hearings, plenary hearings and telephone hearings". In (a), deleted "conference and plenary" preceding "hearings"; in (b), substituted "The" for "In conference and plenary hearings, the"; in (c), deleted "in conference and plenary hearings" following "statements"; in (d), deleted "in conference and plenary hearings" following "witnesses"; in (e), deleted "in conference and plenary hearings" following "heard"; in the introductory paragraph of (f), deleted "in plenary hearings" following "after the final argument"; in (f)1, inserted "or as otherwise directed by the judge"; in (f)2, deleted "30-day" preceding "submission"; rewrote (f)4 and (g); and deleted (h) and (i).

Case Notes

Striking answer and suppressing defenses was proper sanction for employer's failure to respond to discovery in employment discrimination complaint. Ospina v. Jay Screen Printing, Inc. and Jay Sign Co., 97 N.J.A.R.2d (CRT) 1.

1:1-14.8 Conduct of proceedings on the papers and telephone hearings

(a) Upon transmittal of a case that may be conducted as a proceeding on the papers, the Clerk shall schedule a hearing and send a notice of hearing on the papers to the parties. The notice shall permit the party requesting the hearing to select a telephone hearing or a proceeding on the papers in lieu of the scheduled in-person hearing. Along with the notice, the Clerk shall transmit a certification to be completed if the party requesting the hearing chooses to have a proceeding on the papers.

(b) A completed certification must be returned to the Clerk and served on the other party no later than 10 days before the scheduled hearing date. Statements, records and other documents which supplement the certification may also be submitted. Upon request and for good cause shown, the Clerk may grant additional time for submission of supplemental documents.

(c) Upon timely receipt of a completed certification, the Clerk will assign the record for review and determination by a judge. The record consists of the certification and supplemental documents, as well as documents transmitted with the file by the transmitting agency. In a proceeding on the papers, the record is closed when the Clerk assigns the record to a judge.

(d) If the party requesting the hearing does not appear at the scheduled in-person or telephone hearing and no certificate is timely received, the matter shall be handled as a failure to appear pursuant to N.J.A.C. 1:1-14.4.

Amended by R.1988 d.517, effective November 7, 1988.
See: 20 N.J.R. 1979(c), 20 N.J.R. 2749(a).
Deleted text from (e) and substituted new. The new text changes the timing of exchange to receipt of the notice of filing of the case, rather than the notice of hearing.
Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
In (c): revised N.J.A.C. citation.
Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
Rewrote the section.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Section was "Conduct of proceedings on the papers". Rewrote (a); in (b), inserted "and served on the other party" and substituted "10 days before the scheduled hearing date" for "30 days from receipt of the notice of hearing and certification"; in (c), substituted "record is closed" for "hearing is concluded"; deleted former (d); recodified former (e) as (d); and rewrote (d).

1:1-14.9 Orders; preparation of orders

(a) Any resolution which does not completely conclude the case shall be by order. Orders may be rendered in writing or orally on the record by the judge.

(b) Unless such review is precluded by law, all judges' orders are reviewable by an agency head in accordance with N.J.A.C. 1:1-14.10 or when rendering a final decision under N.J.A.C. 1:1-18.6.

(c) Orders may be prepared by a party at the direction of a judge. When prepared by a party, the order shall be filed with the judge and served on all parties who may within five days after service object to the form of the order by writing to the judge with a copy to all parties. Upon objection to the form of the order, the judge, without oral argument or any further proceedings, may settle the form of the order either by preparing a new order or by modifying the proposed order. After signing the order, the judge shall cause the order to be served upon the parties.

1:1-14.10 Interlocutory review

(a) Except for the special review procedures provided in N.J.A.C. 1:1-12.6 (emergency relief), and 1:1-12.5(e) (partial

summary decision), an order or ruling may be reviewed interlocutorily by an agency head at the request of a party.

(b) Any request for interlocutory review shall be made to the agency head and copies served on all parties no later than five working days from the receipt of the written order or oral ruling, whichever is rendered first. An opposing party may, within three days of receipt of the request, submit an objection to the agency head. A copy must be served on the party who requested review. Any request for interlocutory review or objection to a request shall be in writing by memorandum, letter or motion and shall include a copy of any written order or ruling or a summary of any oral order or ruling sought to be reviewed. Copies of all documents submitted shall be filed with the judge and Clerk.

(c) Within 10 days of the request for interlocutory review, the agency head shall notify the parties and the Clerk whether the order or ruling will be reviewed. If the agency head does not so act within 10 days, the request for review shall be considered denied. Informal communication by telephone or in person to the parties or their representatives and to the Clerk within the 10 day period will satisfy this notice requirement, provided that a written communication or order promptly follows.

(d) A party opposed to the grant of interlocutory review may, within three days of receiving notice that review was granted, submit to the agency head in writing arguments in favor of the order or ruling being reviewed. A copy shall be served on the party who requested review.

(e) Where the agency head determines to conduct an interlocutory review, the agency head shall issue a decision, order or other disposition of the review at the earliest opportunity but no later than 20 days from receiving the request for review. Where the interests of justice require, the agency head shall conduct an interlocutory review on an expedited basis. Where the agency head does not issue an order within 20 days, the judge's ruling shall be considered conditionally affirmed. The time period for disposition may be extended for good cause for an additional 20 days if both the agency head and the Director of the Office of Administrative Law concur.

(f) Where the proceeding generating the request for interlocutory review has been sound recorded and the agency head requests the verbatim record, the Clerk shall furnish the original sound recording or a certified copy within one day of the request. The party requesting the interlocutory review shall provide the agency head with all other papers, materials, transcripts or parts of the record which pertain to the request for interlocutory review.

(g) The time limits established in this section, with the exception of (e) above, may be extended by the agency head where the need for a delay is caused by honest mistake, accident, or any cause compatible with due diligence.

(h) An agency head's determination to review interlocutorily an order or ruling shall not delay the scheduling or conduct of hearings, unless a postponement is necessary due to special requirements of the case, because of probable prejudice, or for other good cause. Either the presiding judge or the agency head may order a stay of the proceedings, either on their own or upon application. Applications for stays should be made in the first instance to the presiding judge. If denied, the application may be resubmitted to the agency head. Pending review by the agency head, a judge may conditionally proceed on an order or ruling in order to complete the evidential record in a case or to avoid disruption or delay in any ongoing or scheduled hearing.

(i) Except as limited by (*l*) below and N.J.A.C. 1:1-18.4(a), any order or ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case, even if an application for interlocutory review:

1. Was not made;

2. Was made but the agency head declined to review the order or ruling; or

3. Was made and not considered by the agency head within the established time frame.

(j) In the following matters as they relate to proceedings before the Office of Administrative Law, the Director is the agency head for purposes of interlocutory review:

1. Disqualification of a particular judge due to interest or any other reason which would preclude a fair and unbiased hearing, pursuant to N.J.A.C. 1:1-14.12;

2. Appearances of non-lawyer representatives, pursuant to N.J.A.C. 1:1-5.4;

3. Imposition of conditions and limitations upon non-lawyer representatives, pursuant to N.J.A.C. 1:1-5.5;

4. Sanctions under N.J.A.C. 1:1-14.4 or 14.14 and 14.15 consisting of the assessment of costs, expenses, or fines;

5. Disqualification of attorneys, pursuant to N.J.A.C. 1:1-5.3;

6. Establishment of a hearing location pursuant to N.J.A.C. 1:1-9.1(b); and

7. Appearance of attorneys pro hac vice pursuant to N.J.A.C. 1:1-5.2.

(k) Any request for interlocutory review of those matters specified in (j) above should be addressed to the Director of the Office of Administrative Law with a copy to the agency head who transmitted the case to the Office of Administrative Law. Review shall proceed in accordance with (b) through (g) above.

(*l*) Orders or rulings issued under (j)1, 2, 3, 5, 6 and 7 above may only be appealed interlocutorily; a party may not

seek review of such orders or rulings after the judge renders the initial decision in the contested case.

(m) A judge's determination to proceed on the record or to order a new hearing pursuant to N.J.A.C. 1:1-14.13(b) and (c) may only be appealed interlocutorily; a party may not seek review of such orders or rulings after the judge renders the initial decision in the contested case.

Amended by R.1987 d.462, effective November 16, 1987.
See: 19 N.J.R. 1592(a), 19 N.J.R. 2131(b).
Added (m).
Amended by R.1990 d.219, effective May 7, 1990.
See: 22 N.J.R. 590(a), 22 N.J.R. 1353(a).
In (i): added language to clarify who may order a stay in an administrative hearing.
Amended by R.1991 d.34, effective January 22, 1991.
See: 22 N.J.R. 3278(a), 23 N.J.R. 194(a).
Added (k)6.
Amended by R.1996 d.133, effective March 18, 1996.
See: 27 N.J.R. 609(a), 28 N.J.R. 1503(a).
In (k)4 added fines.
Amended by R.2001 d.180, effective June 4, 2001.
See: 33 N.J.R. 1040(a), 33 N.J.R. 1926(a).
In (k)4, inserted "or 14.14" following "1:1-14.4"; added (k)7.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Deleted former (g); recodified former (h) through (m) as (g) through (*l*); in (i), substituted "(*l*)" for "(m)"; in (j)4, inserted "and 14.15"; in (k), substituted "(j)" for "(k)" and "(g)" for "(h)"; and in (*l*), substituted "(j)1" for "(k)1".
Amended by R.2008 d.151, effective June 16, 2008.
See: 40 N.J.R. 915(a), 40 N.J.R. 3617(a).
Added (m).

Case Notes

The Board of Public Utilities declined to consider a customer's opposition to a motion filed by a utility seeking interlocutory review of a ruling of an Administrative Law Judge (ALJ) granting a request to reopen discovery so that the customer might retain an expert on a specified subject because the customer's opposition was not filed within the three-day period allowed by N.J.A.C. 1:1-14-10(b) Nonetheless, the utility's request for interlocutory review on the issue was denied because the utility's only argument in favor of interlocutory review was that the ALJ's ruling "defies logic" and provided no concrete explanation as to why granting an interlocutory appeal would be in the interest of judgment or for good cause. Elaine Dubelman v. United Water New Jersey, BPU Dkt. No. WC12060563U; OAL Dkt. No. PUC 12139-12N, 2013 N.J. PUC LEXIS 314, Final Order (October 16, 2013).

Challenge by two environmental organizations to a sole commissioner's determination that they were not entitled to intervene in proceedings convened to consider upgrades to New Jersey's utility infrastructure in response to large scale weather events but were properly accorded "participant" status per N.J.A.C. 1:1-16.6 was subject to interlocutory review by the New Jersey Board of Public Utilities per N.J.A.C. 1:14-14.4(a), which was a rule of special applicability that supplemented N.J.A.C. 1:1-14.10, because review was in the interest of justice or for good cause shown. On the merits, while it was not improper for the organizations to be denied intervenor status, the scope of their involvement as "participants" that were entitled to submit briefs, was properly expanded to authorize the organizations to participate in oral arguments held in the proceedings. In re Petition of Public Service Electric and Gas Company for Approval of the Energy Strong Program, BPU Dkt. Nos: EO13020155; GO13020156, 2013 N.J. PUC LEXIS 279, Final Decision (September 18, 2013).

In employment discrimination case, Administrative Law Judge's denial of all fees for one of the employee's attorneys was not "law of the case," and the ALJ's subsequent modification of that ruling to allow payment for certain services was adopted by the Director; except for specified matters relating to the hearing itself, delineated in N.J.A.C. 1:1-14.10(j), any ruling of the ALJ is subject to review by the agency head at the conclusion of the case. Heusser v. N.J. Highway Auth., OAL Dkt. No. CRT 01863-98, 2005 N.J. AGEN LEXIS 1071, Final Decision (August 30, 2005).

Granting of partial summary judgment 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).

Order of the Administrative Law Judge may be reviewed by the Commissioner of the Department of Education and by the Commissioner of the Department of Human Services whether upon the interlocutory review or at the end of special education case (citing former N.J.A.C. 1:1-9.7). A.N. v. Clark Bd. of Educ., 6 N.J.A.R. 360 (1983).

1:1-14.11 Ordering a transcript; cost; certification to court; copying

(a) Except as provided by (c) below, a transcript of any proceeding may be obtained by requesting the official court reporter or official transcription firm to prepare a transcript. The requesting party shall notify all other parties and the Clerk of the request. Unless the requesting party is the State or a political subdivision thereof, the request shall be accompanied by a reasonable security deposit not to exceed either the estimated cost of the transcript as determined by the preparer or $300.00 for each day or fraction thereof of the proceeding, the deposit to be made payable to the preparer. The reporter shall promptly prepare the transcript and shall file a copy with the Clerk at the time the original is delivered to the requesting party. The preparer shall bill the requesting party for any amount due for the preparation of the transcript and the copy or shall reimburse the requesting party for any overpayment.

(b) An unofficial copy of a sound recorded proceeding may be obtained by making a request to the Clerk accompanied by a blank standard cassette of appropriate length.

(c) When the preparation of a transcript is being requested for an appeal to court, whether the proceeding was sound or stenographically recorded, the request shall be made as follows:

1. For cases heard by an Administrative Law Judge, the request shall be made to the Clerk of the Office of Administrative Law;

2. For cases heard by an agency head, the request shall be made to the Clerk of that agency.

(d) All transcript preparation requests pursuant to (c) above for appeal to a court shall include one copy of the transcript for the Clerk and any additional copies required by R. 2:6-12. The form of the transcript request shall conform with the requirements of R. 2:5-3(a) and be accompanied by the deposit required by R. 2:5-3(d).

1. The Clerk shall promptly arrange for the preparation of the transcript. Upon completion of the transcript, the preparer shall bill the requesting party for any sum due or shall reimburse the requesting party for any overpayment and shall forward the original and any copies ordered

pursuant to R. 2:6-12 to the requesting party. When the last volume of the entire transcript has been delivered to the appellant, the preparer shall forward to the Clerk the copy of the transcript prepared for the Clerk.

2. The Clerk shall transmit the transcript copy to the court and comply with the requirements of R. 2:5-3.

(e) For cases in which an agency possesses a transcript of the hearing being appealed, the request for copying under R. 2:5-3(a) shall be made to the Clerk of that agency. Upon receiving such a request, the Clerk shall make the existing transcript available to the appellant for reproduction for filing and service.

(f) Any transcript that is required by law to be filed with a Clerk shall be considered a public document which is available upon request for copying, as required by the Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

(g) The following shall apply to all transcripts:

1. Transcripts must be prepared in accordance with State standards established by the Administrative Director of the Courts.

2. Unless a proceeding has been sealed, any person may request a transcript or a recording of the proceeding. However, if the person requesting a transcript or tape recording was not a party to the proceeding, the requester, when making the request, must also notify all parties of the request. If a party objects to the request, a written objection must be filed immediately with the Clerk and served on the requester and all other parties to the proceeding. This objection shall be reviewed by the judge who presided over the proceeding.

3. If a proceeding was sealed, only parties to the proceeding may request a transcript or a tape recording and the contents of the transcript or recording shall not be disclosed to anyone except in accordance with the order sealing the proceeding.

(h) Any party or person entitled by Federal statute or regulation to copy and inspect the verbatim transcript may arrange with the Clerk to review any transcript filed under (a) above and shall also be permitted to hear and receive a copy of any sound recorded proceeding pursuant to (b) above. All applications to obtain a transcript of any proceeding at public expense for use on appeal shall be made to the Appellate Court pursuant to New Jersey Court Rule R. 2:5-3 or in case of Federal appeals pursuant to applicable Federal Court Rules.

(i) Where the Division of Ratepayer Advocate is representing public interest in a proceeding and another party to the proceeding is entitled by law to recover the costs thereof from others, such other party shall obtain, pay for and furnish to the Ratepayer Advocate upon request the official transcript.

Amended by R.1990 d.68, effective February 5, 1990.
See: 21 N.J.R. 1181(b), 21 N.J.R. 3587(a), 22 N.J.R. 334(a).
In (a)-(c): Deleted language specifying that "any party, or person, with a legitimate need, may obtain" or "may request a transcript.".
In (a): Added sentence that the requesting party shall notify all other parties of the request. Established new rate for security deposit. Specified responsibilities of the preparer regarding transcripts and billings.
In (c): Revised section to include new rate for security deposit and added sentence, "The reporter shall bill . . . for any overpayment".
Added new sections (d)-(h), recodifying old (d)-(e) as new (i)-(j).
In (j): Deleted sentence regarding payment for official transcripts by state agencies.
Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
In (j), substituted references to Ratepayer Advocate for references to Public Advocate throughout.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (g), substituted "Open Public Records Act" for "Right to Know Law".
Amended by R.2011 d.179, effective July 5, 2011.
See: 43 N.J.R. 701(a), 43 N.J.R. 1523(a).
Rewrote (a); deleted former (c); recodified former (d) through (j) as (c) through (i); in the introductory paragraph of (d), substituted "(c)" for "(d)"; and in (h), deleted "or (c)" following "(a)".

Case Notes

Inmate charged with prison drug trafficking not entitled to verbatim recording of disciplinary proceeding. Negron v. Department of Corrections, 220 N.J.Super. 425, 532 A.2d 735 (App.Div.1987).

