

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

Amended by R.1989 d.158, effective March 20, 1989.  
See: 20 N.J.R. 2845(a), 21 N.J.R. 749(a).

Exceptions allowing non-lawyer representatives to sign consent orders or stipulations, added at (f).

Correction in (c): changed 1:11-4.4 to 1:1-14.4.

Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).

See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).

In (c): revised N.J.A.C. citation.

Amended by R.1992 d.213, effective May 18, 1992.

See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).

Added (g).

Amended by R.1997 d.158, effective April 7, 1997.

See: 29 N.J.R. 282(a), 29 N.J.R. 1295(a).

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

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

In (c), inserted "and 14.15" twice.

#### Case Notes

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

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

### 1:1-5.6 Appearance without representation: State agencies

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

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

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

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

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

Section was "Appearance without representation: State agencies or county or municipal welfare agencies; corporations". In the introductory paragraph of (a), deleted "or a county or municipal welfare agency" following "State agency" and "and/or on witnesses" preceding "presented to the judge:"; in (a)1, deleted "and/or witnesses" preceding "upon which"; rewrote (a)2; and deleted (b).

## SUBCHAPTER 6. PLEADINGS

### 1:1-6.1 Pleading requirements

(a) Specific pleading requirements are governed by the agency with subject matter jurisdiction over the case. Except as otherwise provided by this subchapter, parties in contested

cases should refer to the rules of the appropriate agency for guidance.

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

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

#### Case Notes

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

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

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

### 1:1-6.2 Amendment of pleadings

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

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

#### Case Notes

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

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

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

## SUBCHAPTER 7. SERVICE AND FILING OF PAPERS; FORMAT

### 1:1-7.1 Service; when required; manner

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

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

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

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

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

In (a), deleted "or" preceding "by certified mail" and preceding "by ordinary mail".

### 1:1-7.2 Proof of publication and service

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

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

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

### 1:1-7.3 Filing; copies

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

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

(c) All papers filed with the Office of Administrative Law shall be in duplicate. If the filer submits an additional copy of

the paper to be filed with a self-addressed, stamped envelope, the Clerk or judge will return the paper to the filer marked with the date of filing.

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

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

Rewrote (a); in (c), inserted "or judge"; and added (d).

### 1:1-7.4 Format of papers

(a) Every paper filed shall contain:

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

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

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

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

### 1:1-7.5 Filing by facsimile transmission

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

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

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

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

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

New Rule, R.1992 d.213, effective May 18, 1992.

See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).

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

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

In (a), substituted "unless prohibited by the judge." for "if:"; deleted (a)1 and (a)2; and in (e), substituted "Open Public Records Act" for "Right to Know Law".

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).

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

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.

**1:1-14.11 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).

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).

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

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

**1:1-15.2 Official notice**

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

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

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

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

In (a) updated Rules of Evidence citation.

**Case Notes**

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

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

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

**1:1-15.3 Presumptions**

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

**1:1-15.4 Privileges**

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

Administrative Correction.

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

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

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

Updated Rules of Evidence citations.

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

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

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

**Case Notes**

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

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

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

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

**Case Notes**

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

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

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

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

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

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

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

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

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

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

Hearsay medical reports not sufficient to show police officer permanently and totally disabled for accidental disability retirement pur-

poses. *Mercier v. Board of Trustees, Police and Firemen's Retirement System*, 92 N.J.A.R.2d (TYP) 94.

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

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

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

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

#### Law Review and Journal Commentaries

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

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

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

Amended by R.2007 d.393, effective December 17, 2007.  
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).  
Substituted "10" for "five".

#### 1:1-15.7 Exhibits

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

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

(c) The standard marking for exhibits shall be:

1. P = petitioner;
2. R = respondent;
3. A = appellant;
4. J = joint;
5. C = judge;
6. I = intervenor; or
7. Such other additional markings required for clarity as the judge may direct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In (d), deleted the last sentence.

### 1:1-18.2 Oral initial decision

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

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

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

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

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

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

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

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

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

Rewrote (b).

### 1:1-18.3 Written initial decision

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

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

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

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

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

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

#### Case Notes

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

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

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

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

(b) The exceptions shall:

1. Specify the findings of fact, conclusions of law or dispositions to which exception is taken;

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

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

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

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

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

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

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

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

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

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

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

#### Case Notes

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

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

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

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).

#### 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.

(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

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.

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

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*, D.N.J.1991, 802 F.Supp. 1158, affirmed 972 F.2d 1332.

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).

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).

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

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

#### 1:1-18.7 Remand; procedure

(a) An agency head may enter an order remanding a contested case to the Office of Administrative Law for further action on issues or arguments not previously raised or incompletely considered. The order of remand shall specifically state the reason and necessity for the remand and the issues or arguments to be considered. The remand order shall be attached to a N.J.A.C. 1:1-8.2 transmittal form and returned

to the Clerk of the Office of Administrative Law along with the case record.

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

#### Case Notes

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

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

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

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

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

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

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

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

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

(f) Any order granting an extension must set forth the factual basis constituting good cause for the extension, and establish a new time for filing the decision or exceptions and replies. Extensions for filing initial or final decisions may not exceed 45 days from the original decision due date. Additional extensions of not more than 45 days each may be granted only for good cause shown.

Amended by R.1992 d.213, effective May 18, 1992.

See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).

Revised (c), (e) and (f).

Amended by R.2003 d.306, effective August 4, 2003.

See: 35 N.J.R. 1614(a), 35 N.J.R. 3551(a).

In (e), rewrote the last sentence.

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

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

In (d), deleted "with a proposed form of extension order" following "writing" and "and the Director of the Office of Administrative Law" following the second occurrence of "parties"; and in (f), deleted "set forth the dates of any previous extensions," preceding "and establish", and substituted "for good cause shown" for "in the case of extraordinary circumstances".

#### Case Notes

Decision by ALJ recommending that college board of trustees follow its written procedures for denying reappointment to director of educational opportunity fund was "deemed adopted" by the board, where the board took no action to adopt, reject, or modify the ALJ's decision within 45 days, and did not seek an extension of time to do so within that period, there was no emergency justifying delay. *Newman v. Ramapo College of N.J.*, 349 N.J.Super. 196, 793 A.2d 120.

Automatic approval of administrative law judge's recommendations was not applicable. *Rollins Environmental Services (NJ), Inc. v. Weiner*, 269 N.J.Super. 161, 634 A.2d 1356 (A.D.1993).

Provision for automatic adoption of administrative law judge's recommendations will not be literally enforced where agency head is not dragging his feet in issuing final decision. *Rollins Environmental Services (NJ), Inc. v. Weiner*, 269 N.J.Super. 161, 634 A.2d 1356 (A.D.1993).

It was proper exercise of discretion to grant nunc pro tunc extension of time for Hackensack Meadowlands Development Commission (HMDC) to issue its final decision regarding intermunicipal tax-sharing obligations under Hackensack Meadowlands Reclamation and Development Act. *Town of Secaucus v. Hackensack Meadowlands Development Com'n*, 267 N.J.Super. 361, 631 A.2d 959 (A.D.1993), certification denied 139 N.J. 187, 652 A.2d 175.

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

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

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

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