

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).

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).

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

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.

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).

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).

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

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).

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".

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".

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

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).

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

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).

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. Sheddin 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 de-accelerated 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

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).

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

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 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).

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) A transcript of any proceeding which has been sound recorded may be obtained by filing a request with the Clerk. The requesting party shall notify all other parties 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 Clerk shall promptly arrange for the preparation of the transcript with a copy for the case file. Upon completion of the transcript, the preparer shall forward the transcript to the requesting party and the copy to the Clerk. 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) A transcript of any stenographically recorded proceeding may be obtained by requesting the appropriate stenographic firm to prepare a transcript, except as specified in (d) below. The requesting party shall provide notice of the request to the Clerk and to all other parties. Unless the requesting party is the State or a political subdivision thereof, the stenographic firm may require 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 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 reporter 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.

(d) 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.

(e) All transcript preparation requests pursuant to (d) 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.

(f) 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.

(g) 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.

(h) 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.

(i) 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) or (c) 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.

(j) 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".

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).

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 in which the judge's ability to provide a fair and impartial hearing might reasonably be questioned, including but not limited to instances where the judge:

1. Has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

2. Is by blood or marriage the second cousin of or is more closely related to any party to the proceeding or an officer, director or trustee of a party;

3. 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;

4. Is by blood or marriage the second cousin of or is more closely related to a likely witness to the proceeding;

5. While in private practice served as attorney of record or counsel in the case or was associated with a lawyer who served during such association as attorney of record or counsel in the proceeding, or the judge or such lawyer has been a witness concerning the case;

6. Has served in government employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding;

7. Is interested, individually or as a fiduciary, or whose spouse or minor child residing in the same household is interested in the outcome of the proceeding; or

8. 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) 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 8 above apply. A judge may not avoid disqualification by disclosing on the record the basis for disqualification and securing the consent of the parties.

(c) 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.

(d) 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).

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).

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. BK1 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 adjudication 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).

Exclusion of chiropractor's testimony in a Lemon Law proceeding was within the realm of the ALJ's discretion, where the chiropractor,

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

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

1:1-18.1 Initial decision in contested cases

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

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

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

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

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

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

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

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

Amended by R.1987 d.462, effective November 16, 1987.

See: 19 N.J.R. 1592(a), 19 N.J.R. 2131(b).

Added text to (h) "except for matters ..."

Amended by R.1992 d.46, effective February 3, 1992.

See: 23 N.J.R. 3406(a), 24 N.J.R. 404(a).

Revised (d); deleted (e); redesignated existing (f)-(h) as (e)-(g).

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

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

In (d), deleted the last sentence.

Case Notes

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

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

1:1-18.2 Oral initial decision

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

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

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

Amended by R.1996 d.57, effective February 5, 1996.

See: 27 N.J.R. 4039(a), 28 N.J.R. 813(a).

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

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

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

Rewrote (b).

1:1-18.3 Written initial decision

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

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

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

1. An appropriate caption;

2. The appearances of the parties and their representatives, if any;
3. A statement of the case;
4. A procedural history 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).

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).

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 Env'tl. 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).