Unofficial copy of the sound recording of Office of Administrative Law proceedings may not be substituted for the official hearing transcript, and will not be considered if so submitted. The Commissioner may not make additional findings of fact based on testimony for which no official transcript was provided. Strengthen Our Sisters v. Bd. of Educ. of West Milford, OAL Dkt. No. EDU 11097-08, 2009 N.J. AGEN LEXIS 733, Final Decision (July 8, 2009).

State Board of Education does not have the authority to waive or modify standards established by the Administrative Director of the Courts for the preparation of hearing transcripts or to reduce the deposit required by the Office of Administrative Law for the preparation of transcripts, or in the case at hand to require a local school board to share the cost of transcripts ordered by appellants challenging the school board's denial of their request to provide transportation for their children. T.F.S. ex rel. J.R.S. v. Bd. of Educ., South Brunswick Twnshp., OAL Dkt. Nos. EDU 6674-02 and EDU 10118-05; C Nos. 400-05 and 264-06; SB No. 36-06, 2005 N.J. AGEN LEXIS 1490 (April 9, 2007).

Regulations governing administrative proceedings are clear in providing that a copy of a sound recording of a hearing obtained from the Office of Administrative Law (OAL) is "unofficial"; here, the tape purportedly contained testimony from another case, it was not a copy obtained from OAL, and appellant failed to demonstrate that the testimony on the tape was relevant to the conduct alleged in the instant charges. In re Tenure Hearing of McCullough, EDU No. 6702-03S; C No. 70-06; SB No. 12-06, 2006 N.J. AGEN LEXIS 929 (October 4, 2006).

Rule allows respondent an opportunity to obtain a transcript of proceeding (citing former N.J.A.C. 1:1-3.3). Div. of Motor Vehicles v. Exum, 5 N.J.A.R. 298 (1983).

1:1-14.12 Disqualification of judges

(a) A judge shall, on his or her own motion, withdraw from participation in any proceeding if the judge:

1. Is by blood or marriage the second cousin of or is more closely related to any party to the proceeding;

2. Is by blood or marriage the first cousin of or is more closely related to any attorney in the case. This proscription

shall extend to partners, employers, employees, or office associates of any such attorney;

3. Has been attorney of record or counsel in the action;

4. Has given an opinion upon a matter in question in the action;

5. Is interested in the event of the action;

6. Has discussed or negotiated his or her post-retirement employment with any party, attorney, or law firm involved in the matter; or

7. When there is any other reason which might preclude a fair and unbiased hearing and decision, or which might reasonably lead the parties or their representatives to believe so.

(b) Paragraphs (a)3, 4, and 5 above shall not prevent a judge from sitting because of having given an opinion in another action in which the same matter in controversy came in question or given an opinion on any question in controversy in the pending action in the course of previous proceedings therein, or because the board of chosen freeholders of a county or the municipality in which the judge resides or is liable to be taxed are or may be parties to the record or otherwise interested.

(c) A judge shall, as soon as practicable after assignment to a particular case, withdraw from participation in a proceeding whenever the judge finds that any of the criteria in (a)1 through 7 above apply. A judge may not avoid disqualification by disclosing on the record the basis for disqualification and securing the consent of the parties.

(d) Any party may, by motion, apply to a judge for his or her disqualification. Such motion must be accompanied by a statement of the reasons for such application and shall be filed as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. In no event shall the judge enter any order, resolve any procedural matters or render any other determination until the motion for disqualification has been decided.

(e) Any request for interlocutory review of an administrative law judge's order under this section shall be made pursuant to N.J.A.C. 1:1-14.10(k) and (*l*).

Amended by R.2013 d.105, effective September 3, 2013.
See: 45 N.J.R. 149(a), 45 N.J.R. 2031(a).
Rewrote (a); added new (b); recodified former (b) through (d) as (c) through (e); and in (c), substituted "7" for "8".

Case Notes

Blind Administrative Law Judge was not required to recuse himself due to his inability to visually inspect a videotape. Division of Motor Vehicles v. Hall, 94 N.J.A.R.2d (OAL) 14.

Administrative law judge was not required to recuse himself. Ridings v. Maxim Sewerage Corp., 92 N.J.A.R.2d (OAL) 10.

Decision in criminal case involving substantive aspects of judicial disqualification provided no basis for collateral attack on issue of recusal of administrative law judge. N.J.S.A. 18A:6-27. In the Matter of the Tenure Hearing of John Fargo, 92 N.J.A.R.2d (EDU) 172.

1:1-14.13 Proceedings in the event of death, disability, departure from State employment, disqualification or other incapacity of judge

(a) If, by reason of death, disability, departure from State employment, disqualification or other incapacity, a judge is unable to continue presiding over a pending hearing or issue an initial decision after the conclusion of the hearing, a conference will be scheduled to determine if the parties can settle the matter or, if not, can reach agreement upon as many matters as possible.

(b) In the event settlement is not reached, another judge shall be assigned to complete the hearing or issue the initial decision as if he or she had presided over the hearing from its commencement, provided:

1. The judge is able to familiarize himself or herself with the proceedings and all testimony taken by reviewing the transcript, exhibits marked in evidence and any other materials which are contained in the record; and

2. The judge determines that the hearing can be completed with or without recalling witnesses without prejudice to the parties.

(c) In the event the hearing cannot be continued for any of the reasons enumerated in (b) above, a new hearing shall be ordered by the judge.

(d) An order or ruling issued pursuant to (b) and (c) above may only be appealed interlocutorily; a party may not seek review of such orders or rulings after the judge renders the initial decision in the contested case.

Amended by R.2008 d.151, effective June 16, 2008.
See: 40 N.J.R. 915(a), 40 N.J.R. 3617(a).
Added (d).

1:1-14.14 Sanctions; failure to comply with orders or requirements of this chapter

(a) For unreasonable failure to comply with any order of a judge or with any requirements of this chapter, the judge may:

1. Dismiss or grant the motion or application;

2. Suppress a defense or claim;

3. Exclude evidence;

4. Order costs or reasonable expenses, including attorney's fees, to be paid to the State of New Jersey or an aggrieved representative or party; or

5. Take other appropriate case-related action.

New Rule, R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
Amended by R.1996 d.133, effective March 18, 1996.
See: 27 N.J.R. 609(a), 28 N.J.R. 1503(a).
Added (b) through (d).

Recodified in part to N.J.A.C. 1:1-14.15 by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Recodified (b) through (d) as N.J.A.C. 1:1-14.15.

Case Notes

Administrative law judge has power to impose reasonable monetary sanctions on attorneys. In re Timofai Sanitation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

Before administrative law judge (ALJ) could impose sanctions on attorneys, court was required to conduct evidentiary hearing. In re Timofai Sanitation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

Initial Decision (2009 N.J. AGEN LEXIS 765) adopted, which found that an employee who refused to answer interrogatories and produce certain documents on the grounds of self-incrimination was prohibited from testifying about the matters on which he refused to disclose information and documentation. If the employee was going to defend his actions based on the Internal Revenue Code, the City had the right to review tax returns, to receive responses regarding the ex-wife's employment and income after the divorce, to learn if the employee claimed his former wife on other documents, and to review other relevant documents that would have been used in defending the case. In re Peterson, OAL Dkt. No. CSV 01472-09, 2009 N.J. CSC LEXIS 1494, Final Decision (December 2, 2009).

Dismissal was the proper sanction where parent's counsel failed to provide the ALJ the complete and final witness and his full and complete exhibit packet in advance of the hearing, as ordered by the ALJ; failure on the part of counsel to comply with the court order was egregious, was uncalled for, and there was no excuse for his failure to comply. A.D. ex rel. A.J. v. Camden City Bd. of Educ., OAL Dkt. No. EDS 8733-09, 2009 N.J. AGEN LEXIS 772, Final Decision (October 28, 2009).

All evidence regarding a school district's proposed placement for a three-year-old autistic child was excluded as a sanction for the school district's failure to comply with an order requiring it to provide the parents' expert access to the proposed placement to conduct an observation; failure to comply with the order effectively denied the parents the opportunity to present a case regarding whether the proposed placement would have provided their child with a free appropriate public education. S.B. ex rel. P.B. v. Park Ridge Bd. of Educ., OAL Dkt. No. EDS 13813-08, 2009 N.J. AGEN LEXIS 318, Final Decision (April 21, 2009).

Initial Decision (2008 N.J. AGEN LEXIS 1031) adopted, which dismissed, for lack of prosecution, a school district employee's claim for reimbursement of full salary without loss of sick time for an injury allegedly sustained in the course of her employment; although the case was placed on inactive status awaiting a determination by the Division of Workers' Compensation as to whether the employee sustained a qualifying injury, the employee's compensation claim had been dismissed for lack of prosecution and the employee failed to offer any explanation or justification as why the education claim should not also have been dismissed, especially in light of the fact that more than eight years had elapsed since the filing of the education appeal. Green v. School Dist. of Jersey City, OAL Dkt. No. EDU 7401-00, 2009 N.J. AGEN LEXIS 639, Final Decision (January 29, 2009).

Even if the Merit System Board had jurisdiction to review the City's request that appellant pay the costs of the City's experts based on the appellant's attorney's late arrival to the hearing before the ALJ, the facts would not support such a penalty, given the reasonable explanation of the late arrival; moreover, the Board would generally not penalize an appellant for the actions of his or her representative unless those actions were shown to be intentionally and flagrantly in violation of OAL rules and authorized by that appellant. In re Harris, OAL Dkt. No. CSV 11388-03, 2007 N.J. AGEN LEXIS 1075, Merit System Board Decision (September 26, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 414) adopted, finding that when discovery requests encompassed all aspects of the petition, the proper remedy under N.J.A.C. 1:1-14.14 for failure to provide discovery was suppression of the petitioner's claim. L.A. and C.A. ex rel. P.M.A. v. Bd. of Educ. of Port Republic, OAL Dkt. No. EDU 12031-06, 2007 N.J. AGEN LEXIS 521, Commissioner's Decision (July 18, 2007).

Parent's duplicative discovery requests did not warrant sanctions (adopting 2006 N.J. AGEN LEXIS 263 as supplemented) (decided under former N.J.A.C. 1:1-14.14(a) and (b), now N.J.A.C. 1:1-14.14 and 1:1-14.15). R.O. ex rel. R.O. v. Bd. of Educ. of W. Windsor-Plainsboro School Dist., OAL Dkt. No. EDU 8827-05, 2006 N.J. AGEN LEXIS 575, Commissioner's Decision (June 28, 2006).

Respondent's answer and cross-petition dismissed for persistent discovery failures. 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), aff'd in part, and rev'd in part on other grounds, A-5453-05 (App.Div. Oct. 22, 2007) (unpublished opinion) (affirming dismissal of respondent's answer and cross-petition, but reversing the granting of affirmative relief to petitioner as an evidentiary hearing was necessary).

Initial Decision (2005 N.J. AGEN LEXIS 397) adopted, which ordered insurance producer's defenses stricken where, for almost seven months, the producer failed to respond to requests for discovery, failed to comply with the ALJ's order to comply with the discovery requests, and demonstrated a flagrant disregard for the rules and the OAL's orders. Bryan v. Bellissima, OAL Dkt. No. BKI 10040-2004S, 2005 N.J. AGEN LEXIS 1154, Final Decision (August 30, 2005).

1:1-14.15 Conduct obstructing or tending to obstruct the conduct of a contested case

(a) If any party, attorney, or other representative of a party, engages in any misconduct which, in the opinion of the judge, obstructs or tends to obstruct the conduct of a contested case, the party, attorney, or other representative may be fined in an amount which shall not exceed $1,000 for each instance.

(b) Where the conduct deemed to obstruct or tending to obstruct the conduct of a contested case occurs under circumstances which the judge personally observes and which he or she determines unmistakably demonstrates willfulness and requires immediate adjudication to permit the proceedings to continue in an orderly and proper manner:

1. The judge shall inform the party, attorney or other representative of the nature of the actions deemed obstructive and shall afford the party, attorney or other representative an immediate opportunity to explain the conduct; and

2. Where the judge determines, after providing the party, attorney or other representative, an opportunity to explain, that the conduct does constitute misconduct and that the conduct unmistakably demonstrates willfulness, the judge shall issue an order imposing sanctions.

i. The order imposing sanctions shall recite the facts and contain a certification by the judge that he or she personally observed the conduct in question and explain the conclusion that the party, attorney or other representative engaged in misconduct.

(c) Where the conduct deemed to obstruct or tending to obstruct a contested case did not occur in the presence of the judge or where the conduct does not require immediate ad-

judication to permit the proceedings to continue in an orderly and proper manner, the matter shall proceed by order to show cause specifying the acts or omissions alleged to be misconduct. The proceedings shall be captioned "In the Matter of _____, Charged with Misconduct."

(d) In any proceeding held pursuant to (c) above, the matter may be presented by a staff attorney of the Office of Administrative Law, or by the Attorney General. The designation shall be made by the Director of the Office of Administrative Law. The matter shall not be heard by the judge who instituted the proceeding if the appearance of objectivity requires a hearing by another judge.

Recodified in part from N.J.A.C. 1:1-14.14 and amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Recodified former introductory paragraph of (b) as (a); in (a), substituted a period for "provided:"; recodified former (b)1 as introductory paragraph of (b); in introductory paragraph of (b), substituted a colon for ", the"; inserted designation (b)1; in (b)1, inserted "The" at the beginning and "and" at the end; in (b)2, inserted "and that the conduct unmistakably demonstrates willfulness" and substituted a period for "which" at the end; inserted designation (b)2i; and rewrote (b)2i and (c).

Case Notes

Administrative law judge has power to impose reasonable monetary sanctions on attorneys. In re Timofai Sanitation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

Before administrative law judge (ALJ) could impose sanctions on attorneys, court was required to conduct evidentiary hearing. In re Timofai Sanitation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

SUBCHAPTER 15. EVIDENCE RULES

1:1-15.1 General rules

(a) Only evidence which is admitted by the judge and included in the record shall be considered.

(b) Evidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth.

(c) Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. All relevant evidence is admissible except as otherwise provided herein. A judge may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:

1. Necessitate undue consumption of time; or

2. Create substantial danger of undue prejudice or confusion.

(d) If the judge finds at the hearing that there is no bona fide dispute between the parties as to any unstipulated material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, except for (c) above or a valid claim of privilege.

(e) When the rules in this subchapter state that the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, the judge shall hold a preliminary inquiry to determine the issue. The judge shall indicate which party has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. No evidence may be excluded in determining such issue except pursuant to the judge's discretion under (c) above or a valid claim of privilege. This provision shall not be construed to restrict or limit the right of a party to introduce evidence subsequently which is relevant to weight or credibility.

Case Notes

Rules of Evidence application in arbitration proceedings. Fox v. Morris County Policemen's Ass'n, 266 N.J.Super. 501, 630 A.2d 318 (A.D.1993), certification denied 137 N.J. 311, 645 A.2d 140.

M.D. license revocation's request that all 70 patients present be permitted to testify held unreasonable (citing former N.J.A.C. 1:1-15.2(a)). In the Matter of Cole, 194 N.J.Super 237, 476 A.2d 836 (App.Div.1986).

In an administrative hearing, all relevant evidence is admissible (citing former N.J.A.C. 1:1-15.2(a)). Delguidice v. New Jersey Racing Commission, 100 N.J. 79, 494 A.2d 1007 (1985).

Evidence at public hearings under former rulemaking regulations. In re: Matter of Public Hearings, 142 N.J.Super. 136, 361 A.2d 30 (App.Div.1976), certification denied 72 N.J. 457, 371 A.2d 62 (1976).

An Administrative Law Judge concluded that a senior correction officer (SCO) was properly removed from her position at a youth correctional facility for having engaged in conduct unbecoming an employee within the meaning of N.J.A.C. 4A:2-2.3(a)6 by engaging in conduct indicating undue familiarity of a romantic nature with a male inmate. Specifically, the SCO, using an alias, did send and receive from the inmate letters of a romantic nature and planned with the inmate to continue their relationship once the inmate was released from custody. Even if photocopies of erotic photographs recovered from the inmate's cell were excluded from evidence per N.J.A.C. 1:1-15.1(c)2 on a finding that they were unreliable and unduly prejudicial, there remained ample evidence on which to find that the SCO's conduct violated both civil service rules and departmental regulations and imperiled public safety and good order in the facility, and removal from her position thus was proper. In re Dana S. Register, Mountainview Youth Corr. Facility, OAL Dkt. No. CSR 17778-13, 2014 N.J. AGEN LEXIS 161, Initial Decision, April 7, 2014.

In disciplinary proceedings against a senior correction officer on allegations of undue familiarity with an inmate, the ALJ properly excluded statements made by the inmate about contact with another officer. Admission of the inmate's statements was likely to create a "mini-trial" and would have had limited probative value in that the statements would not prove, by themselves, that the inmate was not worthy of credibility (adopting 2011 N.J. AGEN LEXIS 427). In re Smalls, OAL Dkt. No. CSR 2916-11, 2011 N.J. CSC LEXIS 1138, Final Decision (October 19, 2011).

