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

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

1:1-14.5 Ex parte communications

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

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

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

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

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

Case Notes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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(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).

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

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

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

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

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

1:1-14.7 Conduct of hearings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Initial Decision (2008 N.J. AGEN LEXIS 202) adopted, which considered the out-of-court statements of a cognitively impaired victim

sions "for good cause shown." Shedaker v. N.J. Dep't of Envtl. Prot., Land Use Regulation, OAL Dkt. No. ELU 10281-07S, 2008 N.J. AGEN LEXIS 1416, Final Decision (December 8, 2008).

N.J.A.C. 1:1-18.4 makes no provision for replies to reply exceptions, and thus they were not considered. El-Hewie v. Bd. of Educ. of Bergen County Vocational School Dist., OAL Dkt. No. EDU 7673-06, Commissioner's Decision (April 10, 2008).

In an appeal from an Administrative Law Judge's finding that dancers were petitioner's employees for purposes of unemployment and disability contributions, additional evidence not presented at the hearing could not be submitted as part of petitioner's exception, nor could it be incorporated or referred to within exceptions. West 22 Entertainment, Inc. v. N.J. Dep't of Labor & Workforce Dev., OAL Dkt. No. LID 07169-05, 2008 N.J. AGEN LEXIS 149, Final Decision (January 16, 2008 (Issued).

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

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

Exceptions are required to be filed within 13 days after the Initial Decision, including partial summary decisions, and although an end-date for filing exceptions was not specified in the order for extension, it was not reasonable to assume that the exception period could run until the date established for the Final Decision on the matter; in addition, the bases for many of licensee's exceptions were improper. Bakke v. Prime Ins. Syndicate, OAL Dkt. No. BKI 1168-05, 2006 N.J. AGEN LEXIS 985, Final Decision (May 24, 2006).

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

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

1:1-18.5 Motions to reconsider and reopen

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

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

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

Case Notes

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

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

1:1-18.6 Final decision; stay of implementation

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

(b) The agency head may reject or modify conclusions of law, interpretations of agency policy, or findings of fact not relating to issues of credibility of lay witness testimony, but shall clearly state the reasons for so doing. The order or final decision rejecting or modifying the initial decision shall state in clear and sufficient detail the nature of the rejection or modification, the reasons for it, the specific evidence at hearing and interpretation of law upon which it is based and precise changes in result or disposition caused by the rejection or modification.

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

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

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

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

Amended by R.2001 d.180, effective June 4, 2001 (operative July 1, 2001).
See: 33 N.J.R. 1040(a), 33 N.J.R. 1926(a).
Rewrote (b); added new (c) and (d), and recodified existing (c) and (d) as (e) and (f).

Case Notes

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

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

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

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

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

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

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

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

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

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

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

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

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

ALJ's findings and credibility determinations were arbitrary and not supported by the evidence in the record. The credible evidence in the record established that the employee verbally threatened physical violence and brandished a knife at the victim after provoking a heated conversation; minor inconsistencies in the witness's testimony did not destroy the overall credibility of his testimony (rejecting 2009 N.J. AGEN LEXIS 542). In re Smith, OAL Dkt. No. CSV 2389-08, 2009 N.J. CSC LEXIS 1496, Final Decision (December 2, 2009).

ALJ's findings — that an employer's articulated reasons for selecting complainant for demotion and discharge as part of its reduction in force were mere pretext for discrimination based on complainant's Cuban origin — were supported by sufficient, competent, and credible evidence and the Director of New Jersey's Division on Civil Rights had limited authority to reject the ALJ's credibility determinations and factual findings; the ALJ justifiably determined that the employer's assertion that complainant was selected for transfer/demotion based on performance deficiencies was not credible. Luzardo v. Liberty Optical, OAL Dkt. No. CRT 03924-08, 2009 N.J. AGEN LEXIS 726, Final Decision (June 25, 2009).

