

(Victim Counselor Privilege); N.J.R.E. 508 (Newsperson's Privilege); N.J.R.E. 509 (Marital Privilege-Confidential Communications); N.J.S.A. 45:8B-29 (Marriage Counselor Privilege); N.J.R.E. 511 (Cleric-Penitent Privilege); N.J.R.E. 512 and 610 (Religious Belief); N.J.R.E. 513 (Political Vote); N.J.R.E. 514 (Trade Secret); N.J.R.E. 515 (Official Information); N.J.R.E. 516 (Identity of Informer); N.J.R.E. 530 (Waiver of Privilege by Contract or Previous Disclosure; Limitations); N.J.R.E. 531 (Admissibility of Disclosure Wrongfully Compelled); N.J.R.E. 532 (Reference to Exercise of Privileges); and N.J.R.E. 533 (Effect of Error in Overruling Claim of Privilege).

Administrative Correction.

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

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

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

Updated Rules of Evidence citations.

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

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

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

#### Case Notes

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

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

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

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

#### Case Notes

While the writings of an administrative analyst with the New Jersey Division of Pensions and Benefits were hearsay, as they appeared highly reliable, they were admissible in an administrative hearing under the residuum rule, N.J.A.C. 1:1-15.5(b), to corroborate a retiree's un rebutted 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).

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

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

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

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

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

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

#### Law Review and Journal Commentaries

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

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

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

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

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

Substituted "10" for "five".

### 1:1-15.7 Exhibits

(a) The verbatim record of the proceedings shall include references to all exhibits and, as to each, the offering party, a brief description of the exhibit stated by the offering party or the judge, and the marking directed by the judge. The verbatim record shall also include a record of the exhibits re-

tained 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, all parties agree and the judge finds there is good cause for permitting the witness to testify by telephone.

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

#### **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).

#### **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.

(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.

**1:1-18.2 Oral initial decision**

(a) The judge may render the initial decision orally in any case where the judge determines that the circumstances

appropriately permit an oral decision and the questions of fact or law are sufficiently non-complex.

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

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

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

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

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

Rewrote (b).

**1:1-18.3 Written initial decision**

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

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

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

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

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

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

#### Case Notes

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

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

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

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

(b) The exceptions shall:

1. Specify the findings of fact, conclusions of law or dispositions to which exception is taken;
2. Set out specific findings of fact, conclusions of law or dispositions proposed in lieu of or in addition to those reached by the judge;
3. Set forth supporting reasons. Exceptions to factual findings shall describe the witnesses' testimony or documentary or other evidence relied upon. Exceptions to conclusions of law shall set forth the authorities relied upon.

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

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

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

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

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

Change at (a) from ten to thirteen days.  
Amended by R.1991 d.44, effective February 4, 1991.  
See: 22 N.J.R. 3278(b), 23 N.J.R. 293(a).

In (a) and (d): deleted filing of documents with the Clerk and added text indicating which documents shall be filed with the judge.  
Amended by R.2007 d.393, effective December 17, 2007.  
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).

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

#### Case Notes

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

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

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

#### 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).

#### 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.