Initial Decision's (2007 N.J. AGEN LEXIS 576) findings of fact were adopted and its conclusions of law were modified. Under this section, an ALJ had the sole discretion to determine what weight to accord hearsay evidence to determine that a public employee was not entitled to accidental disability retirement after suffering injuries. Considering the nature, character and scope of the evidence, the circumstances of the creation of the evidence and the reliability of the evidence, the employee's permanent disability was not the direct result of an alleged traumatic event that was caused by external circumstances; instead it was the result of pre-existing disease that was aggravated or accelerated by work. In re Wassuta, OAL DKT No. TYPPF 11092-02, 2007 N.J. AGEN LEXIS 875, Final Decision (September 18, 2007).

Exclusion of chiropractor's testimony in a Lemon Law proceeding was within the realm of the ALJ's discretion, where the chiropractor, who had not examined the claimants, was prepared to testify as to whether the driver's seat of their vehicle provided sufficient support; the ALJ had observed that the chiropractor would be testifying without reference to any particular standards. Krinick v. Ford Motor Co., OAL Dkt. No. CMA 7868-05, 2005 N.J. AGEN LEXIS 1068, Final Decision (September 9, 2005).

By the ALJ's own account, the investigative report of a chief ranger was relevant to the issue of whether respondents violated regulations regarding keeping and storing explosives; consequently, it was inappropriate for the ALJ to exclude the report without first establishing that the report's probative value was substantially outweighed by the risk that its admission would have necessitated an undue consumption of time or created a substantial danger of under prejudice or confusion (rejecting 2007 N.J. AGEN LEXIS 697). N.J. Dep't of Labor & Workforce Dev. v. John P. Twining Blasting, OAL Dkt. No. LID 760-06 (LID 320-03 On Remand), 2008 N.J. AGEN LEXIS 1247, Remand Decision (June 9, 2008 (Issued).

Initial Decision (2007 N.J. AGEN LEXIS 562) adopted, which concluded that where a sanitation worker was removed on charges of incapacity after permanent restrictions were imposed by physicians hired through the city's third-party administrator, the city failed in its burden of proof because the medical documents on which it relied were conclusory hearsay, lacking in sufficient medical analysis, and unsupported by reliable, competent evidence that would have supported findings of fact; the worker had shown himself able to perform his duties, but for short periods of rehabilitation, and he had the requisite strength and adaptability that could have been reasonably accommodated after return to his former position. In re Misiur, OAL Dkt. No. CSV 768-07, 2007 N.J. AGEN LEXIS 1157, Merit System Board Decision (August 29, 2007).

In a disciplinary action against a police officer who was alleged to have sexually assaulted three women, the ALJ should have allowed the testimony of a third victim where her allegations of date rape were similar or identical to the two other victims; the issue of consent was at issue, and the evidence was significant, particularly since the situation was strikingly similar to that of the other two victims. The fact that the grand jury did not issue an indictment regarding the third victim's allegations did not preclude the evidence from being considered as relevant testimony in the disciplinary proceeding (remanding 2005 N.J. AGEN LEXIS 205). In re Cofone, OAL Dkt. Nos. CSV 2578-01 and CSV 6148-03, 2005 N.J. AGEN LEXIS 1080, Remand Decision (August 10, 2005).

In a disciplinary action against a police officer who was alleged to have sexually assaulted three women, the ALJ should have allowed the expert to testify as to the level of the victims' blood alcohol content and also should have allowed testimony as to the specialized training the officer received to recognize alcohol intoxication and incapacity; both pieces of evidence were relevant as to the officer's knowledge of the complainants' incapacities to consent to intercourse (remanding 2005 N.J. AGEN LEXIS 205). In re Cofone, OAL Dkt. No. CSV 2578-01 and CSV 6148-03, 2005 N.J. AGEN LEXIS 1080, Remand Decision (August 10, 2005).

Appeal from license suspension for refusal to submit to breath test (N.J.S.A. 39:4-50.4). Administrative law judge is able to consider unpublished appellate opinion. No provision in the Administrative Procedure Rules of Practice prohibits this. Absent a ruling requiring otherwise, an agency is not free to ignore relevant unpublished appellate opinion of which it is aware unless the respondent can show surprise. Division of Motor Vehicles v. Festa, 6 N.J.A.R. 173 (1982).

1:1-15.2 Official notice

(a) Official notice may be taken of judicially noticeable facts as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence.

(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

Initial Decision (2006 N.J. AGEN LEXIS 31) adopted, in which the ALJ took judicial notice of the diagnostic codes listed on a cottage technician's Absence Note to conclude that her testimony was not worthy of belief; the technician testified that she left work due to nausea, vomiting, and diarrhea, but the diagnostic codes indicated that the technician was actually treated for acute maxillary sinusitis and depressive disorder, supporting the appointing authority's contention that the technician's illness was a mere pretext on learning she was to be reassigned to a different unit during her shift. In re Edison, OAL Dkt. No. CSV 549-05, 2006 N.J. AGEN LEXIS 908, Final Decision (October 18, 2006).

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).

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).

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. 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".
Amended by R.2009 d.112, effective April 6, 2009.
See: 41 N.J.R. 5(a), 41 N.J.R. 1391(a).
Deleted "N.J.R.E 501 (Privilege of Accused)" following "similarity of circumstances:".

Case Notes

Initial Decision (2009 N.J. AGEN LEXIS 765) adopted, which found that an employee who refused to answer interrogatories and produce certain documents on the grounds of self-incrimination was prohibited from testifying about the matters on which he refused to disclose information and documentation. If the employee was going to defend his actions based on the Internal Revenue Code, the City had the right to review tax returns, to receive responses regarding the ex-wife's employment and income after the divorce, to learn if the employee claimed his former wife on other documents, and to review other relevant documents that would have been used in defending the case. In re Peterson, OAL Dkt. No. CSV 01472-09, 2009 N.J. CSC LEXIS 1494, Final Decision (December 2, 2009).

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.

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).

Case Notes

Community-supervised-for-life offender, who, for some time, has been released into the community, must be afforded due process of law before the New Jersey State Parole Board can impose a curfew confining the offender to his home. The level of process will depend on a number of variables and the unique circumstances of each case but, at a minimum, a supervised offender must be provided reasonable notice and a meaningful opportunity to be heard. Jamgochian v. New Jersey State Parole Bd., 196 N.J. 222, 952 A.2d 1060, 2008 N.J. LEXIS 899 (2008).

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 unrebutted 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).

Applicant was denied Medicaid eligibility for failure to provide information to establish his identity under N.J.A.C. 10:71-3.9 because there was no proof on the record sufficient to establish that any of the acceptable documents was provided to the agency in a timely manner. The sole evidence on this issue came from a nursing home's representative who had no personal knowledge that the applicant's medical records reflecting his age and identity were sent to the agency in a timely manner. The representative's testimony was based exclusively on hearsay, which could not form the sole basis for a decision under N.J.A.C. 1:1-15.5. C.C. v. Cape May Cnty. Bd. of Social Serv. and Div. of Med. Assistance and Health Serv., OAL Dkt. No. HMA 5372-14, 2014 N.J. AGEN LEXIS 349, Initial Decision (July 8, 2014).

Senior correction officer engaged in conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6). Her denial that she allowed an inmate to touch an intimate part of her body and adjust the Velcro straps of her vest was overborne not only by the testimony of another correction officer but by the corroborating statement of the inmate. Although the inmate's statement to an investigator was clearly hearsay, it was admissible under the residuum rule, N.J.A.C. 1:1-15.5, solely for the purpose of corroborating other competent evidence. In re Edwina Washington, East Jersey State Prison, Dep't. of Corr., OAL DKT. NO. CSR 09975-13, 2013 N.J. AGEN LEXIS 299, Initial Decision (Nov. 18, 2013).

Petitioner was properly denied accidental disability benefits by the Board of Trustees of the Public Employees' Retirement System after the Board found that he was not totally and permanently disabled. The medical records he sought to admit would have been admissible under the Residuum Rule, N.J.A.C. 1:1-15.5, but absent medical testimony to explain those records, there was no scintilla of competent evidence to support that hearsay. Michael Davydow v. Public Employees' Ret. Sys., OAL Dkt. No. TYP 12145-12, 2013 N.J. AGEN LEXIS 140, Initial Decision (April 17, 2013).

Initial Decision (2011 N.J. AGEN LEXIS 267) adopted, which found that in a disciplinary proceeding against a correction sergeant for violating the appointing authority's drug policy, the validity of the state laboratory's findings was well established by the testimony of the director of the laboratory, who was qualified to review the laboratory's testing paperwork and protocols and offer an opinion on the results contained therein; the testimony was offered to corroborate material already in evidence. Experts are qualified to review the materials of their colleagues and offer opinions within the realm of their qualifications and expertise. In re Lore, OAL Dkt. No. CSR 1344-11, 2011 N.J. CSC LEXIS 893, Final Decision (June 15, 2011).

In an action by the New Jersey Higher Education Student Assistance Authority (NJHESAA) to garnish the wages of a student loan debtor, affidavits offered by the NJHESAA, which alone would not ordinarily satisfy the requirement of some competent evidence to support findings of fact in lieu of live testimony, were adequate because there would have been a cumulative effect of in-person testimony. NJHESAA v. Ascencio, OAL Dkt. No. HEA 0616-10, 2010 N.J. AGEN LEXIS 308, Final Decision (June 22, 2010).

Initial Decision (2010 N.J. AGEN LEXIS 71) adopted, which found that a deceased supervisor's statements to others regarding a mechanical equipment specialist's failure to properly follow appropriate procedures in bleeding the air out of the radiation system were sufficiently corroborated by other surrounding evidence, including a memo authored by the deceased, such that admission of the statements was appropriate in a disciplinary action against the mechanical equipment specialist. In re Kandic, OAL Dkt. No. CSV 330-08, 2010 N.J. CSC LEXIS 585, Final Decision (March 10, 2010).

Initial Decision (2009 N.J. AGEN LEXIS 1112) adopted, which found that in a police officer's appeal from a determination of the State Health Benefits Commission (SHBC) denying his request for reimbursement of medical expenses for surgical procedures, the hearsay statements in petitioner's medical records, standing alone, were insufficient to support a finding in his favor. Absent competent medical testimony that the surgeries were medically necessary, petitioner could not establish entitlement to reimbursement under the SHBP for the services. In re Villano, OAL Dkt. No. TYP 11482-08, 2010 N.J. AGEN LEXIS 765, Final Decision (January 25, 2010).

Where the evidence against a correction lieutenant consisted solely of a videotape and reports containing hearsay statements of various witnesses, the appointing authority failed in its burden of proving that the lieutenant mistreated or struck a resident; the video did not clearly reveal what happened and, notwithstanding the appointing authority's argument that the residents who claimed to have seen the incident were consistent with their interviews, their inconsistencies regarding such things as what hand was used to strike the alleged victim and what was said during the altercation were significant enough to undermine the admissibility of those statements (adopting 2009 N.J. AGEN LEXIS 250). In re Parker, OAL Dkt. No. CSV 2994-08, 2009 N.J. AGEN LEXIS 814, Civil Service Comm'n Decision (July 8, 2009).

Although a confidential informant's statements were inadmissible hearsay and there was no evidence that a senior correction officer brought a cellular phone into the prison or had a relationship with an inmate, other legally competent evidence supported the officer's removal where the cellular phone was found within the security perimeter, the phone contained the officer's personal contact information, and she attempted to contact the carrier of the illegally introduced cell telephone while it was inside the secured perimeter (rejecting 2009 N.J. AGEN LEXIS 5). In re Smith, OAL Dkt. No. CSV 10046-08, CSV 782-08 (On Remand), and CSV 4528-07 (On Remand), 2009 N.J. AGEN LEXIS 783, Final Decision (March 25, 2009).

Initial Decision (2008 N.J. AGEN LEXIS 791) adopted, which concluded that, although two reports from independent car repair businesses were admitted as hearsay evidence in a Lemon Law dispute, they were accorded little or no weight because their conclusions that the vehicle suffered from a nonconformity were not subject to cross-examination by the manufacturer. Ragusano v. Ford Motor Co., OAL Dkt. No. CMA 8077-08, 2008 N.J. AGEN LEXIS 1050, Final Decision (October 10, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 1269) adopted, which determined that the record was bereft of credible, competent evidence that a representative of the Police and Firemen's Retirement System or the Division of Pensions and Benefits made any misrepresentation or provided misinformation to public employees on which they reasonably relied to their detriment that holiday pay would be creditable for purposes of calculating their pensions or told union members, union officials, or other public employees that the change in a union contract would retroactively allow holiday pay received prior to a contract amendment to be considered creditable salary. In re Segear, OAL Dkt. No. TYP 01500-06, TYP 03718-06, TYP 03719-06, TYP 03877-06, 2008 N.J. AGEN LEXIS 1324, Final Decision (September 8, 2008).

Although parents who had articulated some very serious concerns about the extended school year for their nine-year-old emotionally disturbed son, presented and moved into evidence letters from providers of services to their son, those letters were hearsay because the writers were not available for cross-examination. While it is well established that hearsay is admissible in an administrative proceeding, some legally competent evidence had to support each ultimate finding of fact which did not occur in the immediate case. M.M. et al v. Ramsey Bd. of Educ., OAL Dkt. No. EDS 9036-08, 2008 N.J. AGEN LEXIS 827, Final Decision (August 29, 2008).

Audiotaped statement of non-testifying female dancer admitted at hearing, but would not be used to impute actual knowledge of prostitution to ABC licensee's management because the licensee did not have the opportunity to cross-examine her. N.J. Div. of Alcoholic Beverage Control v. S.B. Lazarus, Inc., OAL Dkt. No. ABC 2309-07, 2008 N.J. AGEN LEXIS 342, Initial Decision (June 2, 2008).

In an automobile insurance cancellation case, the insurer's contention that water incursion could not cause a digital odometer rollback, presented only by hearsay evidence, could not be found as fact without legally competent evidence to support it, and the insurer's subsequent submission of affidavits attesting to the same bare conclusion did not cure the residuum rule deficiency. Nguyen v. NJ Re-Insurance Co., OAL Dkt. No. BKI 2981-06, 2008 N.J. AGEN LEXIS 309, Initial Decision (April 23, 2008).

Initial Decision (2008 N.J. AGEN LEXIS 202) adopted, which considered the out-of-court statements of a cognitively impaired victim as to the source of the injury to his jaw, though there was a question as to whether the victim understood truth from a lie; testimony of witnesses and exhibits corroborated the hearsay statements. In re Murphy, OAL Dkt. No. CSV 12287-07, 2008 N.J. AGEN LEXIS 604, Final Decision (April 23, 2008).

In a special education case, there was no legally competent evidence in the record to support the hearsay assertions made in a parent's written statement that the consortium school bus drivers speed on the roadways, that her autistic son may be subject to an assault and could not yell out in his own defense because he does not speak, and that the driver assigned to the child's bus spoke only one English word; for that reason and because of the lack of opportunity for cross-examination, the statements were inadmissible. W.S. and P.S. ex rel. W.S. v. Ramsey Bd. of Educ., OAL DKT. NO. EDS 1544-08, 2008 N.J. AGEN LEXIS 89, Final Decision (February 20, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 826) adopted, which concluded that employee, a senior correction officer, did not facilitate a romantic relationship between an inmate and another correction officer

or act as their lookout to avoid detection; even if the Department of Corrections may have had reason to suspect that the employee aided or abetted the other officer's improper conduct, apart from uncorroborated hearsay originating from a highly unreliable source, there was no independent proof that the employee knew about the clandestine activity and failed to report it. While hearsay evidence is admissible at an administrative proceeding, the outcome cannot be based on hearsay alone, pursuant to N.J.A.C. 1:1-15.5(b). In re Livingston, OAL Dkt. No. CSV 05786-06, 2008 N.J. AGEN LEXIS 577, Merit System Board Decision (January 30, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 376) adopted, which concluded that, in a disciplinary action against a police officer, a four-year-old victim's hearsay statements to others regarding the officer exposing himself and masturbating in front of her were admissible because there was other legally competent evidence to support the allegations. In re Fisher, OAL Dkt. No. CSV 9722-00, 2007 N.J. AGEN LEXIS 1183, Final Decision (August 15, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 293) adopted, which determined that a county correction officer who injured his left knee during one attack by an inmate, and then subsequently injured his knee again in a second attack, was not entitled to accidental disability retirement benefits with the Police and Firemen's Retirement System. The officer presented no medical testimony to support his contention that he was permanently and totally disabled as a direct result of the second injury and instead relied on the report of a physician who had performed a partial medial meniscectomy on him after the first injury. This evidence was hearsay, was not subject to cross-examination, did not support any other expert testimony on behalf of the employee in that he presented none, and thus, was not competent under the residuum rule of N.J.A.C. 1:1-15.5. In re Muscarella, OAL Dkt. No. TYPPF 3879-2006N, 2007 N.J. AGEN LEXIS 880, Final Decision (July 10, 2007).