ALJ's findings were not supported by sufficient, competent, and credible evidence in the record where there were two eyewitnesses to an incident of alleged patient abuse and the ALJ failed to consider the testimony from the second witness in his initial decision; there was not a scintilla of evidence that demonstrated the second witness fabricated the allegation against the cottage training technician, nor did the record demonstrate that the witness's credibility was lacking (rejecting 2008 N.J. AGEN LEXIS 486). In re Haslam, OAL Dkt. No. CSV 11724-07, 2009 N.J. AGEN LEXIS 798, Final Decision (June 14, 2009).

Although complainant contended that the landlord told him that he would not rent his owner-occupied two-unit dwelling to complainant because complainant had two children, the landlord denied making the statement and the Director of New Jersey Division on Civil Rights had limited authority to reject the ALJ's credibility determinations and the factual findings that the landlord did not violate New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1 et seq.; there was no basis to conclude that the ALJ's credibility determinations were arbitrary or were not based on sufficient competent evidence in the record. Almeida v. Moreira, OAL Dkt. No. CRT 01061-08, 2009 N.J. AGEN LEXIS 617, Final Decision (March 9, 2009).

ALJ's determination that an eyewitness was not credible was unreasonable; although there were minor discrepancies between the witness's report of abuse and his testimony at the hearing, there was not a scintilla of evidence that demonstrated the witness fabricated the allegation of patient abuse against the cottage training technician. The technician's act of yelling profanities and throwing the patient's foot into the footrest of the wheelchair was sufficiently egregious to warrant his removal (rejecting 2008 N.J. AGEN LEXIS 363). In re Harris, OAL Dkt. No. CSV 8808-07, 2008 N.J. AGEN LEXIS 1066, Final Decision (September 24, 2008).

Senior correction officer was properly removed after the ALJ found, on conflicting evidence, that the officer struck the inmate with his closed fist at least five times in the face and head area and that while the officer was provoked by the inmate, the provocation did not justify the amount of force used. In contrast, a senior correction officer who assisted only in securing the inmate's legs, who did not kick or punch the inmate, and who was not immediately present when other officer struck the inmate in the face, should not have been removed (adopting 2008 N.J. AGEN LEXIS 284). In re Tegano, OAL Dkt. No. CSV 908-06 and 2976-06 (Consolidated), 2008 N.J. AGEN LEXIS 1067, Civil Service Comm'n Decision (September 10, 2008).

In a disciplinary action against an employee for patient abuse, an ALJ's credibility determinations were not arbitrary, capricious, or unreasonable where the findings were based on video surveillance, as well as the complaining witness's testimony, which was in stark contrast to what was observed on the tape (adopting 2007 N.J. AGEN LEXIS 731). In re Cohan, OAL Dkt. No. CSV 481-07, 2008 N.J. AGEN LEXIS 558, Merit System Board Decision (March 26, 2008).

In age and sex discrimination case under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., brought by 68-year-old male adjunct professor, there was no basis in the record for rejecting the ALJ's emphatic conclusion that employer's witness, the department chairperson, was a compelling and credible witness, notwithstanding: (1) the fact that chairperson's testimony concerning the number of times professor announced his retirement might have been inconsistent with certain other evidence on that point; or (2) professor's argument that chairperson's testimony reflected "sexist attitudes." Although chairperson observed that many adjuncts were homemakers who wanted to teach only one day a week, this statement in no way reflected an intent to replace male adjuncts with females. Sergent v. Montclair State Univ., OAL Dkt. No. CRT 03318-05, 2007 N.J. AGEN LEXIS 958, Final Decision (December 24, 2007).

ALJ's conclusion, on conflicting evidence, that a cottage training technician was not guilty of patient abuse was not arbitrary, capricious, or unreasonable; the finding that the slapping sound was the result of a latex glove rather than the slapping of a patient was supported by competent evidence, given the ALJ's advantage of hearing, seeing, and assessing the credibility of the witnesses before him (adopting 2007 N.J. AGEN LEXIS 468). In re Bice-Bey, OAL Dkt. No. CSV 8296-06, 2007 N.J. AGEN LEXIS 1161, Merit System Board Decision (November 21, 2007).

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

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