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 (2007 N.J. AGEN LEXIS 16) adopted, which concluded that where an employee was charged with misuse of a State vehicle, hearsay evidence regarding the car's odometer reading was given no weight; the supervisor who testified against the employee at the OAL hearing did not see the odometer and provided no business records or admissible document to verify the odometer reading, and the appointing authority presented no corroborative evidence to the hearsay. In re Wright, OAL Dkt. No. CSV 7850-05, 2007 N.J. AGEN LEXIS 1159, Final Decision (February 28, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 36) adopted, which determined that an animal control officer who injured his wrist while placing a stray dog into his truck and later suffered a stroke, was not entitled, as a member of the Public Employees' Retirement System, to accidental disability retirement allowance because the dog incident was not a traumatic event and did not directly result in the employee's conceded permanent and total disability. Under the residuum rule of N.J.A.C. 1:1-15.5, the statements in the employee's medical records and in the written opinions of his doctors, standing alone without competent evidence, were not sufficient to support a finding that the employee's permanent and total disability was a direct result of the dog incident. In re Pagano, OAL Dkt. No. TYPPE 03404-2006N, 2007 N.J. AGEN LEXIS 83, Final Decision (February 23, 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).

In disability discrimination case, although letter from employer's counsel was hearsay, such evidence is admissible in administrative hearings, subject to the residuum rule. Williams v. State Shuttle/Top Ten Leasing, Inc., OAL Dkt. No. CRT 5188-04, 2006 N.J. AGEN LEXIS 1094, Final Decision (August 17, 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).

Initial Decision (2006 N.J. AGEN LEXIS 294) adopted, which concluded that a videotaped statement made by a supervisor regarding acts for which several officers were disciplined was inadmissible hearsay because it was not supported by some legally competent evidence in the record; the "prior testimony" hearsay exception did not apply because the statement was made as part of a departmental investigation, not a hearing or deposition, leaving no opportunity for the officers to develop testimony by cross-examination. In re Soares, OAL Dkt. No. CSV 5707-02, CSV 5710-02, CSV 5713-02, CSV 5714-02 and CSV 5925-02, 2006 N.J. AGEN LEXIS 624, Merit System Board Decision (May 10, 2006).

In a disciplinary action against a senior correction officer for fraternization and familiarity with an inmate and conduct unbecoming a correction officer, letters seized from the inmate's cell, phone records, photographic evidence, and the fact that the inmate was assigned to the officer in the role of porter were all legally competent evidence supporting the inmate's out-of-court statement regarding his sexual relationship with the officer. In re Hutchings, OAL Dkt. No. CSV 2703-04, 2006 N.J. AGEN LEXIS 530, Final Decision (April 5, 2006).

In a proceeding against respondent for operating a solid waste facility without a permit, respondent's exception to an investigator's hearsay testimony failed, where the investigator had testified that the individual he observed dumping solid waste (who did not testify) said he had permission from respondent to do the dumping. Applying the residuum rule requires identifying the ultimate finding of fact that must be supported by a residuum of competent evidence, and here, the Solid Waste Management Act imposes strict liability. Thus, the ultimate finding of fact that the dumping occurred was well supported by the investigator's sworn testimony of observed actions corroborated by photographs taken by the investigator depicting the individual dumping solid waste into a container on the property occupied by respondent. N.J. Dep't of Envtl. Prot. v. Circle Carting, Inc., OAL Dkt. No. ESW 05939-03, 2006 N.J. AGEN LEXIS 227, Final Decision (February 21, 2006).

Initial Decision (2005 N.J. AGEN LEXIS 613) adopted, which concluded, in a disciplinary action against a correction officer for making inappropriate comments to a female officer who was his former girlfriend, that the officer's previous statements and report detailing what occurred were admissible as statements of a party-opponent; also admissible were the female officer's statements made to a superior immediately after the incident, which came within the excited utterance exception to the hearsay rule. In re Miller, OAL Dkt. No. CSV 8036-03, 2006 N.J. AGEN LEXIS 104, Final Decision (December 21, 2005).

Physician's note was properly admitted into evidence in support of employee's claim for pain and humiliation damages, although physician was not available for cross-examination. ALJ correctly ruled that hearsay is admissible in administrative hearings and that he would consider employer's inability to cross-examine the author and lack of advance notice when deciding the weight to accord this evidence (adopting in part, and rejecting in part Initial Decision, 2005 N.J. AGEN LEXIS 228). Ryan v. Freehold Reg'l High School Dist., OAL Dkt. No. CRT 6101-03, 2005 N.J. AGEN LEXIS 1167, Final Decision (November 10, 2005).

Deceased fellow employee's statement that worker arrived at 9:55 a.m. but recorded 9:15 a.m. as his arrival time was admissible hearsay because other legally competent evidence existed to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the appearance of arbitrariness; the other competent evidence was the notation made by the fellow employee on the sign-in sheet and the worker's own admission that he did not record his arrival time on the sign-in sheet until approximately 9:50 a.m. (adopting 2005 N.J. AGEN LEXIS 339). In re Gilfone, OAL Dkt. No. CSV 3637-03 (CSV 9662-02 On Remand), 2005 N.J. AGEN LEXIS 1191, Final Decision (September 7, 2005).

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).

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".

Case Notes

Physician's note was properly admitted into evidence without authentication, because employer raised absolutely no issues or objections regarding the authenticity of the note at the hearing. Ryan v. Freehold Reg'l High School Dist., OAL Dkt. No. CRT 6101-03, 2005 N.J. AGEN LEXIS 1167, Final Decision (November 10, 2005).

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.

(e) Testimony of a witness may be presented by telephone if, before the hearing begins, the judge finds there is good cause for permitting the witness to testify by telephone. In determining whether good cause exists, the judge shall consider:

1. Whether all parties consent to the taking of testimony by telephone;

2. Whether credibility is an issue;

3. The significance of the witness' testimony;

4. The reason for the request to take testimony by telephone; and

5. Any other relevant factor.

(f) Testimony of a witness may be given in narrative fashion rather than by question and answer format if the judge permits.

Amended by R.2008 d.151, effective June 16, 2008.
See: 40 N.J.R. 915(a), 40 N.J.R. 3617(a).
In the introductory paragraph of (e), deleted "all parties agree and" preceding "the judge" and inserted the final sentence; and added (e)1 through (e)5.

Case Notes

Construction code official authorized to determine particular fire code prevention requirements of building where building use deviates in any significant respect from building uses "specifically covered" by fire prevention subcode; hearing held by construction board of appeals was procedurally deficient. In the Matter of the "Analysis of Walsh Trucking Occupancy and Sprinkler System", 215 N.J.Super. 222, 521 A.2d 883 (App.Div.1987).

Except as otherwise provided by N.J.A.C. 1:1-15, by statute or by rule establishing a privilege, every person is qualified to be a witness (citing former N.J.A.C. 15.2(e)). 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).

Initial Decision (2008 N.J. AGEN LEXIS 202) adopted, which considered the out-of-court statements of a cognitively impaired victim as to the source of the injury to his jaw, though there was a question as to whether the victim understood truth from a lie; testimony of witnesses and exhibits corroborated the hearsay statements. In re Murphy, OAL Dkt. No. CSV 12287-07, 2008 N.J. AGEN LEXIS 604, Final Decision (April 23, 2008).

1:1-15.9 Expert and other opinion testimony

(a) If a witness is not testifying as an expert, testimony of that witness in the form of opinions or inferences is limited to such opinions or inferences as the judge finds:

1. May be rationally based on the perception of the witness; and

2. Are helpful to a clear understanding of the witness' testimony or to the fact in issue.

(b) If a witness is testifying as an expert, testimony of that witness in the form of opinions or inferences is admissible if such testimony will assist the judge to understand the evidence or determine a fact in issue and the judge finds the opinions or inferences are:

1. Based on facts and data perceived by or made known to the witness at or before the hearing; and

2. Within the scope of the special knowledge, skill, experience or training possessed by the witness.

(c) Testimony in the form of opinion or inferences which is otherwise admissible is not objectionable because it embraces the ultimate issue or issues to be decided by the judge.

(d) A witness may be required, before testifying in terms of opinions or inference, to be first examined concerning the data upon which the opinion or inference is based.

(e) Questions calling for the opinion of an expert witness need not be hypothetical in form unless, in the discretion of the judge, such form is required.

(f) If facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, those facts and data upon which an expert witness bases opinion testimony need not be admissible in evidence.

Case Notes

School district's failure to comply with an order to allow the parents' expert to observe the district's proposed placement for their three-year-old autistic child denied the parents' opportunity for an impartial due process hearing was denied because, in order for the testimony of an expert in the form of opinions or inferences to be admissible, it had to be based on facts and data perceived by or made known to the witness at or before the hearing; the testimony of the parents' expert would have been inadmissible unless she had facts and data concerning the proposed program. S.B. ex rel. P.B. v. Park Ridge Bd. of Educ., OAL Dkt. No. EDS 13813-08, 2009 N.J. AGEN LEXIS 318, Final Decision (April 21, 2009).

Adopting and modifying on other grounds Initial Decision (2005 N.J. AGEN LEXIS 1070), which found the testimony of the manufacturer's witness to be lacking in foundation and not credible where the witness testified that the after-market installation of a snowplow on the consumer's truck could have been the cause of the vehicle's intermittent shutting down without warning; although the administrative rules give an ALJ latitude in admitting evidence, an expert's opinion must still be based on factual evidence. Marago v. Daimler Chrysler Motors Co., OAL Dkt. No. CMA 8775-05, 2005 N.J. AGEN LEXIS 1070, Final Decision (December 22, 2005).

1:1-15.10 Offers of settlement inadmissible

Offers of settlement, proposals of adjustment and proposed stipulations shall not constitute an admission and shall not be admissible.

1:1-15.11 Stipulations

The parties may by stipulation agree upon the facts or any portion thereof involved in any controversy. Such a stipulation shall be regarded as evidence and shall preclude the parties from thereafter challenging the facts agreed upon.

1:1-15.12 Prior transcribed testimony

(a) If there was a previous hearing in the same or a related matter which was electronically or stenographically recorded, a party may, unless the judge determines that it is necessary to evaluate credibility, offer the transcript of a witness in lieu of producing the witness at the hearing provided that the witness' testimony was taken under oath, all parties were present at the proceeding and were afforded a full opportunity to cross-examine the witness.

(b) A party who intends to offer a witness' transcribed testimony at the hearing must give all other parties and the judge at least 10 days notice prior to the commencement of the hearing of that intention and provide each with a copy of the transcript being offered.

(c) Opposing parties may subpoena the witness to appear personally. Any party may produce additional witnesses and other relevant evidence at the hearing.

(d) Provided the requirements in (a) above are satisfied, the entire controversy may be presented solely upon such transcribed testimony if all parties agree and the judge approves.

(e) Prior transcribed testimony that would be admissible as an exception to the hearsay rule under Evidence Rule 63(3) is not subject to the requirements of this section.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a), inserted "or a related"; in (b), substituted "10" for "five" and inserted "prior to the commencement of the hearing".

Case Notes

Although prior transcribed testimony that would be admissible under N.J.R.E. 804 is not subject to the requirements of N.J.A.C. 1:1-15.12, it was unclear why the complaining witness failed to testify at the Human Services Specialist's OAL disciplinary hearing; remand was necessary to give the appointing authority the opportunity to produce the witness, or, alternatively, for a determination as to whether the witness was in fact "unavailable" within the meaning of N.J.R.E. 804 such that her prior testimony at the departmental hearing could be used in the OAL proceeding (remanding 2007 N.J. AGEN LEXIS 252). In re Caldwell, OAL Dkt. No. CSV 8952-05, 2007 N.J. AGEN LEXIS 1174, Remand Decision (July 11, 2007).

SUBCHAPTER 16. INTERVENTION AND PARTICIPATION

1:1-16.1 Who may apply to intervene; status of intervenor

(a) Any person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.

(b) Persons or entities permitted to intervene shall have all the rights and obligations of a party to the proceeding.

Case Notes

Interested parties were entitled to relevant information on consideration of automobile insurance rates of Market Transition Facility. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

Policyholders were "interested parties" with respect to access to information to be used by Department of Insurance on setting rates. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

An Administrative Law Judge concluded that a local school board had standing to intervene in and be heard on the issue of whether a charter school would be permitted to expand its Hebrew language partial immersion charter school to include additional grade levels because the law governing such actions, including N.J.S.A. 18A:36A-4(c), N.J.A.C. 6A:11-2.3, and N.J.A.C. 6A:11-2.6, makes it clear that a local board of education is a necessary party to such a proceeding and has not just the right but the obligation to make recommendations on any such appli-

cation. The same more than satisfied N.J.A.C. 1:1-16.1 et seq., which grants a right to intervene to any person or entity with a "statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case..." Hatikvah Int'l Acad. Charter Sch. v. N.J. Dep't of Educ. et al., OAL Dkt. No. EDU 03776-14, AGENCY Dkt. No. 76-3/14, 2014 N.J. AGEN LEXIS 176, Initial Decision, April 10, 2014.

Initial Decision (2006 N.J. AGEN LEXIS 79) adopted, which concluded that where petitioner, who was denied a waterfront development permit, no longer owned the subject property and the successor owners had not responded to notification of the opportunity to seek leave to intervene, there was no longer a justiciable controversy; accordingly, the petitioner's appeal was moot and would be dismissed. Spalliero v. N.J. Dep't of Envtl. Prot., Land Use Regulation, OAL Dkt. No. ESA 8164-03, 2006 N.J. AGEN LEXIS 225, Final Decision (March 3, 2006).

Administrative law judge was without jurisdiction to compel joinder of third party in school district's placement dispute with parents. B.R. v. Woodbridge Board, 95 N.J.A.R.2d (EDS) 159.

1:1-16.2 Time of motion

(a) A motion for leave to intervene may be filed at any time after a case is initiated.

(b) If made before a case has been filed with the Office of Administrative Law, a motion for leave to intervene shall be filed with the head of the agency having jurisdiction over the case. The agency head may rule upon the motion to intervene or may reserve decision for action by a judge after the case has been filed with the Office of Administrative Law.

(c) If made after a case has been filed with the Office of Administrative Law, a motion for leave to intervene shall be filed with the judge or, if the case has not yet been assigned to a judge, with the Clerk of the Office of Administrative Law.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (c), inserted "the judge or, if the case has not yet been assigned to a judge, with".

1:1-16.3 Standards for intervention

(a) In ruling upon a motion to intervene, the judge shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters.

(b) In cases where one of the parties is a State agency authorized by law to represent the public interest in a case, no movant shall be denied intervention solely because the movant's interest may be represented in part by said State agency.

(c) Notwithstanding (a) above, persons statutorily permitted to intervene shall be granted intervention.

Case Notes

Interested parties were entitled to relevant information on consideration of automobile insurance rates of Market Transition Facility. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

Policyholders were "interested parties" with respect to access to information to be used by Department of Insurance on setting rates. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

LLC that was a party to a proposed Gas Service Agreement (GSA) between it and a gas company (Company) won an order permitting it to intervene in proceedings brought by the Company for approval of the proposed GSA because it had a significant interest in the outcome of the case and would be directly affected by the outcome. That being so, the LLC satisfied the criteria for intervention in N.J.A.C. 1: 1-16.3(a). However, another utility that had distributed the LLC's natural gas but had notified the LLC that it was terminating the agreements under which such distribution had been provided was not entitled to intervene, and there was no basis for concluding that the other utility's involvement in the proceeding would add measurably and constructively to the conduct of the case. In re Petition of New Jersey Natural Gas Company For (1) Approval of a Gas Service Agreement Between Taqa Gen-X, LLC and New Jersey Natural Gas Company and (2) a Protective Order and Exemption From Public Disclosure of Confidential Information, Dkt. No. GO13010059, 2013 N.J. PUC LEXIS 293, Final Decision (September 18, 2013).

Large volume customers of a gas company were allowed to intervene in matter where Rate Counsel moved to dismiss petition to defer certain carrying costs. In the Matter of the Petition of South Jersey Gas Company for Authorization to Defer Carrying Costs, 94 N.J.A.R.2d (BRC) 139.

Telephone company's motion to intervene in proposed modification of a lease agreement between cable television operator and alternative competitive access provider granted. In the Matter of the Petition of Suburban Cablevision to Lease Excess Capacity, 94 N.J.A.R.2d (BRC) 125.

1:1-16.4 Notice of opportunity to intervene or participate

Where it appears to the judge that a full determination of a case may substantially, specifically and directly affect a person or entity who is not a party to the case, the judge, on motion of any party or on his or her own initiative, may order that the Clerk or any party notify the person or entity of the proceeding and of the opportunity to apply for intervention or participation pursuant to these rules.

Case Notes

Interested parties were entitled to relevant information on consideration of automobile insurance rates of Market Transition Facility. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

Policyholders were "interested parties" with respect to access to information to be used by Department of Insurance on setting rates. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

1:1-16.5 Alternative treatment of motions to intervene

Every motion for leave to intervene shall be treated, in the alternative, as a motion for permission to participate.

Case Notes

Interlocutory review of a decision of the commissioner overseeing storm mitigation proceedings denying intervention to but granting participant status under N.J.A.C. 1:1-16.5 and N.J.A.C. 1:1-16.6 to an

environmental organization (EO) was an appropriate exercise of the discretion of the Board of Public Utilities because the EO did not show that, in the absence of a grant of intervention, that there will be an inadequate review of the environmental aspects of the proposed program. Those entities that were already parties to the proceedings could be relied upon to factor environmental impacts into their assessment of proposals. Moreover, the EO can appropriately share its expertise in methane leakage and flood mitigation planning and projection by participating in conferences and site visits, and filing statements and briefs including its perspective on the various proposals. In re the Petition of Public Service Electric & Gas Company for Approval of the Energy Strong Program, BPU Dkt. Nos. EO13020155; GO130201562013, N.J. PUC LEXIS 307, Final Decision (October 16, 2013).

1:1-16.6 Participation; standards for participation

(a) Any person or entity with a significant interest in the outcome of a case may move for permission to participate.

(b) A motion to participate may be made at such time and in such manner as is appropriate for a motion for leave to intervene pursuant to N.J.A.C. 1:1-16.2. In deciding whether to permit participation, the judge shall consider whether the participant's interest is likely to add constructively to the case without causing undue delay or confusion.

(c) The judge shall determine the nature and extent of participation in the individual case. Participation shall be limited to:

1. The right to argue orally; or

2. The right to file a statement or brief; or

3. The right to file exceptions to the initial decision with the agency head; or

4. All of the above.

Case Notes

Interlocutory review of a decision of the commissioner overseeing storm mitigation proceedings denying intervention to but granting participant status under N.J.A.C. 1:1-16.5 and N.J.A.C. 1:1-16.6 to an environmental organization (EO) was an appropriate exercise of the discretion of the Board of Public Utilities because the EO did not show that, in the absence of a grant of intervention, that there will be an inadequate review of the environmental aspects of the proposed program. Those entities that were already parties to the proceedings could be relied upon to factor environmental impacts into their assessment of proposals. Moreover, the EO can appropriately share its expertise in methane leakage and flood mitigation planning and projection by participating in conferences and site visits, and filing statements and briefs including its perspective on the various proposals. In re the Petition of Public Service Electric & Gas Company for Approval of the Energy Strong Program, BPU Dkt. Nos. EO13020155; GO130201562013, N.J. PUC LEXIS 307, Final Decision (October 16, 2013).

Challenge by two environmental organizations to a sole commissioner's determination that they were not entitled to intervene in proceedings convened to consider upgrades to New Jersey's utility infrastructure in response to large scale weather events but were properly accorded "participant" status per N.J.A.C. 1:1-16.6 was subject to interlocutory review by the New Jersey Board of Public Utilities per N.J.A.C. 1:14-14.4(a), which was a rule of special applicability that supplemented N.J.A.C. 1:1-14.10, because review was in the interest of justice or for good cause shown. On the merits, while it was not improper for the organizations to be denied intervenor status, the scope of their involvement as "participants" that were entitled to submit briefs, was properly expanded to authorize the organizations to participate in oral arguments held in the proceedings. In re Petition of Public Service Electric and Gas Company for Approval of the Energy Strong Program, BPU Dkt. Nos: EO13020155; GO13020156, 2013 N.J. PUC LEXIS 279, Final Decision (September 18, 2013).

The administrative law judge may determine the extent of participation once it is found a participant has a significant stake in the outcome. The Division of ABC granted participant status and allowed to file a brief (citing former N.J.A.C. 1:1-12.6(c)). Canal St. Pub v. City of Paterson, 6 N.J.A.R. 221 (1982).

SUBCHAPTER 17. CONSOLIDATION OF TWO OR MORE CASES; MULTIPLE AGENCY JURISDICTION CLAIMS; DETERMINATIONS OF PREDOMINANT INTEREST

1:1-17.1 Motion to consolidate; when decided

(a) As soon as circumstances meriting such action are discovered, an agency head, any party or the judge may move to consolidate a case which has been transmitted to the Office of Administrative Law with any other contested case involving common questions of fact or law between identical parties or between any party to the filed case and any other person, entity or agency.

(b) This rule shall apply to cases:

1. Already filed with the Office of Administrative Law;

2. Commenced in an agency but not yet filed with the Office of Administrative Law; and

3. Commenced in an agency and not required to be filed with the Office of Administrative Law under N.J.S.A. 52:14F-8.

(c) The judge assigned to the case first transmitted to the Office of Administrative Law shall hear and rule upon the motion to consolidate.

(d) All motions to consolidate, including those involving predominant interest allegations, must be disposed of by interlocutory order prior to commencing the evidentiary hearing.

Case Notes

Two matters seeking due process proceedings with the Office of Special Education regarding an Individual Education Plan (IEP) for a child were consolidated on the motion of an administrative law judge because the criteria for consolidation in N.J.A.C. 1:1-17.1 were met. L.O. ex rel. W.L. v. Middletown Twp. Bd. of Educ., and Middletown Twp. Bd. of Educ. v. L.O. ex rel. W.L., OAL DKT. NO. EDS 1948-14, OAL DKT. NO. EDS 5937-14, AGENCY DKT. NOS. 2014 20497 and 2014 21122, 2014 N.J. AGEN LEXIS 456, Final Decision, July 31, 2014.

For consolidation to occur, a contested case must have been commenced; as no claim was filed with Dep't of Human Services, motion for consolidation denied (citing former N.J.A.C. 1:1-14.1(b)). A.N. v. Clark Bd. of Educ., 6 N.J.A.R. 360 (1983).

1:1-17.2 Form of motion; submission date

(a) A motion to consolidate shall address whether the matter should be consolidated considering the standards set forth in N.J.A.C. 1:1-17.3.

(b) Motions to consolidate cases which commenced in separate agencies and all replies thereto shall include a predominant interest allegation and shall be supported by a brief and affidavits. Copies of such motions and any responsive papers shall be filed with each agency if that agency is not party to the case.

(c) All consolidation motions involving cases commenced in two or more agencies shall be scheduled by the Office of Administrative Law for oral argument under N.J.A.C. 1:1-12.3.

(d) Motions for consolidation involving cases transmitted or to be transmitted to the Office of Administrative Law from a single agency shall be handled in accordance with N.J.A.C. 1:1-12.2.

Amended by R.1995 d.432, effective August 21, 1995.
See: 27 N.J.R. 2033(a), 27 N.J.R. 3155(a).
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Rewrote (a).

1:1-17.3 Standards for consolidation

(a) In ruling upon a motion to consolidate, the judge shall consider:

1. The identity of parties in each of the matters;

2. The nature of all the questions of fact and law respectively involved;

3. To the extent that common questions of fact and law are involved, the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases;

4. To the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party;

5. The advisability generally of disposing of all aspects of the controversy in a single proceeding; and

6. Other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or is ripe to be declared contested.

Case Notes

In action by parents of autistic child who resided in first school district, second school district was necessary and proper party to proceeding challenging second district's proposed discontinuance of services to child; child requested that he be allowed to continue education in second district, first district stated that it would continue to pay child's tuition at second district, second district was essentially barring child from its school; possibility that child could be barred by entire controversy doctrine from bringing action against second district. D.K. v. Roseland Bd. of Educ., D.N.J.1995, 903 F.Supp. 797.

Hybrid dual agency hearing ordered to determine propriety of multiple fees to real estate brokers serving as mortgage bankers/brokers in single transaction. Mortgage Bankers Association v. New Jersey Real Estate Commission, 102 N.J. 176, 506 A.2d 733 (1986).

Administrative law judge bound by standards of consolidation which focus on the identity of parties, the nature of the questions of fact and law involved, and the advisability of disposing of all aspects of this controversy in a single proceeding (citing former N.J.A.C. 1:1-14.3). A.N. v. Clark Bd. of Educ., 6 N.J.A.R. 360 (1983).

1:1-17.4 Review of orders to consolidate cases from a single agency

(a) Except as provided in (b) below, orders granting or denying the consolidation of cases commenced before a single State agency shall be subject to N.J.A.C. 1:1-14.10.

(b) An order consolidating any matter commenced before a single agency but not transmitted to the Office of Administrative Law shall be forwarded to the agency head for review.

1. The agency head's review of the judge's order shall be completed no later than 45 days from the entry of the judge's order, except when, for good cause shown and upon notice to all parties, the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head. Where the agency head does not act on review of the judge's order within 45 days, the judge's order shall be deemed adopted.

1:1-17.5 Multiple agency jurisdiction claims; standards for determining predominant interest

(a) When a motion to consolidate pertains to contested cases filed with two or more State agencies which are asserting jurisdiction, the judge shall determine which agency, if any, has the predominant interest in the conduct and outcome of the matter. In determining this question, the following factors shall be weighed:

1. Whether more than one agency asserting jurisdiction over a common issue has jurisdiction over the issue, and if more than one agency has jurisdiction, whether the jurisdiction is mandatory for one of the agencies;

2. Whether the common issue before the two agencies is, for either agency, the sole, major or dominant issue in dispute and whether its determination would either serve to moot the remaining questions or to affect substantially their resolution;

3. Whether the allegations involve issues and interests which extend beyond the immediate parties and are of particular concern to one or the other agency;

4. Whether the claims, if ultimately vindicated, would require specialized or particularized remedial relief available in one agency but not the other;

5. Whether the common issue is clearly severable from the balance of the controversy and thus will permit non-duplicative factual and legal determinations by each agency.

Case Notes

Complainant could proceed to agency that deferred action for determination of unresolved claim following successful determination. Balsley by Balsley v. North Hunterdon Regional School Dist. Bd. of Educ., 117 N.J. 434, 568 A.2d 895 (1990).

Student who prevailed on Education Law sex discrimination claim could seek counsel fees. Balsley by Balsley v. North Hunterdon Regional School Dist. Bd. of Educ., 117 N.J. 434, 568 A.2d 895 (1990).

1:1-17.6 Determination of motions involving consolidation of cases from multiple agencies; contents of order; exempt agency conduct

(a) In motions concerning multiple agencies, the judge shall initially determine the consolidation question. If consolidation is to be ordered, then a predominant interest determination must also be rendered in the consolidation order. If particular issues in the entire controversy are clearly severable, the judge's consolidation order shall specify which agency shall decide each such issue. Motions for consolidation involving predominant interest determinations must be decided within 45 days from the date of submission.

(b) If one agency is determined to have a predominant interest, that agency shall render the final decision on all issues within the scope of its predominant interest. The judge in the consolidation order shall specify the issues relating to the predominant issue and shall clearly identify the agency having the authority to issue a final decision on those issues.

(c) If there are requests for relief which may not be granted by the agency with the predominant interest, the judge shall in the consolidation order specify clearly which determinations by the agency with the predominant interest shall bind the agency subsequently considering any applications for relief.

(d) When an agency exempt under N.J.S.A. 52:14F-8(a) is determined to have a predominant interest in a contested case, the matter shall be heard by an administrative law judge unless the exempt agency decides, in its final order reviewing the judge's consolidation order to have the matter heard by its own personnel. If the exempt agency decides to have its own personnel hear the matter, but the hearer does not have jurisdiction over all issues within the scope of the agency's predominant interest, the hearer shall be designated a special administrative law judge as provided by N.J.S.A. 52:14F-6(b).

Case Notes

Complainant could proceed to agency that deferred action for determination of unresolved claim following successful determination. Balsley by Balsley v. North Hunterdon Regional School Dist. Bd. of Educ., 117 N.J. 434, 568 A.2d 895 (1990).

Student who prevailed on Education Law sex discrimination claim could seek counsel fees. Balsley by Balsley v. North Hunterdon Regional School Dist. Bd. of Educ., 117 N.J. 434, 568 A.2d 895 (1990).

1:1-17.7 Review of orders involving consolidation of cases from multiple agencies

(a) All orders granting or denying consolidation of cases commenced before multiple agencies shall be forwarded by the Office of Administrative Law to the respective agency heads for their review.

(b) The agency head's review of the judge's order shall be completed no later than 45 days from the entry of the judge's order, except when, for good cause shown and upon notice to all parties, the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head. Where the agency head does not act on review of the judge's order within 45 days, the judge's order shall be deemed adopted.

(c) Agency heads considering a judge's consolidation order are encouraged to consult and coordinate with each other before issuing a final order.

1:1-17.8 Initial decision in cases involving a predominant interest; order of review; extension of time limits

(a) The judge in a consolidated case involving a predominant interest shall consider all the issues and arguments in the case and shall render a single initial decision in the form prescribed by N.J.A.C. 1:1-18, disposing of all the issues in controversy.

(b) The initial decision shall be filed first with the agency which has the predominant interest. After rendering its final decision, the agency with the predominant interest shall transmit the record, including the initial decision and its final decision, to the other agency which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

(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

Failure by an Administrative Law Judge (ALJ) to enter into evidence exhibits proffered by the appointing authority during its defense of the claim of a corrections officer that he had been improperly suspended underpinned an order remanding the matter to the Office of Administrative Law because the existing record did not comport with the requirements in N.J.A.C. 1:1-18.1(a) that the ALJ's initial decision shall be based exclusively on testimony, documents and arguments accepted by the judge for consideration in rendering a decision or with the requirement in N.J.A.C. 1:1-18.3(c)11 that that the ALJ's written initial decision contain a list of witnesses and of exhibits admitted into evidence (remanding 2013 N.J. AGEN LEXIS 190). In re Eric Gandy, Dep't. of Corr., CSC Dkt. No. 2012-815, 2013 N.J. CSC LEXIS 469, Civil Service Comm'n Decision (August 15, 2013).

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 and list of hearing dates;

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 witnesses and 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).
Amended by R.2009 d.112, effective April 6, 2009.
See: 41 N.J.R. 5(a), 41 N.J.R. 1391(a).
In (c)4, inserted "and list of hearing dates"; and in (c)11, inserted "witnesses and of".

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).

Failure by an Administrative Law Judge (ALJ) to enter into evidence exhibits proffered by the appointing authority during its defense of the claim of a corrections officer that he had been improperly suspended underpinned an order remanding the matter to the Office of Administrative Law because the existing record did not comport with the requirements in N.J.A.C. 1:1-18.1(a) that the ALJ's initial decision shall be based exclusively on testimony, documents and arguments accepted by the judge for consideration in rendering a decision or with the requirement in N.J.A.C. 1:1-18.3(c)11 that that the ALJ's written initial decision contain a list of witnesses and of exhibits admitted into evidence (remanding 2013 N.J. AGEN LEXIS 190). In re Eric Gandy, Dep't. of Corr., CSC Dkt. No. 2012-815, 2013 N.J. CSC LEXIS 469, Civil Service Comm'n Decision (August 15, 2013).

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).

The N.J. Board of Public Utilities rejected a utility customer's exceptions to the initial decision on the customer's billing dispute with a utility company as issued by an Administrative Law Judge (ALJ) because the exceptions were not filed within the 13-day period following the mailing of the decision as required by N.J.A.C. 1:1-18.4. Moreover, even if the exceptions had been timely filed, the customer failed to propose specific findings of fact, conclusion of law or other dispositions as required by the rules and also attempted to present additional documentation that was not presented at the hearing, which was improper. Alva Muhammad v. Public Service Electric & Gas Co., BPU Dkt. No. EC12040303U; OAL Dkt. No. PUC 07198-12, 2013 N.J. PUC LEXIS 311, Final Decision (October 16, 2013).

Petitioners' exceptions could not be considered where the deadline for filing exceptions with the Department was September 1, 2009, petitioners' exceptions were postmarked two days after the deadline, on September 3, 2009, and were received a week after the deadline, on September 8, 2009. "Filing" was defined as "receipt." Fitting v. N.J. Dep't of Envtl. Prot., OAL Dkt. No. ESA 2714-07, 2009 N.J. AGEN LEXIS 753, Final Decision (September 25, 2009).

Board's exceptions to an ALJ's January 8, 2009, decision were timely filed where the exceptions were faxed to the Commissioner's office on the last day upon which they could be received — January 22, 2009. B.A. ex rel. M.A.A. v. Bd. of Educ. of Somerville, OAL Dkt. No. EDU 8740-07, 2009 N.J. AGEN LEXIS 730, Remand Decision (June 22, 2009).

Commissioner addressed petitioner's untimely exceptions to the Initial Decision; although the exceptions were filed more than 13 days after the decision, the petitioner was appearing pro se and attempted to timely file the exceptions, and N.J.S.A. 52:14B-10(c) allows for time extensions "for good cause shown." Shedaker v. N.J. Dep't of Envtl. Prot., Land Use Regulation, OAL Dkt. No. ELU 10281-07S, 2008 N.J. AGEN LEXIS 1416, Final Decision (December 8, 2008).

N.J.A.C. 1:1-18.4 makes no provision for replies to reply exceptions, and thus they were not considered. El-Hewie v. Bd. of Educ. of Bergen County Vocational School Dist., OAL Dkt. No. EDU 7673-06, Commissioner's Decision (April 10, 2008).

In an appeal from an Administrative Law Judge's finding that dancers were petitioner's employees for purposes of unemployment and disability contributions, additional evidence not presented at the hearing could not be submitted as part of petitioner's exception, nor could it be incorporated or referred to within exceptions. West 22 Entertainment, Inc. v. N.J. Dep't of Labor & Workforce Dev., OAL Dkt. No. LID 07169-05, 2008 N.J. AGEN LEXIS 149, Final Decision (January 16, 2008 (Issued).

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).

County was not entitled to relief on its claim that, prior to the issuance of the initial decision of the Administrative Law Judge (ALJ), it had entered into a binding settlement agreement between it and a wrongly-removed county correction officer to settle her back pay and benefit claims because the purported agreement was never brought before the ALJ or the Civil Service Commission as contemplated by N.J.A.C. 1:1-19.1. Nor did the county bring the purported agreement to the attention of the ALJ in a timely manner by a motion to reopen the record per N.J.A.C. 1:1-18.5(c) or, once the ALJ ruled, by the filing of a request per N.J.A.C. 1:1-18.8(d) to extend the deadline for the filing of its objections to the ALJ's ruling. Because the county did not bring the agreement to either the ALJ or the Commission, neither arbiter ever considered it and there was no basis for "reconsideration" of the matter as permitted by N.J.A.C. 4A:2-1.6(b). In re Keisha Henderson, Essex County, CSC Docket No. 2013-1607, 2013 N.J. CSC LEXIS 180, Final Decision (March 7, 2013).

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).

Civil Service Commission rejected the initial decision of an administrative law judge (ALJ) reinstating an officer who had been removed from a city police force for rule violations arising from his treatment of a juvenile arrestee including his failure to intervene when the officer's partner pointed a firearm at the arrestee's head in an effort to learn the whereabouts of controlled substances that the arrestee was claimed to have hidden and the officer's own conduct in inflicting bodily injury on the arrestee. Based on a review of the entire record, the

Commission concluded that the ALJ's decision was not supported by credible evidence, that the strict standards that had to be satisfied if such a decision was to be overturned, including those in N.J.A.C. 1:1-18.6(c), had been met, and that the city had acted properly in removing the officer. In re Lawrence Norman, City of Camden, CSC Dkt. No. 2009-3858, OAL Dkt. No. CSV 8101-09, 2013 N.J. CSC LEXIS 127, Final Decision (February 6, 2013).

ALJ's findings were arbitrary, capricious, unreasonable, and not supported by sufficient, competent, and credible evidence in the record where a videotape captured sufficient visual evidence demonstrating that a senior correction officer was not hit by a bundle of sheets that was thrown from the second tier of the housing unit; as such, the officer was properly disciplined for falsifying an incident report (rejecting 2011 N.J. AGEN LEXIS 406). In re Johnson, OAL Dkt. No. CSR 1352-11, 2011 N.J. CSC LEXIS 1102, Civil Service Comm'n Decision (October 5, 2011).

While the ALJ may have made a few factual mistakes in her determination, those findings were for ancillary claims that did not impact the charges against the senior correction officer, nor did they ultimately impact the ALJ's credibility determinations; as such, the ALJ's credibility determinations were proper and supported by credible evidence (adopting 2011 N.J. AGEN LEXIS 268). In re Gonzalez, OAL Dkt. No. CSV 10496-10, 2011 N.J. CSC LEXIS 1106, Final Decision (October 5, 2011).

In an action to suspend or revoke an acupuncturist's license, the ALJ's credibility findings were not arbitrary, capricious, or unreasonable and were supported by sufficient competent and credible evidence in the record. Although the ALJ may have erred in allowing an expert to comment on the credibility of the acupuncturist, the ALJ had an independent basis for finding that the acupuncturist was credible and had not acted inappropriately with a patient (adopting with modification 2010 N.J. AGEN LEXIS 179). In re Lee, OAL Dkt. No. BDS 03271-09, 2010 N.J. AGEN LEXIS 686, Final Decision (July 15, 2010).

In complainant's action alleging unlawful reprisal in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 et seq., the Director of the New Jersey Division on Civil Rights refused to set aside the factual findings of the administrative law judge (ALJ) that the complainant failed to establish that respondent's conduct and actions were in reprisal for his allegedly successful challenge of an attempt to take away his disability accommodations; the ALJ's findings were not arbitrary, capricious, or unreasonable, but were supported by competent and credible evidence in the record (adopting 2009 N.J. AGEN LEXIS 718). Gorson v. Dep't of Human Services, OAL Dkt. No. CRT 2380-08, 2009 N.J. AGEN LEXIS 1127, Final Decision (December 3, 2009).

ALJ's findings and credibility determinations were arbitrary and not supported by the evidence in the record. The credible evidence in the record established that the employee verbally threatened physical violence and brandished a knife at the victim after provoking a heated conversation; minor inconsistencies in the witness's testimony did not destroy the overall credibility of his testimony (rejecting 2009 N.J. AGEN LEXIS 542). In re Smith, OAL Dkt. No. CSV 2389-08, 2009 N.J. CSC LEXIS 1496, Final Decision (December 2, 2009).

ALJ's findings — that an employer's articulated reasons for selecting complainant for demotion and discharge as part of its reduction in force were mere pretext for discrimination based on complainant's Cuban origin — were supported by sufficient, competent, and credible evidence and the Director of New Jersey's Division on Civil Rights had limited authority to reject the ALJ's credibility determinations and factual findings; the ALJ justifiably determined that the employer's assertion that complainant was selected for transfer/demotion based on performance deficiencies was not credible. Luzardo v. Liberty Optical, OAL Dkt. No. CRT 03924-08, 2009 N.J. AGEN LEXIS 726, Final Decision (June 25, 2009).

ALJ's findings were not supported by sufficient, competent, and credible evidence in the record where there were two eyewitnesses to an incident of alleged patient abuse and the ALJ failed to consider the testimony from the second witness in his initial decision; there was not a scintilla of evidence that demonstrated the second witness fabricated the allegation against the cottage training technician, nor did the record demonstrate that the witness's credibility was lacking (rejecting 2008 N.J. AGEN LEXIS 486). In re Haslam, OAL Dkt. No. CSV 11724-07, 2009 N.J. AGEN LEXIS 798, Final Decision (June 14, 2009).

Although complainant contended that the landlord told him that he would not rent his owner-occupied two-unit dwelling to complainant because complainant had two children, the landlord denied making the statement and the Director of New Jersey Division on Civil Rights had limited authority to reject the ALJ's credibility determinations and the factual findings that the landlord did not violate New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1 et seq.; there was no basis to conclude that the ALJ's credibility determinations were arbitrary or were not based on sufficient competent evidence in the record. Almeida v. Moreira, OAL Dkt. No. CRT 01061-08, 2009 N.J. AGEN LEXIS 617, Final Decision (March 9, 2009).

In a disciplinary action against an employee for patient abuse, an ALJ's credibility determinations were not arbitrary, capricious, or unreasonable; while a co-worker was in close proximity when the alleged incident occurred, there was not enough information to substantiate his allegations. Specifically, the testimony indicated that the medical examination did not reflect that the patient sustained any injuries, and there were no witnesses to support the co-worker's allegations (adopting 2008 N.J. AGEN LEXIS 1212). In re Ziah, OAL Dkt. No. CSV 237-08, 2008 N.J. AGEN LEXIS 1212, Civil Service Comm'n Decision (October 8, 2008).

ALJ's determination that an eyewitness was not credible was unreasonable; although there were minor discrepancies between the witness's report of abuse and his testimony at the hearing, there was not a scintilla of evidence that demonstrated the witness fabricated the allegation of patient abuse against the cottage training technician. The technician's act of yelling profanities and throwing the patient's foot into the footrest of the wheelchair was sufficiently egregious to warrant his removal (rejecting 2008 N.J. AGEN LEXIS 363). In re Harris, OAL Dkt. No. CSV 8808-07, 2008 N.J. AGEN LEXIS 1066, Final Decision (September 24, 2008).

Senior correction officer was properly removed after the ALJ found, on conflicting evidence, that the officer struck the inmate with his closed fist at least five times in the face and head area and that while the officer was provoked by the inmate, the provocation did not justify the amount of force used. In contrast, a senior correction officer who assisted only in securing the inmate's legs, who did not kick or punch the inmate, and who was not immediately present when other officer struck the inmate in the face, should not have been removed (adopting 2008 N.J. AGEN LEXIS 284). In re Tegano, OAL Dkt. No. CSV 908-06 and 2976-06 (Consolidated), 2008 N.J. AGEN LEXIS 1067, Civil Service Comm'n Decision (September 10, 2008).

In a disciplinary action against an employee for patient abuse, an ALJ's credibility determinations were not arbitrary, capricious, or unreasonable where the findings were based on video surveillance, as well as the complaining witness's testimony, which was in stark contrast to what was observed on the tape (adopting 2007 N.J. AGEN LEXIS 731). In re Cohan, OAL Dkt. No. CSV 481-07, 2008 N.J. AGEN LEXIS 558, Merit System Board Decision (March 26, 2008).

In age and sex discrimination case under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., brought by 68-year-old male adjunct professor, there was no basis in the record for rejecting the ALJ's emphatic conclusion that employer's witness, the department chairperson, was a compelling and credible witness, notwithstanding: (1) the fact that chairperson's testimony concerning the number of times professor announced his retirement might have been inconsistent with certain other evidence on that point; or (2) professor's argument that chairperson's testimony reflected "sexist attitudes." Although chairperson observed that many adjuncts were homemakers who wanted to teach only one day a week, this statement in no way reflected an intent to replace male adjuncts with females. Sergent v. Montclair State Univ., OAL Dkt. No. CRT 03318-05, 2007 N.J. AGEN LEXIS 958, Final Decision (December 24, 2007).

ALJ's conclusion, on conflicting evidence, that a cottage training technician was not guilty of patient abuse was not arbitrary, capricious, or unreasonable; the finding that the slapping sound was the result of a latex glove rather than the slapping of a patient was supported by competent evidence, given the ALJ's advantage of hearing, seeing, and assessing the credibility of the witnesses before him (adopting 2007 N.J. AGEN LEXIS 468). In re Bice-Bey, OAL Dkt. No. CSV 8296-06, 2007 N.J. AGEN LEXIS 1161, Merit System Board Decision (November 21, 2007).

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 Envtl. 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).

In a disciplinary action brought against a senior correction officer after his positive drug test for marijuana, discrepancies regarding other specimens and the container used to collect the officer's sample did not undermine the reasonable probability that the officer's specimen had not been altered in any important respect between collection and analysis; the ALJ's findings otherwise were unreasonable and contrary to the credible evidence in the record. In re Gonsalvez, OAL Dkt. No. CSV 8601-02, 2006 N.J. AGEN LEXIS 1128, Final Decision (February 22, 2006), aff'd per curiam, No. A-4080-05T5, 2007 N.J. Super. Unpub. LEXIS 1369 (App.Div. October 31, 2007).

Merit System Board refused to disturb an ALJ's reversal of the removal of a Human Services Assistant on allegations of patient abuse where the findings were not arbitrary, capricious, or unreasonable; there was sufficient evidence in the record to support the ALJ's credibility determinations that the assistant would not have hit the patient and that the witness may not have actually seen what he believed he saw (adopting 2006 N.J. AGEN LEXIS 328). In re Greene, OAL Dkt. No. CSV 8697-05, 2006 N.J. AGEN LEXIS 864, Merit System Board Decision (September 20, 2006).

In a disciplinary action against a correction officer recruit on claims that he made inappropriate sexual comments, exposed himself, and masturbated in front of a fellow recruit, the ALJ's determination that the complaining witness was not credible was unreasonable and contrary to the evidence in the record where the witness's account of the critical details of the incident remained consistent, and the minor inconsistencies cited by the ALJ regarding the precise words uttered by the recruit, his exact location during the masturbation, and the time of the witness's telephone call to her supervisor were of little consequence; additionally, the record was devoid of any reason why the complaining witness would lie about what occurred during the shift in question. In re Royster, OAL Dkt. No. CSV 6360-04, 2005 N.J. AGEN LEXIS 1087, Final Decision (December 7, 2005), aff'd per curiam, No. A-2435-05T5, 2007 N.J. Super. Unpub. LEXIS 1260 (App.Div. April 19, 2007).

Strict standard in N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.6(c) for overturning the ALJ's credibility determination was not met as the ALJ's credibility determinations and conclusions were not in error or otherwise arbitrary, capricious or unreasonable; therefore, the charges against the senior corrections officer for failing to stop a fellow officer from striking a juvenile inmate with a wooden object and failing to obtain proper medical attention for the inmate were properly dismissed and the 6-month suspension reversed. The ALJ determined that the appointing authority's direct evidence failed to establish the officer's presence in the dormitory area and/or his viewing of the assault by even a preponderance of the credible evidence, while the officer's testimony regarding the events of the night was sufficiently credible; moreover, there was no evidentiary support that the circumstances heard or witnessed by the officer were so unusual as to require him to come into the dormitory (adopting 2005 N.J. AGEN LEXIS 230). In re Graham, OAL Dkt. No. CSV 0727-02, 2005 N.J. AGEN LEXIS 1172, Merit System Board Decision (September 21, 2005).

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).

Remand was appropriate and necessary, where the public interest would clearly not be served if the Racing Commission were compelled to determine trainer's suitability for license on incomplete record. Record indicated the evidence before ALJ was limited where: (1) no testimony was taken; (2) record did not indicate if burden of demonstrating suitability for license was placed on trainer as it should have been; and (3) it was not clear if trainer was given opportunity to prove his suitability for licensure. Height v. N.J. Racing Comm'n, OAL Dkt. No. RAC 06380-07, 2008 N.J. AGEN LEXIS 1113, Final Decision (March 20, 2008).

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. 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. If the Director 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 transmitting agency head, who shall issue the order and cause it to be served on all parties.

(f) Any order granting an extension must set forth the factual basis constituting good cause for the extension, and establish a new time for filing the decision or exceptions and replies. Extensions for filing initial or final decisions may not exceed 45 days from the original decision due date. Additional extensions of not more than 45 days each may be granted only for good cause shown.

Amended by R.1992 d.213, effective May 18, 1992.
See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).
Revised (c), (e) and (f).
Amended by R.2003 d.306, effective August 4, 2003.
See: 35 N.J.R. 1614(a), 35 N.J.R. 3551(a).
In (e), rewrote the last sentence.
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 "with a proposed form of extension order" following "writing" and "and the Director of the Office of Administrative Law" following the second occurrence of "parties"; and in (f), deleted "set forth the dates of any previous extensions," preceding "and establish", and substituted "for good cause shown" for "in the case of extraordinary circumstances".
Amended by R.2013 d.105, effective September 3, 2013.
See: 45 N.J.R. 149(a), 45 N.J.R. 2031(a).
In (c), deleted "and serve copies on all parties" following "transmitting agency head"; and in (e), deleted "and serve copies on all parties" following "Law", and substituted "10" for "ten".

Case Notes

Decision by ALJ recommending that college board of trustees follow its written procedures for denying reappointment to director of educational opportunity fund was "deemed adopted" by the board, where the board took no action to adopt, reject, or modify the ALJ's decision within 45 days, and did not seek an extension of time to do so within that period, there was no emergency justifying delay. Newman v. Ramapo College of N.J., 349 N.J.Super. 196, 793 A.2d 120.

Automatic approval of administrative law judge's recommendations was not applicable. Rollins Environmental Services (NJ), Inc. v. Weiner, 269 N.J.Super. 161, 634 A.2d 1356 (A.D.1993).

Provision for automatic adoption of administrative law judge's recommendations will not be literally enforced where agency head is not dragging his feet in issuing final decision. Rollins Environmental Services (NJ), Inc. v. Weiner, 269 N.J.Super. 161, 634 A.2d 1356 (A.D.1993).

It was proper exercise of discretion to grant nunc pro tunc extension of time for Hackensack Meadowlands Development Commission (HMDC) to issue its final decision regarding intermunicipal tax-sharing obligations under Hackensack Meadowlands Reclamation and Development Act. Town of Secaucus v. Hackensack Meadowlands Development Com'n, 267 N.J.Super. 361, 631 A.2d 959 (A.D.1993), certification denied 139 N.J. 187, 652 A.2d 175.

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).

Time limit for the Board of Public Utilities to render a final decision was extended when good cause and unforeseeable circumstances were shown pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8. Governor Chris Christie declared a state of emergency, and state offices were closed for a day and a half, and the Board had sent an electronic communication to the Office of Administrative Law advising that, as a result of the inclement weather, the Board would unexpectedly require an extension of time and would execute this request for extension with a vote at the rescheduled meeting. Vishindas Harjani v. Atlantic City Electric Co., OAL Dkt. No. PUC 9396-13, 2014 N.J. PUC LEXIS 21, January 29, 2014.

Fact that more time was needed to review the record underlying an initial decision of an Administrative Law Judge afforded good cause within the meaning of N.J.A.C. 1:1-18.8 for a 45-day extension of the statutory period for review and issuance of a final decision. Cheryl Hensle v. Public Service Electric & Gas Co., BPU Dkt. No. GC12110992U; OAL Dkt. No. PUC 11156-13, 2013 N.J. PUC LEXIS 308, Final Order (October 16, 2013).

Fact that the record underlying an initial decision of an Administrative Law Judge was voluminous afforded good cause within the meaning of N.J.A.C. 1:1-18.8 for a 45-day extension of the statutory period for review and issuance of a final decision. In re Long term Capacity Agreement Pilot Program, BPU Dkt. No. EO11010026; OAL Docket Nos. PUC 08022-12 and PUC 12918-122013 N.J. PUC LEXIS 302, Final Order (October 16, 2013).

County was not entitled to relief on its claim that, prior to the issuance of the initial decision of the Administrative Law Judge (ALJ), it had entered into a binding settlement agreement between it and a wrongly-removed county correction officer to settle her back pay and benefit claims because the purported agreement was never brought before the ALJ or the Civil Service Commission as contemplated by N.J.A.C. 1:1-19.1. Nor did the county bring the purported agreement to the attention of the ALJ in a timely manner by a motion to reopen the record per N.J.A.C. 1:1-18.5(c) or, once the ALJ ruled, by the filing of a request per N.J.A.C. 1:1-18.8(d) to extend the deadline for the filing of its objections to the ALJ's ruling. Because the county did not bring the agreement to either the ALJ or the Commission, neither arbiter ever considered it and there was no basis for "reconsideration" of the matter as permitted by N.J.A.C. 4A:2-1.6(b). In re Keisha Henderson, Essex County, CSC Docket No. 2013-1607, 2013 N.J. CSC LEXIS 180, Final Decision (March 7, 2013).

Challenge to extension of time under N.J.A.C. 1:1-18.8 for the Commissioner to issue a ruling on an appeal was actually a motion for leave to appeal an interlocutory order, rather than a "motion for emergent

relief"; interlocutory review of an administrative ruling may be granted in the interest of justice or for good cause shown, and petitioner failed to demonstrate good cause. Toddlertown Child Care Center v. Bd. of Educ. of Irvington, OAL Dkt. Nos. EDU 3041-07 and EDU 5430-07 (CONSOLIDATED), SB No. 35-07, 2007 N.J. AGEN LEXIS 974 (December 19, 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).

Although an appellant's exceptions were untimely, his exceptions and the appointing authority's responses were both received prior to the matter being considered by the Board; consequently, good cause existed to accept the appellant's exceptions. In re Zorn, OAL Dkt. No. CSV 8501-05, 2006 N.J. AGEN LEXIS 633, Remand Decision (April 5, 2006).

SUBCHAPTER 19. SETTLEMENTS AND WITHDRAWALS

1:1-19.1 Settlements

(a) Where the parties to a case wish to settle the matter, and the transmitting agency is not a party, the judge shall require the parties to disclose the full settlement terms:

1. In writing, by consent order or stipulation signed by all parties or their attorneys; or

2. Orally, by the parties or their representatives.

(b) Under (a) above, if the judge determines from the written order/stipulation or from the parties' testimony under oath that the settlement is voluntary, consistent with the law and fully dispositive of all issues in controversy, the judge shall issue an initial decision incorporating the full terms and approving the settlement.

(c) Where the parties to a case wish to settle the matter and the transmitting agency is a party to the case, if the agency head has approved the terms of the settlement, either personally or through an authorized representative, the parties shall:

1. File with the Clerk and the assigned judge, if known, a stipulation of dismissal, signed by the parties, their attorneys, or their non-lawyer representatives when authorized pursuant to N.J.A.C. 1:1-5.5(f); or

2. If the parties prefer to have the settlement terms incorporated in the record of the case, then the full terms of the settlement shall be disclosed in a consent order signed by the parties, their attorneys, or their non-attorney representatives when authorized pursuant to N.J.A.C. 1:1-5.5(f). The consent order shall be filed with the Clerk and the assigned judge, if known.

(d) The stipulation of dismissal or consent order under (c) above shall be deemed the final decision.

Amended by R.1987 d.461, effective November 16, 1987.
See: 19 N.J.R. 1593(a), 19 N.J.R. 2131(c).
(b)1.-2. added to clarify that in those cases where the agency head, either in person or through counsel, has consented to the settlement terms.
Amended by R.1995 d.300, effective June 19, 1995.
See: 27 N.J.R. 1343(a), 27 N.J.R. 2383(a).
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In the introductory paragraph of (a), substituted "transmitting agency is not a party" for "agency head has not consented to the settlement terms"; and rewrote (c).

Case Notes

Emotionally disturbed child and his parent were "prevailing parties". E.P. by P.Q. v. Union County Regional High School Dist. No. 1, D.N.J.1989, 741 F.Supp. 1144.

Because counsel for a police department and counsel for a terminated trainee failed to comply with the requirements in N.J.A.C. 1:1-19.1 regarding the submission of their settlement agreement to the Office of Administrative Law, the Office would neither issue an order or decision memorializing the same nor provide enforcement of the agreement in the event that either party claimed that the other had violated it. In re Pierce, City of Hackensack Police Dep't, OAL DKT. NO. CSV 08936-13, AGENCY DKT. NO. 2013-3358, 2014 N.J. AGEN LEXIS 401, Initial Decision, June 17, 2014.

Despite a perceived lack of clarity in a Settlement Agreement executed by a customer and a public utility to settle a billing dispute, which agreement was then approved by an administrative law judge (ALJ), the New Jersey Board of Public Utilities concluded that the ALJ's initial decision was properly affirmed in accord with N.J.A.C. 1:1-19.1(a)(1) because representatives of each of the parties had confirmed to the Board that the parties were satisfied with the Agreement and the resolution contained therein and the customer's attorney in fact had advised the Board that she did not want to pursue the matter any further. Maylock Realty Corp. v. N.J. Bd. of Pub. Utils., BPU Dkt. No. EC12030187U; OAL Dkt. No. PUC 04966-2012N, 2013 N.J. PUC LEXIS 196, Final Agency Action (June 21, 2013).

County was not entitled to relief on its claim that, prior to the issuance of the initial decision of the Administrative Law Judge (ALJ), it had entered into a binding settlement agreement between it and a wrongly-removed county correction officer to settle her back pay and benefit claims because the purported agreement was never brought before the ALJ or the Civil Service Commission as contemplated by N.J.A.C. 1:1-19.1. Nor did the county bring the purported agreement to the attention of the ALJ in a timely manner by a motion to reopen the record per N.J.A.C. 1:1-18.5(c) or, once the ALJ ruled, by the filing of a request per N.J.A.C. 1:1-18.8(d) to extend the deadline for the filing of its objections to the ALJ's ruling. Because the county did not bring the agreement to either the ALJ or the Commission, neither arbiter ever considered it and there was no basis for "reconsideration" of the matter as permitted by N.J.A.C. 4A:2-1.6(b). In re Keisha Henderson, Essex County, CSC Docket No. 2013-1607, 2013 N.J. CSC LEXIS 180, Final Decision (March 7, 2013).

Initial Decision (2009 N.J. AGEN LEXIS 156) adopted, which found that once a public employee voluntarily determines to settle a matter, all proceedings are immediately discontinued, the matter ceases to go forward, and the matter is to be referred back to the originating agency; nowhere in N.J.A.C. 1:1-19.1 is there any requirement to delay the ministerial process of transmitting the matter back to the sending agency or to give the employee any additional opportunity to reconsider his decision. In re Tarver, OAL Dkt. No. CSV 4713-08, 2009 N.J. AGEN LEXIS 986, Final Decision (April 29, 2009).

Initial Decision (2009 N.J. AGEN LEXIS 156) adopted, which found that a senior correction officer who voluntarily and unilaterally agreed to

settle his due process appeal could not later attempt to withdraw from the agreement where the record demonstrated that he signed the agreement and was examined as to its content by competent counsel. In re Tarver, OAL Dkt. No. CSV 4713-08, 2009 N.J. AGEN LEXIS 986, Final Decision (April 29, 2009).

Initial Decision (2007 N.J. AGEN LEXIS 798) adopted, which granted the appointing authority's motion to enforce a settlement in a nurse's disciplinary action where the nurse knowingly and voluntarily authorized her agent and representative to settle the matter and where her reasons for rejecting the settlement at a later date did not involve coercion, deception, fraud, undue pressure, or unseemly conduct, but a mere change of heart; the fact that the settlement had not been signed was of no consequence where settlement agreements could be reached orally. In re Smith, OAL Dkt. No. CSV 6370-07, 2008 N.J. AGEN LEXIS 512, Final Decision (January 30, 2008).

Initial Decision (2007 N.J. AGEN LEXIS 261) adopted, which concluded that the terms of an unsigned "draft" agreement between a teacher and board of education constituted the terms of an agreed upon settlement that bound both parties, subject to approval by the Commissioner; the teacher's attorney had advised the school board that the settlement was acceptable, but the teacher objected to it. In re Tenure Hearing of Jones, OAL Dkt. No. EDU 8618-05S, 2007 N.J. AGEN LEXIS 494, Commissioner's Decision (August 9, 2007).

N.J.A.C. 1:1-19.1 does not require that respondent specifically state under oath that the settlement was voluntary. The ALJ may determine from the entirety of the sworn testimony (including certifications) of all the parties whether a voluntary settlement exists (decided under former version of rule). In re Tenure Hearing of Jones, OAL Dkt. No. EDU 8618-05S, 2007 N.J. AGEN LEXIS 494, Commissioner's Decision (August 9, 2007).

1:1-19.2 Withdrawals

(a) A party may withdraw a request for a hearing or a defense raised by notifying the judge and all parties. Upon receipt of such notification, the judge shall discontinue all proceedings and return the case file to the Clerk. If the judge deems it advisable to state the circumstances of the withdrawal on the record, the judge may enter an initial decision memorializing the withdrawal and returning the matter to the transmitting agency for appropriate disposition.

(b) When a party withdraws, the Clerk shall return the matter to the agency which transmitted the case to the Office of Administrative Law for appropriate disposition.

(c) After the Clerk has returned the matter, a party shall address to the transmitting agency head any motion to reopen a withdrawn case.

Amended by R.1990 d.71, effective February 5, 1990.
See: 21 N.J.R. 3589(a), 22 N.J.R. 334(b).
In (a): deleted language specifying the entering of an initial decision for withdrawals and added, "discontinue . . . for appropriate disposition".
In (b): specified that Clerk shall return matter to agency which had transmitted the case to OAL.
In (c): deleted language referring to decision granting withdrawal.
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): deleted "in writing" from withdrawal procedure request.

Law Review and Journal Commentaries

Law Against Discrimination. Judith Nallin, 138 N.J.L.J. No. 15, 23 (1994).

Case Notes

Discharged employee's election to file national origin discrimination charge with the Equal Employment Opportunity Commission pursuant to federal law precluded employee from bringing state court national origin discrimination claim after the EEOC determined that employee failed to demonstrate probable cause for administrative determination of discrimination. Hernandez v. Region Nine Housing Corp., 286 N.J.Super. 676, 670 A.2d 95 (A.D.1996).

Law Against Discrimination did not jurisdictionally prevent plaintiff from filing complaint in superior court after withdrawing her administrative complaint. Aldrich v. Manpower Temporary Services, 277 N.J.Super. 500, 650 A.2d 4 (A.D.1994), certification denied 139 N.J. 442, 655 A.2d 445.

Former employee was not entitled to reopening of the withdrawal of her good faith layoff appeal under N.J.A.C. 1:1-19.2. She presented no evidence that she was not properly represented nor that she signed a settlement agreement under duress. A review of agency records revealed that her layoff rights were property applied. In re Carolyn McKnight, Newark, CSC Dkt. No. 2012-2589, 2013 N.J. CSC LEXIS 211, Final Decision (April 3, 2013).

SUBCHAPTER 20. MEDIATION BY THE OFFICE OF ADMINISTRATIVE LAW

1:1-20.1 Scheduling of mediation

(a) Mediation may be scheduled, at the discretion of the Director, when requested by the transmitting agency, or by all parties to a hearing or when requested by an agency with regard to a matter which has not been transmitted as a contested case. Mediation may be scheduled in any matter where the transmitting agency has a mediation program available to the parties to the case only upon request of the agency head for good cause and with the consent of the Director.

(b) When a request for mediation is granted, the Office of Administrative Law shall supply the parties with a list containing not less than six administrative law judges as suggested mediators. Each party may strike two judges from the list and the Office of Administrative Law will not assign any judge who has been stricken from the list to conduct the mediation. The Office of Administrative Law shall notify the parties of the assigned mediator.

New Rule, R.1999 d.413, effective December 6, 1999.
See: 31 N.J.R. 2290(a), 31 N.J.R. 2717(a), 31 N.J.R. 3999(a).
Former N.J.A.C. 1:1-20.1, Conduct of mediation, recodified to N.J.A.C. 1:1-20.2.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a), inserted "or when requested by an agency with regard to a matter which has not been transmitted as a contested case".
Amended by R.2008 d.151, effective June 16, 2008.
See: 40 N.J.R. 915(a), 40 N.J.R. 3617(a).
In the second sentence of (a), substituted "may" for "shall not" and inserted "only upon request of the agency head for good cause and with the consent of the Director".

1:1-20.2 Conduct of mediation

(a) Mediation shall be conducted in accordance with the following procedures:

1. Discovery to prepare for mediation shall be permitted at the discretion of the judge.

2. All parties to the mediation shall make available for the mediation a person who has authority to bind the party to a mediated settlement.

3. Parties may not use any information gained solely from the mediation in any subsequent proceeding.

4. Parties may not subpoena the mediator for any subsequent proceeding.

5. Parties may not disclose to any subsequently assigned judge the content of the mediation discussion.

6. Parties shall mediate in good faith.

7. Any agreement of the parties derived from the mediation shall be binding on the parties and will have the effect of a contract in subsequent proceedings.

(b) If any party fails to appear at the mediation, without explanation being provided for the nonappearance, the mediator shall return the matter to the Clerk for scheduling a hearing or for return of the matter to the agency and, where appropriate, the mediator may consider sanctions under N.J.A.C. 1:1-14.14.

(c) The mediator may at any time return the matter to the Clerk and request that a hearing be scheduled before another judge or that the matter be returned to the agency.

(d) No particular form of mediation is required. The structure of the mediation shall be tailored to the needs of the particular dispute. Where helpful, parties may be permitted to present any documents, exhibits, testimony or other evidence which would aid in the attainment of a mediated settlement.

(e) In no event shall mediation efforts continue beyond 30 days from the date of the first scheduled mediation unless this time limit is extended by agreement of all the parties.

Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
In (a)5, revised N.J.A.C. citation.
Recodified from N.J.A.C. 1:1-20.1 and amended by R.1999 d.413, effective December 6, 1999.
See: 31 N.J.R. 2290(a), 31 N.J.R. 2717(a), 31 N.J.R. 3999(a).
In (a), deleted a former 2, and recodified former 3 through 7 as 2 through 6. Former N.J.A.C. 1:1-20.2, Conclusion of mediation, recodified to N.J.A.C. 1:1-20.3.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Added new (a)1; recodified former (a)1 through (a)6 as (a)2 through (a)7; in (a)5, inserted "or for return of the matter to the agency" and "the mediator"; and in (a)6, inserted "or that the matter be returned to the agency".
Amended by R.2009 d.112, effective April 6, 2009.
See: 41 N.J.R. 5(a), 41 N.J.R. 1391(a).
Rewrote (a)3 and (a)4; added new (a)5 through (a)7; recodified former (a)5 through (a)7 as (b) through (d); and recodified former (b) as (e).

1:1-20.3 Conclusion of mediation

(a) If the transmitting agency is a party to the mediation, successful mediation shall be concluded by a mediation agreement.

(b) If the transmitting agency is not a party, successful mediation shall be concluded by initial decision. The initial 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.

(c) If mediation does not result in agreement, the matter shall be returned to the Clerk for scheduling appropriate proceeding or for return to the transmitting agency.

Amended by R.1997 d.158, effective April 7, 1997.
See: 29 N.J.R. 282(a), 29 N.J.R. 1295(a).
In (c), inserted "or for return to the transmitting agency".
Recodified from N.J.A.C. 1:1-20.2 by R.1999 d.413, effective December 6, 1999.
See: 31 N.J.R. 2290(a), 31 N.J.R. 2717(a), 31 N.J.R. 3999(a).
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), inserted the last sentence.

SUBCHAPTER 21. UNCONTESTED CASES IN THE OFFICE OF ADMINISTRATIVE LAW

1:1-21.1 Transmission to the Office of Administrative Law

(a) Any agency head may request under N.J.S.A. 52:14F-5(o) the assignment of an administrative law judge to conduct an uncontested case, including rule making and investigatory hearings. Public or investigatory hearings conducted pursuant to a rulemaking shall proceed in accordance with N.J.S.A. 52:14B-4(g). The agency head may make such a request by letter and by completing the applicable portions of an N.J.A.C. 1:1-8.2 transmittal form.

(b) The letter of request and transmittal form shall be filed with the Clerk of the Office of Administrative Law, together with any attachments, after all pleadings and notice requirements have been concluded.

1:1-21.2 Discovery

(a) Unless other discovery arrangements are requested by the transmitting agency and agreed to by the Director of the Office of Administrative Law, discovery in uncontested cases shall consist of the following:

1. If an agency or a county/local governmental entity is a party to an uncontested case hearing, and the subject of the case is the county/local entity's or agency's action, proposed action or refusal to act, a party shall be permitted

to review the entity's or agency's relevant file or files on the matter. Copies of any document in the file or files shall be provided to the party upon the party's request and for a reasonable copying charge. The agency or county/local entity may refuse to disclose any document subject to a bona fide claim of privilege.

2. If the subject of an uncontested case hearing is not a county/local entity's or agency's action, proposed action or refusal to act, each party shall provide each other party copies of any documents and a list with names, addresses and telephone numbers of any witnesses including experts which the party intends to introduce at the hearing. A summary of the testimony expected to be provided by each witness shall be included. These items shall be exchanged at least 10 days prior to the hearing, unless the judge determines that the information could not reasonably have been disclosed within that time.

(b) Any discovery other than that permitted in (a)1 and 2 above shall be by motion to the judge and for good cause shown.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a)2, substituted "10" for "five"; and deleted (c).

1:1-21.3 Representation

In uncontested cases conducted by the Office of Administrative Law, representation shall not be regulated by N.J.A.C. 1:1-5.

1:1-21.4 Conduct of uncontested cases

(a) Unless other arrangements are requested by the transmitting agency and agreed to by the Director of the Office of Administrative Law, uncontested cases shall proceed in the following manner:

1. Uncontested cases shall begin with the judge reading the case title and the docket number, asking the representatives or parties present to state their names for the record and stating briefly the matter in dispute. The judge shall also, unless all parties are represented by counsel or otherwise familiar with the procedures, state the procedural rules for the hearing. The judge may also permit any stipulations, settlement agreements or consent orders entered into by any of the parties prior to the hearing to be entered into the record.

2. In a sequence determined by the judge, each party to the proceeding shall be permitted to make a presentation setting forth the factual and/or legal basis for its position. When the parties are disputing the facts, the judge shall administer an oath to any party who wishes to make a presentation. The judge may also permit the parties to ask questions, either at the conclusion of each presentation or at the conclusion of all presentations, in the manner and to the extent that he or she determines most suitable.

3. Subject to a bona fide claim of privilege, documents or other tangible items or the written statements of an individual may be entered into the record if they are helpful to an understanding of the situation.

4. No rules of evidence apply to these proceedings.

5. Proposed findings of fact, conclusions of law, briefs, forms of order or other dispositions may be submitted prior to the beginning of the hearing. Such documents may not be accepted thereafter, nor required of the parties at any time unless all parties agree to provide such submissions and the time for issuing the judge's report is not extended.

6. The proceeding shall be deemed concluded on the date the judge determines that no further presentations under (a)2 above shall be necessary.

1:1-21.5 Report

(a) In uncontested cases, the judge shall issue a report to the transmitting agency head which shall deal with each issue presented. The report shall explain the subject matter of the proceeding and the position of each party, shall recommend a course of action and shall set forth the factual or legal basis for the recommendation.

(b) The report may be rendered in writing or orally on the record at the hearing before the parties. If the report is rendered orally, it shall be transcribed and filed with the agency head and mailed to the parties.

(c) The report shall be issued within 45 days after the hearing is concluded unless expedition is required.

1:1-21.6 Extensions

Requests for an extension of any time limit associated with an uncontested case shall be taken to the transmitting agency head.

Amended by R.1987 d.464, effective November 16, 1987.
See: 19 N.J.R. 1593(b), 19 N.J.R. 2131(d).
Repealed old 21.6 exceptions and cross-exceptions and recodified this section from 21.7.

APPENDIX

CODE OF JUDICIAL CONDUCT FOR ADMINISTRATIVE LAW JUDGES

PREAMBLE

The Code of Judicial Conduct for Administrative Law Judges is intended to establish basic ethical conduct standards for administrative law judges. The Code is intended to govern the conduct of these administrative law judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct. This Code is based upon the Model Code of Judicial Conduct as adopted by the ABA on August 7, 1990 and the New Jersey Code of Judicial Conduct.

The text of the Canons is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is a statement of what is or is not appropriate conduct, but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons are rules of reason. They should be applied consistent with constitutional requirements, statutes, administrative rules, and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions. The Code is designed to provide guidance to administrative law judges and to provide a structure for regulating conduct.

CANON 1

AN ADMINISTRATIVE LAW JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE ADMINISTRATIVE JUDICIARY

An independent and honorable administrative judiciary is indispensable to justice in our society. An administrative law judge should participate in establishing, maintaining, and enforcing, high standards of conduct, and shall personally observe those standards so that the integrity and independence of the administrative judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary: Deference to the judgments and rulings of administrative proceedings depends upon public confidence in the integrity and independence of administrative law judges. The integrity and independence of administrative law judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the administrative judiciary is maintained by the adherence of each administrative law judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the administrative judiciary and thereby does injury to the system of government under law.

CANON 2

AN ADMINISTRATIVE LAW JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. An administrative law judge shall respect and comply with the law and at all times shall act in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

Commentary: Public confidence in the administrative judiciary is eroded by irresponsible or improper conduct by judges. An administrative law judge must avoid all impropriety and appearance of impropriety. An administrative law judge must expect to be the subject of constant public scrutiny. An administrative law judge must therefore expect, and accept restrictions on the administrative law judge's conduct that might be viewed as burdensome by the ordinary citizen, and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by administrative law judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the administrative law judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

See also Commentary under Canon 2C.

B. An administrative law judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. An administrative law judge shall not lend the prestige of the office to advance the private interests of the administrative law judge or others; nor shall an administrative law judge convey or permit others to convey the impression that they are in a special position to influence the judge. An administrative law judge shall not testify voluntarily as a character witness.

Commentary: Maintaining the prestige of the administrative judiciary is essential to a system of government in which the administrative judiciary must to the maximum extent possible, function independently of the executive and legislative branches. Respect for the office facilitates the orderly conduct of legitimate administrative judicial functions. Administrative law judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for an administrative law judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, official letterhead must not be used for conducting an administrative law judge's personal business.

An administrative law judge must avoid lending the prestige of the office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family.

Although an administrative law judge should be sensitive to possible abuse of the prestige of the office, an administrative law judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

An administrative law judge must not testify voluntarily as a character witness because to do so may lend the prestige of the office in support of the party for whom the administrative law judge testifies. Moreover, when an administrative law judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. An administrative law judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, an administrative law judge should discourage a party from requiring the judge to testify as a character witness.

C. An administrative law judge shall not hold membership in any organization that practices invidious discrimination as defined by Federal law and the New Jersey Law Against Discrimination.

Commentary: It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination. Membership of an administrative law judge in an organization that practices invidious discrimination may give rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on how the organization selects members and other relevant factors, such as, that the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of categories prohibited by Federal law or the New Jersey Law Against Discrimination persons who would otherwise be admitted to membership. See New York State Club Ass'n Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

Although Canon 2C relates only to membership in organizations that invidiously discriminate, in addition, it would be a violation of Canon 2 and Canon 2A for an administrative law judge to arrange a meeting at a club that the judge knows practices invidious discrimination, or for the judge to regularly use such a club. Moreover, public manifestation by an administrative law judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the administrative judiciary, in violation of Canon 2A.

When a person who is an administrative law judge at the time this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canon 2 and Canon 2A, the administrative law judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but the judge is required to suspend participation in any activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible, the administrative law judge is required to resign immediately from the organization.

CANON 3

AN ADMINISTRATIVE LAW JUDGE SHALL PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of an administrative law judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply.

A. Adjudicative responsibilities:

(1) An administrative law judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) An administrative law judge shall be faithful to the law and maintain professional competence in it. A judge

shall be unswayed by partisan interests, public clamor, or fear of criticism.

(3) An administrative law judge shall maintain order and decorum in proceedings before the judge.

(4) An administrative law judge shall be patient, dignified, and courteous to litigants, witnesses, attorneys, representatives, and others with whom the judge deals in an official capacity, and shall require similar conduct of attorneys, representatives, staff members, and others subject to the judge's direction and control.

Commentary: The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the judge. Judges can be efficient and businesslike while being patient and deliberate.

(5) An administrative law judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff and others subject to the judge's direction and control to do so.

Commentary: A judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, the media, and others an appearance of bias. A judge must be alert to avoid behavior that may be perceived as prejudice.

(6) An administrative law judge shall accord to all persons who are legally interested in a proceeding, or their representative, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications as to substantive matters concerning a pending or impending proceeding. On notice, a judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge, by amicus curiae or as otherwise authorized by law, if the judge affords the parties reasonable opportunity to respond. A judge may with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Commentary: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding except as authorized by law, but does not preclude a judge from consulting with other judges or subordinate personnel whose function is to aid the judges in carrying out adjudicative responsibilities. To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

(7) An administrative law judge shall dispose of all judicial matters promptly, efficiently, and fairly.

Commentary: In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Prompt disposition of the judge's business requires a judge to devote adequate time to his or her duties, to be punctual in attending hearings and expeditious in determining matters under submission, and to insist that other subordinate officials, litigants, and their representatives cooperate with the judge to that end.

(8) An administrative law judge shall abstain from public comment about a pending or impending proceeding in any court or tribunal and shall require similar abstention on the part of personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the hearing procedures of agencies.

Commentary: "Agency personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by rules of professional conduct. This subsection is not intended to preclude participation in an association of judges merely because such association makes public comments about a pending or impending proceeding in the administrative process. The subsection is directed primarily at public comments by a judge concerning a proceeding before another judge.

(9) An administrative law judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

B. Administrative responsibilities:

(1) An administrative law judge shall diligently discharge assigned administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other administrative law judges.

(2) An administrative law judge shall require staff and other persons subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

(3) An administrative law judge shall initiate appropriate disciplinary measures against a judge or a lawyer for unprofessional conduct of which the judge may become aware.

Commentary: Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary

body. Internal agency procedure which routes the complaint should be utilized; however, the judge remains responsible for initiation of the action.

C. Disqualification:

(1) An administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary: By decisional law, the rule of necessity may supersede the rule of disqualification. For example, a judge might be the only judge available in a matter requiring immediate judicial action. The judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a witness concerning it;

Commentary: A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child or any other member of the judge's family residing in the judge's household has a more than de minimis financial interest in the subject matter in controversy or is a party to the proceeding, or any other more than de minimis interest that could be substantially affected by the outcome of the proceeding; generally, receiving service from a particular public utility is a de minimis interest;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as, or is in the employ of or associated in the practice of law with, a lawyer or other representative in the proceeding;

Commentary: The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated of itself disqualifies the judge.

(iii) is known by the judge to have a more than de minimis interest that could be affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a witness in the proceeding.

(2) A judge shall inform himself or herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in the judge's household.

(3) For the purposes of this Code the following words or phrases shall have the meaning indicated:

(a) The degree of relationship is calculated according to the common law;

Commentary: According to the common law, the third degree of relationship test would, for example, disqualify the judge if the judge's or his or her spouse's parent, grandparent, uncle or aunt, brother or sister, cousin, niece or her husband, or nephew or his wife were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a more than de minimis legal or equitable interest, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(v) ownership of one share of stock is more than a de minimis interest.

(d) "proceeding" includes prehearing or other stages of litigation.

(e) the judge has initiated contact about or discussed or negotiated his or her post-retirement employment with any party, attorney, or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially, regardless of whether or not the discussions or negotiations lead to employment of the judge by the party, attorney, or law firm;

Commentary: A judge may not initiate contact about or discuss or negotiate his or her post-retirement employment with any party, attorney, or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially. A matter pending before the judge includes any matter or aspect of a matter which has not been completed, even if only the performance of a ministerial act remains outstanding, such as signing a consent order or a similar order. If the subject is raised in any fashion, the judge must put a halt to the discussion or negotiation at once, rebuff any offer, and disclose what occurred on the record in the presence of all parties and counsel. The judge, all parties, and attorneys on the record can then evaluate objectively whether any further relief is needed.

A judge who engages in post-retirement employment negotiations or discussions while still on the bench with any party, attorney, or law firm that does not have a matter pending before the judge, must do so in a way that minimizes the need for disqualification, does not interfere with the proper performance of the judge's judicial duties, and upholds the integrity of the courts. A judge should delay starting any such negotiations or discussions until shortly before his or her planned retirement, and should discuss post-retirement employment opportunities with the fewest possible number of prospective employers. A judge should also inform the Director about the post-retirement employment negotiations or discussions to the extent that such negotiations or discussions will interfere with the judge's regular assignments.

A judge should not initiate contact about or discuss or negotiate his or her post-retirement employment with a party, attorney, or law firm that has in the past appeared before the judge until the passage of a reasonable interval of time, so that the judge's impartiality in the handling of the case cannot reasonably be questioned. What is reasonable depends on the circumstances. For instance, it may be that an uncontested matter resolved swiftly by entry of a default judgment would not call for a lengthy interval of time. Prolonged or particularly acrimonious litigation may caution in favor of a longer delay. Actions likely to result in continuing post-judgment matters would also warrant a lengthier intervening period of time.

(f) a judge disqualified by the terms of this Canon may not avoid disqualification by disclosing on the record the disqualifying interest and securing the consent of the parties.

CANON 4

AN ADMINISTRATIVE LAW JUDGE SHALL REGULATE EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL DUTIES

A. Extra-judicial activities in general:

An administrative law judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

Commentary: Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

B. Avocational activities:

An administrative law judge may speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this Code.

Commentary: As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including the revision of substantive and procedural law. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

C. Governmental, civic, and charitable activities:

(1) An administrative law judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system, or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interest.

Commentary: The judge has a professional obligation to avoid improper influence.

(2) An administrative law judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge may, however, represent a country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.

Commentary: Canon 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system, or administration of justice. The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the judge from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the administrative judiciary.

(3) An administrative law judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(a) A judge shall not serve as an officer, director, trustee, or non-legal advisor if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court or tribunal.

Commentary: The changing nature of some organizations and of their relationship to the law makes it necessary for a judge to reexamine regularly the activities of each organization with which he or she is affiliated to determine if it is proper to continue his or her relationship with that organization.

(b) An administrative law judge as an officer, director, trustee or non-legal advisor, or as a member, or otherwise:

(i) may assist such an organization in planning fund-raising, but shall not personally participate in the solicitation of funds or other fund-raising activities; however, this shall not prohibit de minimis fund-raising activities within the confines of the OAL and its employees for non-profit charitable organizations with which judges or their immediate families are associated;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system, or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Canon 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Commentary: An administrative law judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system, or the administration of justice or a nonprofit educational, religious, charitable, fraternal, or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing, or by telephone except in the following cases: (1) a judge may conduct de minimis fund-raising activities within the confines of the OAL and its employees for non-profit charitable organizations with which judges or their immediate families are associated, (2) a judge may solicit other judges for membership in the organizations described above and other persons if neither those persons nor persons with whom they are affiliated are likely ever to appear before the Office of Administrative Law, and (3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for membership solicitation does not violate Canon 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

D. Financial activities:

(1) An administrative law judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in transactions or continuing business relationships with lawyers or other persons likely to come before the Office of Administrative Law.

Commentary: A judge may avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges in

the Office of Administrative Law. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position or involve those family members in frequent transactions or continuing business relationships with persons likely to come before the judge. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification.

(2) An administrative law judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate.

(3) An administrative law judge shall not serve as an officer, director, manager, advisor, or employee of any business entity.

(4) An administrative law judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) Neither an administrative law judge, nor a member of the judge's family or a person treated by the judge as a member of the judge's family residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except for:

Commentary: Because a gift, bequest, favor, or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

(a) a gift incident to a public testimonial, books, tapes, and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards, and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award, or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship;

Commentary: A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required.

(e) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not administrative law judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria to other applicants; or

(h) any other gift, bequest, favor, or loan only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge.

Commentary: Canon 4D(5)(h) prohibits judges from accepting gifts, favors, bequests, or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests, or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

(6) An administrative law judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon and Canon 3. The Director of the Office of Administrative Law is required to disclose such information pursuant to the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12.

E. Fiduciary activities:

(1) An administrative law judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) An administrative law judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the Office of Administrative Law.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

Commentary: The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Canon 4D(4).

F. Practice of law:

A full-time administrative law judge shall not practice law, with or without compensation.

Commentary: This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

This provision will not be interpreted to prohibit a judge from giving legal advice to and assisting in the drafting or reviewing of documents for a member of the judge's family, so long as the judge receives no compensation. A member of the judge's family denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

G. Compensation and reimbursement:

An administrative law judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code to the extent permitted by law.

CANON 5

AN ADMINISTRATIVE LAW JUDGE SHALL REFRAIN FROM POLITICAL ACTIVITY

A. An administrative law judge shall not:

(1) act as a leader or hold an office in a political organization;

(2) publicly endorse or publicly oppose any candidate for public office;

(3) make speeches on behalf of a political organization;

(4) attend political functions or functions that are likely to be considered as being political in nature;

(5) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions; or

(6) otherwise engage in any political activity except as authorized under this Code.

Commentary: An administrative law judge retains the right to participate in the political process as a voter. Canon 5A(2) does not prohibit an administrative law judge from privately expressing his or her views on candidates for public office.

B. A candidate for reappointment to an administrative law judge position or an administrative law judge seeking another governmental office shall not engage in any political activity to secure the appointment except that such persons may:

(1) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(2) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Canon 5B(1); and

(3) provide to those specified in this Canon information as to his or her qualifications for the office.

C. An administrative law judge shall resign from office when the judge becomes a candidate either in a party primary or in a general election for an elective public office.

New Rule, R.1992 d.430, effective November 2, 1992.
See: 24 N.J.R. 2755(a), 24 N.J.R. 4028(a).
Recodified from N.J.A.C. 1:1-1 Appendix A by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
Amended by R.2013 d.105, effective September 3, 2013.
See: 45 N.J.R. 149(a), 45 N.J.R. 2031(a).
Rewrote CANON 3.